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Direct Taxes Professionals' Association Journal

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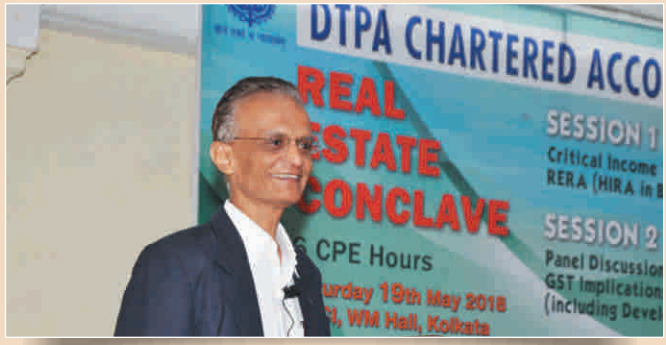
DTPA STUDY CIRCLE MEETING

DTPA PARIWAR - ANNUAL PICNIC

Seminar on "Real Estate Conclave" at BCCI, WM Hall



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EDITORIAL

Post Industrial Revolution, world has made significant strides in respect of technology, ushering in new products to ease human efforts. Continuous researches lead to progressive developments in terms of technology. Technological advancement in due course lead to Information Revolution which is distinguished by an economy based on information, computerisation and digitalisation. Our lives have been transformed. However the misuse of the developments in the field of Information Technology, has had its' detrimental effects too. Pandoras Box hs opened up various criminal activities like Data Theft, Scams, Eavesdropping, Cyberbullying, to name a few, with the overreaching concern on the intrusion to the privacy of Individuals.

India is now moving towards digital economy. with the adoption of Aadhaar and an ever-increasing dependency on information. Data is the lifeblood of today's digital economy. New businesses are challenging the conventional system about marketing. Every tap on smartphones creates digital foot-prints & enormous data generated in the process is being analysed & expoited to create data base regarding preferances, consumption patterns, expectations & value for money feel. The Central Governments initiative like JAM(Jan Dhan-Aadhaar-Mobile) and the increased focus on digital payments is fuelled by data.

Dependence on data continues to grow, so does the vulnerability of data subjects leading to debate on Data Privacy & the need for a comprehensive data privacy law, which not only contributes to and complements the constitutional right to privacy but also enables data subjects to harness the benevolence of technological advances. Recent spurt of bank frauds has led to further concern about data-safety amongst citizens.

Supreme Court has also ruled privacy to a fundamental right, a proper legislative framework to address the concerns over cyber security, data protection and privacy has become an issue of utmost priority.

In view of the above the Central Government of India had set up a Committee of Experts, headed by Justice B. N. Srikrishna, to study the challenges surrounding data protection in India and provide their valuable suggestions and principles on which to base the data privacy legislative framework. The objective is to 'ensure growth of the digital economy while keeping personal data of citizens secured and protected'.

On 28 November 2017 the committee released a white paper seeking public comments on the recommendations made on the draft data protection framework.

Here are the seven key principles proposed in the 243-page white paper on data protection:

1. Technology agnostic: The data protection law must take into account the continuous change in technology and standards of compliance.
2. Holistic application: The law must cover both the private sector and the government sector. It also talks about 'different obligations' & 'legitimate state aims'.
3. Informed consent: It talks about "informed consent" and not just consent. It says the consent should be "informed and meaningful". It also talks of 'right to opt out'.
4. Data minimisation: The data collected or being processes should be minimal, which means only relevant data for the purpose be sought though data can also be collected for other compatibe purposes.
5. Controller accountability: The data controller should be held accountable for any processing of data, whether by itself or entities with whom it may have shared the data for processing."
6. Structured enforcement: The committee proposes to set up "a high-powered statutory authority", which "must co-exist with appropriately decentralised enforcement mechanisms."
7. Deterrent penalties: It proposes for "adequate" penalties for "wrongful processing" to ensure deterrence.

In the current issue of our magazine we have dealt on the subject with contributions from eminent persons apart from normal direct tax related issues. I hope you will find this issue to be of interest to you.

CA. Mahendra K. Agarwal
Chairman DTPA Journal Committee
28th August, 2018

FROM THE DESK OF THE PRESIDENT

My Dear Professional Colleagues,

Theodore Roosevelt:"It is hard to fail, but it is worse never to have tried to succeed."

This is my last communication to you all through this journal, as President of DTPA. We all are aware about the thing that had happened during this month. On one side, India had celebrated its 72nd Independence Day and on the other side, India had lost its Bharat Ratna on 16th of August 2018, our renowned former Prime Minister of India, Mr. Atal Bihari Vajpayee. A deep condolescence for him.

Through this journal, I would like to bring to you the evolution of our Association, which we have wished to achieve. Also, I would like to express my gratitude tomembers who had joined this association during this period. Our Association today has uplifted its image through various modes of its presence and is further taking it to new heights with each passing day.

I'm feeling proud to inform that our association has taken a new step through launching of DTPA mobile applications on 2nd of August 2018. Also, renovation of the DTPA library hall at ground floor was made and inauguration ceremony of the same was held on 3rd of August 2018. Moreover, 9 days “International Residential Seminar” to Mauritius and Dubai from 3rd of August 2018 to 11th of August 2018 was organized by our association. Also our association got a chance to interact with CCIT-4, Mr. Rajib Kumar Hota at DTPA Conference hall on 30th of May 2018 in relation to “Observance of Dedicated Fortnight for Appeal & Rectification Effects by the Department”.

Since the day from which I was given the responsibility as the President till date, numerous study circle meetings, Seminars and Conferences on emerging topics such as Real Estate Seminar etc. have been held with eminent speakers from all over India which witnessed a huge participation by our members.

Serving as a President of DTPA has indeed been a privilege, a great experience and….a major challenge. As my time nears to step aside, I would like to respectfully express my gratitude to you all, my friends and our members, for the honor bestowed upon me in granting me the opportunity to serve you as your president and for supporting me to accomplish my plans. I hope I have fulfilled the expectations placed in me.

I flag off for the last time from this communication by sincerely wishing that each one of you target and achieve all your goals in life!

Please feel free to write to me on rkchokhani@yahoo.com

We from DTPA wish you an Enjoyable and Successful Life ahead!

With warm regards,

CA Ramesh Kumar Chokhani
President-DTPA
28th August, 2018

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Section 234F needs urgent review and withdrawal

Narayan Jain, LL.M., Advocate

1. INTRODUCTION :

Section 234F, inserted through the Finance Act, 2017 with effect from assessment year 2018-19 is being highly debated. Itsconstitutionalityhas been recently challenged in Madras High Court. Section 234F prescribes a fee for delay in filing IT Returns. Let us analysevarious dimensions and see whether imposition of Late Fee under section 234F is justified or not.

2. SECTION 234F :

The text is reproduced hereunder :

"234F. ***Fees for default in furnishing return of income.***—(1) Without prejudice to the provisions of this Act, where a person required to furnish a return of income under section 139, fails to do so within the time prescribed in sub-section (1) of said section, he shall pay, by way of fee, a sum of,—

(a) Rs.5,000, if the return is furnished on or before the 31st day of December of the assessment year;

(b) Rs.10,000 in any other case

Provided that if the total income of the person does not exceed Rs.5 lakh, the fee payable under this section shall not exceed Rs.1,000.

(2) The provisions of this section shall apply in respect of return of income required to be furnished for the assessment year commencing on or after the 1st day of April, 2018.".

3. LATE FEE IMPOSABLE UNDER SECTION234F AT A GLANCE

As per this provision, Income tax assessees failing to file their Income Tax Returns within the prescribed time would have to pay a *fee* for default. The amount of the late fee to be paid is as follows,

1. UptoRs 1,000 for a person whose total income does not exceed between Rs 5 lakh

2. Rs 5,000 for persons with an annual income higher than Rs 5 lakh if the ITR is filed before December 31 of the assessment year

3. Rs. 10, 000 in any other case

However where a person is not required to furnish a return of income under section 139, Late Fee shall not be chargeable.

4. SIXTH PROVISO TO SECTION 139(1) : In this context it may be relevant to refer to the 6th proviso to section 139(1) which provides as under :

"Provided also that every person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, whether incorporated or not, or an artificial juridical person, ***if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year, without giving effect to the provisions of section 10A or section 10B or section 10BA or Chapter VI-A exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income*** *or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed."*

That means the above proviso requires persons to furnish the Return of Income **if Gross Total Income (without giving effect to the provisions of section 10A or section 10B or section 10BA or Chapter VI-A)of an Individual exceeds Exemption Limit**. If the Gross Total Income as aforesaid,is below exemption limit, one is not required to furnish the Income Tax Return in case of Individuals and Hindu Undivided Family. The general impression that one is required to file his Income Tax Return if the income is taxable, is a misnomer.

5. PENALTY UNDER SEC. 271F FOR LATE FILING OF RETURN PRIOR TO INSERTION OF SECTION 234F :

Prior to the insertion of Section 234F, the erstwhile Section 271F came into play on default in filing of IT Returns in certain cases. Section 271F (effect from the 1st day of June, 2002), reads as under :

"**271F.** ***Penalty for failure to furnish return of income.***— If a person who is required to furnish a return of his income, as required under sub-section (1) of section 139 or by the provisos to that sub-section, **fails to furnish such return before the end of the relevant assessment year,** the Assessing Officer **may direct** that such person shall pay, by way of penalty, a sum of Rs.5,000."

As per Section 271F, if there is a default in filing IT Returns, the Assessing Officer was conferred the discretion to impose a penalty of Rs.5,000 on the assessee. Importantly, before such a penalty is

imposed, the Assessing Officer was required to give the assessee an opportunity to being heard.

6. PENALTY UNDER SEC. 271F NOT IMPOSABLE IF ASSESSEE PROVES THAT THERE WAS REASONABLE CAUSE FOR THE SAID FAILURE :

Section 273B. provides that notwithstanding anything contained in the different provisions for imposing penalty inclusinfg section, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions **if he proves that there was reasonable cause for the said failure.**Section 271F was deleted after Section 234F came into forcew.e.f. asst. year 2018-19. Section 234F, in turn, has now been challenged as *harsh, oppressive, unreasonable and arbitrary and* on the various other grounds, discussed hereinafter.

7. Reasons due to which one may not be able to furnish the return in time : It may be mentioned that an assessee may not be able to furnish the return within stipulated date due to many reasons like Illness, accident, Survey, Search & Seizure, Marriage in family, foreign travel, demise of a family member, Absence of accountant, Inconvenience to auditor or Advocate, Flood, Fire or any other natural calamity and so on.

8. PENALTY DISGUISED AS "FEE" UNDER SEC. 234F

It may be noticed that Section 234F uses the word "Fee" in prescribing what is effectively a penalty. Whereas "Fees" connote that there is an element of *quid pro quo*, with a person paying for the provision of a service, Section 234F does not entail the provision of any such reciprocal arrangement. Levy of Late Fee under section*section 234F is a fee sans any service rendered, it is illogical, irrational and liable to be held unconstitutional.In the absence of any work or service given by the Department to the taxpayer, No fees ought to be collected from the taxpayer.*

9. VIOLATION OF PRINCIPLES OF NATURAL JUSTICE

The imposition of the *penalty* in the guise of Late Fee via Section 234F is being carried out without giving the income tax assessee an opportunity of being heard, thereby violating the principle of *audialterampartem*.

There is an imposition of penalty for the failure to furnish tax returns within prescribed due date without even giving an opportunity to the defaulting assessee to explain his case and therefore levy of such Late Fee is irrational on the fact of it and palpably arbitrary and in flagrant violation of principles of natural justice.

Adding to the problem, the late fee is deducted automatically from taxes paid while filing the Return. *The provision is such that it does not dwell into the reasons for delay but also deducts the fee automatically before affording any opportunity in any manner to the assessee to furnish his explanation.Hence, Section 234F entails a clear violation of the principles of natural justice.*

10. SECTION 234F IS ATTRACTED EVEN IF TAX LIABILITIES ARE FULLY DISCHARGED BY WAY OF ADVANCE TAX, TDS OR SELF ASSESSMENT TAX :

It *is pertinent to note that Section 234F of the Income Tax Act, 1961 is attracted even if the taxpayer has discharged his entire tax liability to the Government by way of Advance Tax, TDS, Self Assessment etc. Therefore, an assessee is punished by virtue of Section 234F even if he has fulfilled his tax responsibilities. In view of the same, Section 234F is illogical, unjustified and harsh.*

11. NO INTELLIGENT OR RATIONAL CLASSIFICATION OF TAXPAYERS UNDER SECTION 234F

Section 234F only makes a single differentiation when it comes to determining the amount of late fee to be paid i.e. those earning less than Rs. 5 lakh and those whose income exceeds Rs 5 lakh. Such classification violates the right to equality under Article 14 of the Constitution thus, a*person earning Rs.5.01 lakhs is treated on the same pedestal with a person earning in several Crores. While that being so, the provisions of section 234F infringes the corner-stone of equality enshrined under article 14 of the Indian Constitution which postulates not only that equals should be treated equally.*

12. NO EXEMPTION FOR SENIOR CITIZENS OR DIFFERENTLY ABLED PERSONS ETC.

The provision of levy of Late Fee under section 234F is clearly unmindful of the difficulties faced by senior citizens and the differently-abled persons. Further, it does not provide any leeway for the delay in filing IT Returns due to *genuinely acceptable reasons* such as sickness, chronic ailments, maternity, wedding, accident, examination, foreign travel, death in the family etc.

13. DIFFICLTY IN CASE OF E-FILING OF RETURNS

The taxpayer is likely to be inconvenienced due to the fact that most of the IT Returns can only be e-filed. In this context, Section 234F has not provided for any exceptions like on what has to be done in case of technical delays in transactions are attributed to the Government due to non-functioning of Income Tax Return filing Website and the delay cannot be attributable to the assessee. It has been seen in practical life that *there is an inordinate delay in downloading and filing the ITRs in the e-portal of the*

Income Tax Department. Section 234F is however silent on this issue.

14.SECTION 139(4) ALREADY PROVIDES FOR FILING BELATED RETURN UNDER SECTION 139(4) :

Section 139(4) of the Income Tax Act already provides for filing a Belated return under sec 139(4). Such Return can be filed before the end of relevant assessment year or before the completion of assessment, whichever is earlier.

15. SECTION 234A ALREADY PROVIDES FOR INTEREST :

Those filing IT RETURN Late are already required to pay interest under sec. 234A, if sufficient TDS or Advance Tax has not been paid. That means a deterrent already exists.

16. PENALTY PROVISIONS UNDER SECTION 271F WERE MORE LOGICAL:

The penalty provision under sec 271F were more justified as the penalty could be initiated only if a Return was filed beyond 31st March that is last day of assessment year and it provided for opportunity of hearing to theassessee. Section 273B provides that penalty u/s 271F and various other sections need not be imposed if the assesse proves that there was reasonable cause for the failure.

17. CONCLUSION :The Government will do well if the Late Fee under section 234F is immediately reviewed and withdrawn and instead Penalty under section 271F may be reintroduced. It will be appropriate if an amendment is urgently placed in Parliament. This way litigation will also be stopped as well as agony of taxpayers will no longer remain. [CBDT has considered the problems being faced by taxpayers and has already extended the date of filing Return under section 139(1) from 31st July to 31st August. 2018 for assessment year 2018-19].

The author Mr. Narayan Jain is a Master of Law, practicing Advocate and author of the famous book "How to Handle Income Tax Problems" and "Income Tax Pleading & Practice'. He is former President of DTPA and *Chairman, PR and Allied Laws Committee of All India Federation of Tax Practitioners.*

TAX MANAGEMENT THROUGH PARTITION, FAMILY ARRANGEMENT / SETTLEMENT.

N. M. Ranka, Senior Advocate

Tax Management :

A rupee of tax saved is much more than the rupee of income earned. After understanding the tax laws, availing of various exemptions, deductions and incentives provided under the tax laws and resorting to tax management / tax planning, many tax payers could promote their resources and prosper. So much so that one could reduce the tax burden to a tolerance limit. Brunt of taxation can be substantially reduced by adopting proper tax planning. Tax Management is sound law and certainly not bad morality to so arrange one's affairs as to reduce the brunt of taxation to a minimum. Arranging affairs in such a manner that charge of tax is reduced is not prohibited. Availing various recognized methods of tax planning is lawful and has the sanctity of the courts. Avoidance of tax is not tax evasion. End effect of tax planning, tax avoidance and tax evasion is one and the same but tax evasion alone deserves to be deprecated and need not be resorted to. Adopt / Suggest Tax Management - It is your duty. Not Tax Evasion - It is a crime against Society and needs to be deprecated and tax evaders socially boycotted.

2. Hindu Undivided Family : The Expression "Hindu Undivided Family" has not been defined under the Income-tax Act or in any other statue. When we dissect – essentials are (I) Should be Hindu, (Jain, Sikh and Buddhist are treated as Hindus but not Musalman or Christian); (ii) A family i.e. group of persons – more than one; and (iii) should be undivided i.e. living jointly and having commonness amongst them. All the three essentials are cumulative. It is a body consisting of persons lineally descended upto three generations or three degrees from a common ancestor and include their wives, children and adopted child. By the Hindu Succession (Amendment) Act, 2005 w.e.f. 9th September, 2005, daughter, even after marriage, would be a co-parcener, of which her father is a co-parcener and in addition, on her marriage, shall become a member of her husband's joint Hindu Undivided Family. Her rights in the parental family would remain intact as that of a son. Discrimination on account of gender stands abolished for good, though belated..

3. Concept and Assessment : The concept of Joint Family under Hindu law as well as the HUF in Income-tax Act, 1961 is broadly the same. HUF is purely a creature of law and cannot be created by an act of parties (except in case of adoption and reunion). A HUF is a fluctuating body, its size increases with birth of a member in the family and decreases on death of a member of the family. Females come into HUF on marriage. If there is family necleus, under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members, and the Income-tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members (Refer Gowli Buddanna Vs. C.I.T. (1966) 60-ITR-293 (SC). Where a Coparcener having a wife and minor daughters and no son receives his share of joint family property on partition, such property, in the hands of the coparcener, belongs to the HUF of himself, his wife and minor daughters. (Refer N. V. Narendranath Vs. C.W.T. (1969) 74-ITR-190 (SC). Assessment in the status of a Hindu undivided family can be made only when there are two or more members of the Hindu undivided family. (Refer C. Krishna Prasad Vs. C.I.T. (1974) 97-ITR-493 (SC). Husband and wife can constitute H.U.F. if property is received on partition. (Refer C.I.T. Vs. Parshottamdas K. Panchal (2002) 257-ITR-96 (Gujarat).

4. Ancestral Property : All property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara Law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth. Thus, if 'A' inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property, as regards his male issue. (AIR 1936 Orissa 331). A person inheriting

property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's sons, and son's son's sons. Dipo Vs. Wassan Singh – AIR 1983 SC 846 at 847-48; Arjun Singh v. Pingle Devi – AIR 1993 HP 34; Om Prakash Vs. Sarvjit Singh – AIR 1995 HP. 92. The share, which a coparcener obtains on partition of ancestral property, is ancestral property as regards his male issue. They take an interest in it by birth (Lal Bahadur v. Kanhaiya Lal, (1907) 29 All 244: 34 IA 65; Chatturbhooj v. Dharamsi, (1885) 5 Bom HCOCJ 128: Rulla Ram v. Amar Singh, AIR 1994 HP 102 relying on AIR 1987 SC 558 and AIR 1986 Pat 1753).

5. Accumulations of income of ancestral property, property purchased or acquired out of income or with assistance of ancestral property, the proceeds of sale of ancestral property, and property purchased out of such proceeds, or obtained in lieu of such property, are ancestral property. (Maya Ram v. Satnam Singh, AIR 1967 Punj 353). It is well established that sons, grandsons and great-grandsons acquire a vested interest not only in the income and accretions of ancestral property, which accrued after their birth, but also in the income and accretions, which accrued prior to their birth. (Isree Persad V. Nasif Koover - AIR 10 Cal 1017 at 1021; Jagmohan Das v. Mangal Das) 11 Mad 246.

6. According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Chapter 1.1-27). The incidents of co-parcenership under the Mitakshara law are : first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenery under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcener with his adoptive father as regards the ancestral properties of the latter." State Bank of India v. Ghamandi Ram – AIR 1969 SC 1330.

7. **Partition :** To divide and distribute assets / property amongst the members of the family is called partition. Now it has to be total and by metes and bounds. It can be oral. However, if in writing would attract stamp duty. It can be unequal and not in accordance with share of each member. It need be recognised under Section 171 of the Income-tax Act for those which have been hithertofore assessed.

8. Family Arrangement : When a partition is effected between the co-parceners / members of a joint Hindu Family, the partition deed attracts stamp duty under the State Law. However, it can be avoided by arriving at a family arrangement in between the members. The family arrangement may be even oral. If the terms of the family arrangement are reduced to writing; a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made, either for the purpose of the record or for information of the Court for making necessary mutation. It has been held that in such a case the memorandum, itself, does not create or extinguish any rights in immovable property and is, therefore, not compulsorily registrable. (Refer Tek Bahadur Bhujil – AIR 1966 SC 292; Sahu Madho Das v. Mukund Ram – AIR 1955 SC 481; Vijay Kumar v. Sanjay Kumar – AIR 2003 Delhi 168; Digambhar Adhar Patil v. Deoram Girdhar Patel – AIR 1995 SC 1728, AIR 1973 Allahabad 158, AIR 1988 AP 147; AIR 1966 SC 1836; AIR 1966 (SC) 252; AIR 1997 (Raj.) 211; AIR 1998 (Raj.) 348 and Kale and others v. Dy. Director of Consolidation and Others, AIR 1976 SC 807.

9. The family arrangement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family; (2) It must be voluntary and should not be induced by fraud, coercion or undue influence; (3) The family arrangement may be oral in which case no registration is necessary; (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Which create or extinguish any rights in immovable properties and would fall within the mischief of section 17(1)(b) of the Registration Act; (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the

arrangement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same; (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable, the family arrangement is final and binding on the parties to the settlement. (Refer Kale v. Deputy Director : AIR 1976 SC 807; Lakshmi Ammal v. Chaprovahthi – AIR 1999 SC 336; C.G.T. v. D. Nagrirathinam (2004) 266-ITR-342 (Madras).

10. Like partition, family arrangement is not a transfer. A family arrangement, on the contrary, is a transaction between members of the same family for the benefit of the family so as to preserve the family property, the peace and security of the family, avoidance of family dispute and litigation and also for saving the honour of the family. Such an arrangement is based on the assumption that there was an antecedent title in the parties and the agreement acknowledges and defines what that title is. It is for this reason that a family arrangement by which each party takes a share in the property has been held as not amounting to a conveyance of property from a person who has title to it to a person who has no title. (Refer : S.K. Sattar SK Mohd. Choudhari v. Gundappa Amabadas Bukate (1966) 6 SCC 373; C.I.T. v. A.L. Ramnathan (2000) 245-ITR-494 (Madras.)

11. A Memorandum of Understanding cannot be said as a bogus document on account of one being a stranger or allotted more than his share, if it is established that he had some semblance of interest and disputes have cropped up between the said persons. Memorandum of Understanding actuated to resolve disputes can be treated as family settlement (Refer Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel & Others AIR 2006 S.C. 3302). It is settled law that when parties enter into a family arrangement, the validity of the family arrangement is not to be judged with reference to whether the parties who raised disputes or rights or claimed rights in certain properties had in law any such right or not. C.I.T. V Ponnammal (R.) (1987) 164-ITR-706 (Mad.); CIT Vs. Ramanathan (AL) (2000) 245-ITR-494 (Mad.); Kele V. Deputy Director of Consolidation (1976) AIR 1976 SC 807 and Maturi Pullaiah v. Maturi Narasimham (1966) SC 1936 relied on in C.I.T. Vs. Kay Arr Enterprises and Others (2008) 299-ITR-348 (Madras)

12. Transfer of shares in Companies can be possibly made by way of family arrangement between the family members as held in C.I.T. Vs. Kay Arr Enterprises (2008) 299-ITR-348 (Madras). Mrs. P. Sheela Vs. I.T.O. (2009) 308-ITR-(AT) 350 (Bangalore). The Apex Court in Hari Shanker Singhania & Ors. Vs. Gaur Hari Singhania & Ors. AIR 2006 SC 2488 held that family settlement or arrangement is to be treated differently from any other formal commercial settlement and technicalities of limitation etc. should not come in the way of implementation for maintaining peace and harmony in a family. However as a matter of caution in such cases there may be long drawn litigation and for one or other lapse it may be a faulty proposition. It should be the last resort.

13. A family arrangement must be entered into by all parties thereto. The concept of family arrangement has now been accepted in our country and the Supreme Court has generally taken a broad view of the matter and leaned heavily in favour of upholding any such arrangement. The enjoyment of properties by different members of the joint family, who have been put into possession pursuant to a family arrangement, operates as an estoppel against such member and cannot be jeopardized by a member resiling from the arrangement, more particularly when the arrangement had been entered into a considerable time ago. (AIR 2002 Bombay 129). There is thin difference between joint family property and joint property. If the property is acquired with the contributions of the coparceners and the income or savings from joint family fund or from the ancestral property, that property will be a joint family property in which each and every coparcener has a right to claim. A joint property is being created by investment made by individuals from their independent earning. Priya Ranjan Bhagat V/s. Saroj Bhagat – AIR 2016 Jharkhand 22 at 34. There was f family arrangement by a dead among the children of R and S. Each of the members held apart from personal properties, family properties and shared in business concerns and each of the family businesses was independently managed by one of the parties. Disputes arose between the parties. The disputes were referred to an arbitrator. The arbitrator suggested a settlement to which the parties agreed. In terms of the settlement, the assessee had to resign from KB, a firm and transfer his interest to NR for a consideration of Rs. 35,000/- being the capital balance of the firm. Accordingly, the assessee transferred the shares. NR transferred the shares held by him in favour of the assessee. The assessee claimed that there was no transfer which

gave rise to any capital gains. However, the assessing authority held that there was a transfer, there was a capital gain and, therefore, the assessee was liable to pay the tax. The Commissioner(Appeals) confirmed the order. The Tribunal held that there was no transfer and it was only a family arrangement. Therefore, the assessee was not liable to pay tax on capital gains. On appeal to the High Court It was held : *"A partition is not a transfer. What is recorded in a family settlement is nothing but a partition. Every member has an enterior title to the property which is the subject-matter of a transaction, that is partition or a family arrangement. So there is adjustment of shares, crystallization of the respective rights in family properties and, therefore, it cannot be construed as a transfer in the eye of law. When there is no transfer there is no capital gains and consequently no tax on capital gains is liable to be paid"*. C.I.T. v. R. Nagaraja Rao (2013) 352-ITR-565 (Karnataka) at 566.

14. Family arrangement / settlement though not registered can be used as piece of evidence. Subraya M.N. V/s. Vitalla M.N. & Others - AIR 2016 S.C. 3236. An oral partition of joint family property amongst members of a HUF is permissible : AIR 1958 S.C. 706; AIR 1988 S.C. 881; 259-ITR-265 (S.C.)

15. Conclusion :

Always a sincere attempt should be to resort to tax management, so as to have large cash flow and expand the trade and promote new industries. Each one of the functionary should resolve to act for common good and for the welfare of the citizens. It is high time that ways and means are evolved whereby honest and law abiding taxpayers are not put to inconvenience, harassment and witch-hunting. **The tax administration need to be geared up to come up to the expectations of the honest tax-payers. It is high time that during 71st year of Independence, all citizens resolve to eliminate tax evasion and bring glory to Bharat. Let each tax payer to pledge to pay the due taxes forthwith after due planning.**

Overview of Income escaping assessment under the Income-tax Act, 1961

CA Manoj Tiwari

Income Escaping Assessment is the assessment which is done by the Assessing Officer if there is a reason for him to believe that income chargeable to tax has escaped assessment for any assessment year. It gives power to him to re-assess or re-compute income, turnover etc. which has escaped assessment.

1. Main Provisions involved: Section 147 to Section 153

Section 147	Income escaping assessment Three provisos Four explanations
Section 148	Issue of notice where income has escaped assessment Two sub-sections
Section 149	Three sub-sections Two explanations
Section 150	Provision for cases where assessment is in pursuance of an order of appeal etc Two sub-sections
Section 151	Sanction for issue of notice Three sub-sections
Section 152	Other provisions Two sub-sections One proviso
Section 153(2)	Time limit for completion of assessment reassessment and re-computation One proviso

2. Main Court rulings which cover the subject

Citation and Title	*Brief ratio*
Supreme Court in ***CIT vs. Kelvinator of India [320 ITR 561 (SC)***]	Change of opinion and tangible material required
Supreme Court in ***ACIT vs. Rajesh Jhaveri [291 ITR 500 (SC)]***	Reasons to believe means prima-facie opinion
Supreme Court in ***Parsuram Potteries vs. ITO [106 ITR 1 (SC)]***	Importance of finality in legal proceedings
Supreme Court in ***ITO vs. Lakmani Mewal Dass [103 ITR 437 (SC)]***	Requirement of live nexus in reasons to believe (different from reason to suspect)
Supreme Court in ***Chuggamal Rajpal vs. S.P. Shaliha & Ors. [(1971) 79 ITR 603 (SC)]***	Requirement of positive *material* in reasons to believe and application of mind

Supreme Court in ***CIT vs. Green World Corp. [314 ITR 81 (SC)]***	Meaning of directions and reopening on basis of dictates not allowed
Supreme Court in ***Trustees of The HEZ Nizam vs. CIT [242 ITR 381 (SC)]***	Multiplicity of proceedings not allowed on same cause of action
Delhi High Court in ***J. Sekar vs. UOI [W.P.(C) 8100/2017]*** (12/01/2018)	Reasons to believe recording explained at length with reference to application of mind angle (held rubber stamp reasons no reasons)
Delhi High Court in ***Sabh Infrastructure vs. ACIT [398 ITR 198 (Delhi)]***	Standard procedure in reopening stipulated
Supreme Court in ***ITO vs. Techspan India Pvt Ltd. & Another [404 ITR 10 (SC)]***	Merely a change of opinion on facts already available in original assessment proceedings — reassessment not permissible
Supreme Court in ***P G & W Sawoo Pvt Ltd and Another vs. ACIT [2016] 385 ITR 60(SC)***	Increase of rent with retrospective effect — no right to receive income arose in previous year — notice for reassessment not valid

3. Notice issuance & service : refer following legal provisions & case laws

a. Section 282 & Section 282A;

b. Rule 127 & Rule 127A;

c. Notification of 20/12/2017- In the Income-tax Rules, 1962, in rule 127, in sub-rule (2), after the proviso, the following proviso shall be inserted:-

"Provided further that where the communication cannot be delivered or transmitted to the address mentioned in item (i) to (iv) or any other address furnished by the addressee as referred to in first proviso, the communication shall be delivered or transmitted to the following address:—

(i) the address of the assessee as available with a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of the said Act); or

(ii) the address of the assessee as available with the Post Master General as referred to in clause (j) of section 2 of the Indian Post Office Act, 1898 (6 of 1898); or

(iii) the address of the assessee as available with the insurer as defined in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938); or

(iv) the address of the assessee as furnished in Form No.61 to the Director of Income-tax (Intelligence and Criminal Investigation) or to the Joint Director of Income-tax (Intelligence and Criminal Investigation) under sub-rule (1) of rule 114D; or

(v) the address of the assessee as furnished in Form No.61A under sub-rule (1) of rule 114E to the Director of Income-tax (Intelligence and Criminal Investigation) or to the Joint Director of Income-tax (Intelligence and Criminal Investigation); or

(vi) the address of the assessee as available in the records of the Government; or

(vii) the address of the assessee as available in the records of a local authority as referred to in the Explanation below clause (20) of section 10 of the Act."

d. Hon'ble Delhi High Court in the case of ***Pr. CIT-1 vs. Atlanta Capital Pvt. Ltd.*** in ***ITA Nos. 6650 & 6651/2015***, order dated 21.09.2015 and ***CIT vs. Chetan Gupta [(2016) 382 ITR 613 (Del.)];***

e. Whether AO is duty bound to refer latest available address, Yes (***CIT vs. Eshaan Holding (P.) Ltd. [(2012) 344 ITR 0541(Del***)]; Service by mode given in notification of 20/12/2017 to be chosen when notice could not be served normally; on non issue of notice objection can be raised at any stage as issue is not covered u/s 292BB (refer ***PCIT vs. Silver line [(2016) 383 ITR 455 (Del.)]*** etc);

f. Notice issued to wrong address — objection raised by assessee before completion of reassessment proceedings — reassessment not valid [***Ardent Steel Ltd. vs. ACIT [(2018) 405 ITR 422 (Chhattisgarh)***].

4. <u>Nature of return filed in pursuance to notice u/s 148 Important aspects</u>

a. The Return is akin to return u/s 139 and section 148(1), filing of return u/s 148 cannot confer jurisdiction on AO;

b. Income declared in said return ordinarily cannot invite concealment penalty as it is prior to detection (Hon'ble Punjab & Haryana High Court in the case

of ***CIT vs. Rajiv Garg*** [***313 ITR 256 (P &H)]***; Hon'ble Apex Court in the case of ***CIT vs. Suresh Chandra Mittal [251 ITR 9 (SC)]***; in ***Pr. CIT vs. Neeraj Jindal [393 ITR 1 (Delhi)]***;

c. PCIT vs. Shri Jai Shiv Shankar Traders Pvt. Ltd. [383 ITR 448 (Delhi)] has held that the issue of notice u/s 143(2) is not a procedural requirement and is mandatory and completion of assessment without issue of notice u/s 143(2) is fatal to the assessment.

5. <u>What should be stage for issuance of notice u/s 143(2) post return filing u/s 148 (as per *ACIT vs. Hotel Blue Moon [321 ITR 362(SC)]*)</u>

a. Notice u/s 143(2) on same day of return filing u/s 148/139 is held to be bad;

b. In reopening proceedings notice u/s 143(2) issued prior to/parallel with reasons being supplied as requested by assessee in letter filing return u/s 148 is not valid and at least AO in that case must *reasonably* allow ***GKN Driveshaft (India) Ltd. vs. ITO [(2003) 259 ITR 19(SC)]*** process to be exhausted;

c. For framing assessment u/s 143(3)/147 valid notice u/s 143(2) is *sine qua non* which must be issued on basis of valid return u/s 148.

However, it may be said that though the term reassessment indicates that an assessment is being redone, in fact it could be done even when there has been no assessment and could be the first assessment made on an assessee. Thus where no notice u/s. 143(2) has been issued and an assessment completed, a notice u/s.148 may still be issued to complete a reassessment. [***ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd [2007] 291 ITR 500 (SC), Sri Krishna Mahal vs. ACIT [2001] 250 ITR 333 (Mad)***]. In this connection it may be worthwhile to notice the following decisions:

- As long as there is some tangible material to support the belief that income chargeable to tax has escaped assessment, reopening is permissible. Such tangible material need not be "new" or be alien to the record [***Gujarat Power Corporation Ltd vs. ACIT*** in ***Special Leave Application No.29792 of 2007*** dated ***30.07.2012***].
- Even in the case of a section 143(1) intimation, the AO must have "tangible material" that income has escaped assessment. [***Telco Dadajee Dhackjee Limited vs. DCIT*** in ***ITA No. 4613/Mum/2005 (TM)***].
- Even in a case where only a section 143(1) intimation is passed, the power to reopen can be exercised only where there is "reason to believe that income has escaped assessment" and not merely to "scrutinize" the return or "verify" the expenditure. [***Inductotherm (India) Pvt Ltd vs. CIT*** in ***Special Civil Application No.858 of 2006*** dated ***06.08.2012 (Guj)***].

6. <u>Broad categories of reopening and various scenarios</u>

i) When only intimation is given (u/s 143(1)) (within four and after four years) (only thing to see reasons to believe and sanction by competent authority);

ii) When already scrutiny assessment is made and reopening is made with 4 years from assessment year end (reasons + sanction + change of opinion protection available);

iii) When already scrutiny assessment is made and reopening is made after four years end from asst year end ((reasons + sanction + change of opinion + first proviso to section 147 applies (disclosure angle) protection available);

iv) Investigation wing information (***CIT vs. RMG Polyvinyl (I) Ltd. [(2017)396 ITR 5 (Delhi)], Sabh Infrastructure vs. ACIT [398 ITR 198 (Delhi)]***);

v) AIR/database information for cash deposits (Delhi ITAT in ***Bir Bahadur Singh Sijalwi vs. ITO [ITA No. 3814/Del./2011]*** followed in Delhi ITAT in ***Mahabir Prasad vs. ITO [ITA No. 924/Del./2015]*** and ***Krishan Kumar vs. ITO [ITA No. 3985/Del./2017]*** held not possible); ***Sh. Amrik Singh vs. ITO*** [***159 ITD 329];***

vi) AIR information for immovable property dealings (already capital gains offered in different year double taxation angle, factually wrong information, reasons inchoate and vague, year of transfer, capital gains assessable where, etc);

7. Deemed cases where income chargeable to tax has escaped assessment

Explanation 2.— For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(ba) where the assessee has failed to furnish a report

in respect of any international transaction which he was so required under section 92E ;

(c) where an assessment has been made, but-

(ca) where a return of income has not been furnished by the assessee or a return of income has been furnished by him and on the basis of information or document received from the prescribed income-tax authority, under sub-section (2) of section 133C, it is noticed by the Assessing Officer that the income of the assessee exceeds the maximum amount not chargeable to tax, or as the case may be, the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(i) income chargeable to tax has been under assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

8. <u>Scope of explanation 3 to section 147</u>

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

CIT vs. Mohmed Juned Dadani [(2013) 355 ITR 172 (Guj)]

Effect of Explanation 3 to Section 147 — AO not making additions with respect to ground on basis of which notice issued — cannot in a fresh assessment make additions on other issues which did not form part of reasons recorded

"28. Explanation 3 to section 147 of the Act thus does not in any manner, even purport to expand the powers of the Assessing Officer under section 147 of the Act. In any case, an Explanation cannot expand the scope and sweep of the main body of the statutory provision. In the case of ***S. Sundaram Pillai vs. V. R. Pattabiraman*** *reported in* ***AIR 1985 SC 582*** *the Supreme Court observed that, an Explanation added to a statutory provision is not a substantive provision but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. It was observed as under:*

"52. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to sub-serve.

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment, and

(e) It cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

9. Certain elementary principles

a. Burden to prove that income has escaped assessment lies on shoulders of revenue: ***CIT vs. Pardeep Gupta [303 ITR 95 (Delhi)]***;

b. Validity of reopening to be strictly seen in light of reasons recorded as communicated to assessee: Bombay High Court ***Hindustan Unilever Ltd. vs. The State of Maharastra [W.P.(L) No. 122 of 2018]*** case and Delhi High Court in ***Sarthak Securities Co. (P) Ltd. vs. ITO [329 ITR 110 (Delhi)]*** and ***Signature Hotels (P) Ltd. vs. ITO [338 ITR 51 (Delhi)]***;

c. Principle of natural justice to be strictly fulfilled like confrontation and cross examination of back material (leading judgment in ***Andaman Timber Industries vs. CCE [281 CTR 241 (SC)]:*** Held order passed in violation of natural justice a nullity; also relevant are ***Sahara India (Film) vs. CIT [(2008) 300 ITR 403 (SC)]***, ***Kishan Chand Chellaram vs. CIT [(1980) 125 ITR 713 (SC)]*** and ***H.R. Mehta vs. ACIT [387 ITR 561 (Bom.)]***;

d. Sublato fundamento cadit opus (when foundation fail super structure fall.

10. Key Steps/Check list

a. Whether notice issued to existing person (refer ***Spice Infotainment Ltd. vs. CIT [(2012) 247 CTR***

500 (Delhi)] approved by SC) *Notice to dead person invalid;*

b. Whether notice issued within time limit (refer ***Nokia India Pvt Ltd vs. DCIT [W.P.(C) No. 1773/2016 (Del.)]*** and ***ST MicroElectronics Pvt Ltd vs. DCIT [W.P.(C) No. 3648/2014 (Del.)]*** and ***UPSRTC vs. Kusum Gupta [First Appeal from Order No. 1272 of 1992 (All.)]***);

c. Whether notice issued by jurisdictional and proper officer having jurisdiction over the case (vs PAN Database) (refer SC in ***Raza Textiles*** case);

d. Whether notice can be vague or it should be specific (refer ***Manish Maheshwari vs. ACIt [(2007) 289 ITR 341 (SC)]*** and ***New Delhi Auto Finance Pvt Ltd vs. JCIT [(2008) 300 ITR 83 (Del.)]***);

e. Right to receive reasons with *sanction* (read them properly & before filing objections must **seek all information referred in reasons by separate letter**) ***GKN Driveshaft (India) Ltd. vs. ITO [(2003) 259 ITR 19(SC)];***

f. When aforesaid exercise is completed then draft **comprehensive objections** (like proviso *disclosure* aspect, application of mind aspect and live nexus aspect; sanction aspect etc.);

g. Objections must be disposed by separate **speaking order** with application of mind (at this stage assessee can go for writ).

11. Reason to believe of the AO

The Apex Court in the case of ***Calcutta Discount Co. Ltd. vs. ITO [(1961) 41 ITR 191 (SC)]*** analysed the Phrase "reason to believe" and observed that "*It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn.*"

It is not for somebody else to tell the assessing authority what inferences, whether of facts or law, should be drawn.

In the case of ***CIT vs. Greenworld Corporation [(2009) 314 ITR 81 (SC)]*** it was held that the assessment order passed on the dictates of the higher authority being wholly without jurisdiction, was a nullity.

Reopening of assessment on basis of letter of Commissioner (Appeals) containing identical facts stated by assessee was held not valid. [***United Shippers Ltd. vs. ACIT (2015) 371 ITR 441 (Bom.)***]

In the case of ***Sun Pharmaceutical Industries Ltd. vs. DCIT [(2016) 381 ITR 387 (Delhi)] -*** The notice under section 148 was issued as a result of Instruction No. 9 of 2006 dated November 7, 2006 issued by the Central Board of Direct Taxes. These audit objections were not accepted by the Assessing Officer. CBDT instruction directing remedial action in case of audit objections – Notice based solely on such instruction not valid.

12. Key aspects to object:

i) Reasons do not sprout and give rise to any *income escaping assessment* per se and reasons cannot stand on its own legs, Return filing aspect missed; (***CIT vs. RNG Polyvinyl (I) Ltd. [(2017) 396 ITR 5(Del)]***)

ii) Reasons based on borrowed satisfaction and suffers from lack of application of mind (***PCIT vs. Meekashi Overseas Pvt Ltd [(2017) 395 ITR 677 (Del)]***)

iii) Highlight weakness in information referred in reasons that same is scanty, vague ; not actionable and is inchoate and said information is not incriminatory in nature;

iv) If reasons want to make protective assessment challenge it by saying no protective assessment permissible u/s 147;

v) Condition of section 149 when reopening made after four years fulfilled check;

13. Change of opinion

Both under the law as it stood prior to assessment year 1989-90 and law as it stands from assessment year 1989-90 it can be said that a mere change of opinion cannot be a reason for reopening an assessment. In ***ITO & Anr. vs. Sirpur Paper Mills Ltd [1978] 113 ITR 393 (AP)*** has held that the department cannot be permitted to bring fresh litigation because of new views they entertain on same facts or new vision that they present as to what should be the proper inference on the facts disclosed. If this is permitted they held that litigation could have no end except when legal ingenuity is exhausted and would multiply litigation. In this context, it has been held that reassessment is not valid in the following circumstances:

- Having second thoughts on the same material and the omission to draw the correct presumption during original assessment.
- Ignorance of the legal position on the part of the Assessing Officer even though relevant facts and materials were available.
- Ignorance of board circulars.
- Where primary facts were available at the time of original assessment, omission to notice the same.
- Facts available before predecessor and taken note of an original assessment and successor holding a different view.
- Reopening on the basis of Supreme Court decision.

 Reopening on ground that earlier inference was erroneous or on the basis of a change of opinion.

It must be shown that some opinion was formed on the basis of the material at the original assessment stage. If initially no opinion was formed it could not be said that there was a change of opinion.

However merely because the case of the assessee was accepted as correct in the original assessment for the relevant assessment year, it does not preclude the Income Tax Officer to reopen the assessment of an earlier year on the basis of his findings of fact made on the basis of fresh material in the course of assessment of a subsequent assessment year. ***[Ess Ess Kay Engineering Co. Pvt Ltd vs. CIT [2001] 247 ITR 818 (SC)]*** However in a case where there has been no assessment u/s. 143(3) but has been made only u/s. 143(1), there can be no question of a change of opinion since no opinion was at all formed in the first place. ***ACIT vs. Rajesh Jhaveri Stock Brokers Pvt Ltd [2007] 291 ITR 500 (SC).***

In ***CIT vs. Kelvinator of India [320 ITR 561 (SC)]***, the Supreme Court held that the Assessing Officer has power to re-open, provided there is "**tangible material**" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. This is supported by *Circular No.549 dated 31.10.1989* which clarified that the words "reason to believe" did not mean a change of opinion. The Supreme Court in this case was approving the decision of the Full Bench of the Delhi High Court in the case of the same assessee in ***CIT vs. Kelvinator of India [256 ITR 1 (Del)]*** where The Court held that when a regular order of assessment is passed in terms of section 143 (3) of the Act, a presumption can be raised that such an order has been passed on application of mind. It was held that if it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong. It was held that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion In a subsequent decision, however, it was held that if in the original assessment, the Assessing Officer did not examine the claim of the assessee, did not raise queries or elicit answers, it cannot be stated that merely because the Assessing Officer did not reject such a claim in the final order of assessment, he should be deemed to have expressed an opinion with respect to such a claim. As long as there is some tangible material to support the belief that income chargeable to tax has escaped assessment, reopening is permissible. Such tangible material need not be "new" or be alien to the record – ***Gujarat Power Corporation Ltd. vs. ACIT*** in Special Leave Application no. **29792 of 2007**, subsequent to the decision of the Supreme Court in ***Kelvinator of India (supra)*** a reopening based on an audit objection was found to be a case of mere change of opinion in ***CIT vs. Lucas TVS Ltd [249 ITR 306 (SC)]*** where the audit party took an interpretation which was different from the one taken from the Assessing Officer which also was a possible view. In a case where the audit party merely brought out a factual error committed by the Assessing Officer it was however held that it was not a case of change of opinion in ***CIT vs. P.V.S. Beedies Pvt Ltd [(1999) 237 ITR 13 (SC)]***.

14. Number of Reassessments

There is no restriction on the number of times section 147 may be invoked. What is relevant for a reassessment is a finding that the income in the original assessment or the return has been taken at a figure lower than what is rightly assessable.

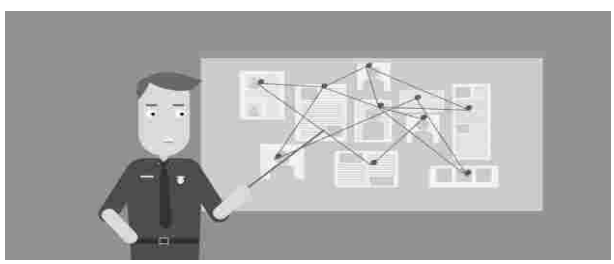
However where a return has been filed within the time allowed in response to an invalid notice of reassessment, a second notice of reassessment treating such return as invalid is not valid.

Further all original proceedings must have been terminated before reassessment proceeding can be validly initiated.

This would be true even if the earlier proceedings which were pending at the time of issue of the reassessment notice are declared invalid.

Where reassessment proceedings were initiated but were dropped there can be an issue of fresh notice after the earlier notice can be said to have been concluded as a result of dropping of proceedings. ***[Kohinoor Enterprises vs. ITO [(1996) 89 Taxman 587 (MP)].***

Where the original was pending proceeding initiated for reassessment are invalid ***[CIT vs. Rajendra G. Shah [(2001) 247 ITR 772 (Bom)].***



Recent Decisions Under The Income Tax Act, 1961

Subash Agarwal, Advocate

1) CIT vs. Kanpur Plasticpack Ltd.

[2018] 95 taxmann.com 140 (SC)

SPECIAL LEAVE PETITION (CIVIL) DIARY NO. 19775 OF 2018

Order Dated : 03.07.2018

RATIO : Sec. 148 – service of notice - SLP dismissed against High Court ruling that reassessment proceedings initiated on the basis of notice served under section 148 on accountant of company were vitiated, as accountant was not Principal Officer of Company, nor was there any material to show that he had been authorised by company to accept any notice.

FACTS : Notice under section 148 was served on accountant of company. He had duly been given Power of Attorney to conduct assessment proceedings for that year. Tribunal held that reassessment proceedings were invalid and quashed assessment order on ground that notice under section 148 was not validly served. High Court held that accountant was not Principal Officer of Company, nor was there any material to show that he had been authorised by company to accept any notice and such being case.

FINDINGS : Reassessment proceedings initiated on the basis of notice served under section 148 on accountant of company were vitiated, as accountant was not Principal Officer of Company, nor was there any material to show that he had been authorised by company to accept any notice.

The Special Leave Petition is dismissed on the ground of delay as well as on merits.

Imp Note : SLP arose out of the order of Allahabad High Court in *CIT* v. *Kanpur Plastipack Ltd.* 390 ITR 381 (All.)

2) BPTP Ltd. vs. PCIT

[2018] 95 taxmann.com 234 (Delhi)

W.P. (C) NO. 7098 OF 2018

Order Dated : 16.07.2018

RATIO : ITAT cannot pass an order for consolidation of appeals pending in different benches without giving notice of hearing to the other side and such order shall specify the reasons for consolidation.

FACTS : The Petitioner is aggrieved by the order of the Income Tax Appellate Tribunal consolidating 13 appeals pending before different Benches. The Petitioner is aggrieved by the cryptic and unreasoned order and relies upon the application filed by one of the parties requesting for consolidating of the appeals. It is submitted that these applications did not disclose any reason as to why consolidation of all appeals, which were pending for a long time and were adjourned at the behest of the revenue by various benches, should be consolidated and listed before one Bench.

The learned counsel for the Revenue seeks to justify the consolidation submitting that similar factual disputes are involved in Assessee's appeal and it was felt that in the interest of justice, it would be essential to consolidate all the appeals to enable the Bench to discern the common picture. The record nowhere discloses nor does the Revenue dispute that the ITAT did give any notice to the Petitioner/assessee before issuing the consolidation order.

FINDINGS : All these appeals preferred by the appellant were listed and heard repeatedly by different Benches. In these circumstances, the Tribunal has to follow the proper procedure.

In these circumstances, all the previous orders are hereby quashed. In case the Revenue wishes to consolidate all these appeals, it shall move a proper comprehensive application before the ITAT, serving a copy in advance to the assessee. The ITAT should issue notice to the Assessee before agreeing on the application and after considering the submission of both the parties, pass a reasoned order.

With aforesaid observations, the present petition filed by the petitioner is allowed and disposed of accordingly.

Cases relied upon :

(i) *Olympia Paper & Stationery Stores* v. *Assistant Commissioner of Income Tax*, (63 ITD 148)

(ii) Dr. Prannoy Roy v. *The Deputy Commissioner of*

Income Tax & Ors, [**W.P. (C) No. 4742/2018**, decided on 04.05.2018]

3) Indian Galvanics Cyrium Foils Ltd. vs. DCIT, Circle- 4(4), Mumbai

[2018] 95 taxmann.com 259 (Bombay)

IT APPEAL NO. 199 OF 2002

Order Dated : 06.07.2018

RATIO : Sec 37- Where assessee had incurred expenses for higher education and training of one of its director's son but failed to place particulars on record like basic qualification, subjects in which he did his administration course; how such subjects had nexus to business activities of appellant, the expenditure cannot be held to be for business purposes.

FACTS : The Appellants - assessee company was engaged in manufacturing copper foils. The assessee had claimed certain amount as expenses incurred under the head 'Management Training and Development expenditure'. It was incurred for higher education and training of one of its director's son, namely, Harsh Kumar, who was sent to USA for completing course in Business Administration. **An agreement was executed with him, who had committed to serve assessee for ten years after completing his course.**

The Assessing Officer, however, refused to accept the assessee's contentions and thus, rejected the claim of assessee. On appeal, the Commissioner (Appeals) allowed the claim of the assessee.

On second appeal of the revenue, the Tribunal allowed the appeal of the revenue and resultantly, disallowance was restored as made by the A.O.

FINDINGS : The amount which is claimed by the Appellant-Assessee as deductible allowance was not incurred wholly and exclusively for the purpose of business of the Appellant-Assessee. Appellant did not place better particulars on record like, basic qualification, subjects in which he did his administration course; how such subjects has had nexus to business activities of appellant and so on.

In the result, the appeal allowed in favour of the revenue.

Cases relied upon :

AR relied upon –

(i) *Sakal Papers (P.) Ltd.* v. *CIT* [1978] 114 ITR 256 (Bom.)

DR relied upon –

(ii) Shreenath Motors (P.) Ltd. v. *CIT* [2014] 365 ITR 536 (Bom.)

(iii) Divyakant C. Mehta v. *ITO* [2014] 365 ITR 423 (Bom.)

4) Sunrise Academy of Medical Specialities) (India) (P.) Ltd. vs. ITO

[2018] 96 taxmann.com 43 (Kerala)

WA. NO. 1297 & WP(C) NO. 3485 OF 2018

Order Dated : 12.07.2018

RATIO : Section 56(2) (viib) is triggered at the stage of computation of income itself even though assessee had disclosed genuineness of persons who purchased shares ot a premium.

FACTS : A private limited Company, incorporated under the Companies Act, and in which the public are not substantially interested, issued shares at a premium above the face value.. A notice under Section 143(2) was issued and the appellant is said to have proved the genuineness of the persons, who purchased the said shares on a premium. The Assessing Officer then attempted to tax the amounts so received under Section 56(2)(viib) of the Income Tax Act, 1961. The assessee filed a writ petition before the High Court.

FINDINGS : As per Sec. 56(2) (viib), any premium received by a Company on sale of shares, in excess of its face value, if the Company is not one in which the public has substantial interest, would be treated as income from other sources, which cannot controlled by the provisions of Sec. 68. Sec. 68 on the other hand, as substituted with the provisos, treats any credit in the books of accounts, even by way of allotment of shares; for which no satisfactory explanation is offered, to be liable to income-tax. In this case, the aggregate consideration received for the shares exceeding the fair market value will be included as income from other sources. However, when the resident investor is not able to explain the nature and source for the credit seen in the books of accounts of the Company or the explanation offered is not satisfactory then the entire credit would be charged to income tax for that previous year. That is, the entire amounts credited in the books of accounts, for allotment of shares or application money, including the fair market value determined will be charged to tax. However if an explanation is offered and if it is satisfactory in the case of a Company in which the public are not substantially interested, then the charge to tax will only be to that portion exceeding the fair market value determined, which anyway has to occur under Section 56(2)(viib).

The appeal of the assessee was dismissed

Case relied upon :

M/s.State of H.P.* v. *Gujarat Ambuja Cement Ltd. (2005) 6 SCC 499)

5) Atul Ltd. vs. DCIT, Range1 1, Ahmedabad

[2018] 95 taxmann.com 161 (Ahmedabad-Trib.)

IT APPEAL NO. 1766 (AHD.) OF 2014

Order Dated : 11.07.2018

RATIO : Section 147 – Re-opening on the basis of Change of Opinion is not permissible even within 4 years.

FACTS : The Assessing Officer sought to reopen the assessment on the ground that loss on sale of stores was capital expenditure and hence not allowable.

FINDINGS : Having noticed the fact that the Assessing Officer had raised specific questions *vide* requisite notice dated 15-10-2010 with respect to allowability on 'loss on sale of stores' and that the assessee had explained the same - without any follow-up question by the Assessing Officer in this regard, the Assessing Officer had indeed formed an opinion about the deductibility of loss on sale of stores. It is also not in dispute that no new material has come to the light on account of which the present assessment proceedings were reopened. On these facts, the reopening was clearly on account of change of opinion by the Assessing Officer - something which is impermissible under the scheme of the Act and in the light of binding judicial precedent. Thus, the impugned reassessment proceedings were to be quashed.

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

Case relied upon :

Gujarat Power Corpn. Ltd. v. *Asstt. CIT* [2013] 350 ITR 266 (Guj.) for the proposition that where the A.O. has raised a query during the course of original assessment proceedings in regard to the issue to re-opening but in the final order he has not discussed anything, it cannot be said that he has not formed an opinion in regard to the said matter and also for the proposition that the principle of change of opinion is applicable even where the re-opening is sought to be done within the four years of the original assessment.

6) CLC & Sons (P.) Ltd. vs. ACIT, Circle-3(1), New Delhi

[2018] 95 taxmann.com 219 (Delhi - Trib.) (SB)

ITA no. 1976/Del/06

Order Dated : 19.07.2018

RATIO : In view of the judgment of the Hon'ble Summit court in CIT v. Smifs Securities Ltd. [2012] 348 ITR 302 (SC) in which it has been held: "that goodwill will fall under the expression 'or any other business or commercial rights of similar nature", goodwill qualifies for depreciation u/s 32(1) of the Act.

FACTS : The assessee company took over all the assets and liabilities of M/s CLC & Sons, a partnership firm. An agreement for transfer of all the assets and liabilities was signed between them. As per clause 2 of the said Agreement, all the assets in the books of the partnership firm were taken over by the assessee company alongwith goodwill which was valued at Rs.10 crore, which was also transferred to the assessee company.

FINDINGS : The A.O. held that no depreciation can be granted on genuine goodwill in terms of section 32(1) of the Act, which opinion stands overturned in view of the judgment of the Hon'ble Summit court in *CIT* v. *Smifs Securities Ltd.* [2012] 348 ITR 302 (SC) in which it has been held: *"that goodwill will fall under the expression 'or any other business or commercial rights of similar nature'"* and, hence, qualifies for depreciation u/s 32(1) of the Act. Secondly, as regards A.O's view that the firm has been succeeded by a company and net assets of the firm have vested in the company, and consequently there is no transfer of goodwill in real sense and further the valuation of goodwill done by the assessee in the instant case was erroneous, both the sides candidly accepted that the second broader limb involved in the instant appeal does not precisely emanate from the substance of the question referred to the Special Bench.

The bench agreed with such a common contention and, accordingly, sent the matter back to the Division Bench for disposing of the appeal in above terms.

Case relied upon :

***CIT* v. *Smifs Securities Ltd.* [2012] 348 ITR 302 (SC)**

7) Customer Lab Solutions (P.) Ltd. vs. ITO, Ward- 1(2), Hyderabad

[2018] 95 taxmann.com 280 (Hyderabad- Trib.)

ITA NO. 438/HYD/2017

Order Dated : 04/07/2018

RATIO : Where the payment to the U.S. company, who does not have any P.E in India, is in the nature of affiliation fee not involving any transfer of technical knowledge or use of technical knowledge, liability to deduct TDS does not arise.

FACTS : The assessee entered into an agreement with US company for the purpose of its consultancy business and accordingly, paid a sum as fee. The A.O. held that the fee paid as royalty within the meaning of clause (*vi*)(*b*) of sub-section (1) of section 9 of the Income Tax Act and disallowed the amount under section 40(*a*)(*i*) on the ground that no TDS had been deducted. Before the CIT(A), it was contended by assessee that the amount paid by the assessee to US company was **affiliate fee** and amount was not in connection with use of any **right to use any material or service provided** by the non-resident as there was no income accruing in India. After detailed discussion, CIT(A) held that the payment was in nature of royalty under the Income-tax Act and DTAA as well.

FINDINGS : The agreement dated 31-03-2005 between the assessee and US company specifies various terms and conditions and the relationship, vision philosophy which CIT(A) has painstakingly considered and extracted in the order to indicate that there is arrangement for use of technical knowledge. However, as seen from the agreement itself, there are two types of payments. The affiliation fee is one-time payment which does not provide for transfer of any technology. However, there is further fee to be paid "Fees on consulting and reports" in the agreement. This fee will be paid based on the performance, targets achieved by assessee in consulting technology, tools etc. What assessee has paid and claimed was only an affiliation fee and not the fee on consulting and reports. **The payment of affiliation fee does not involve any transfer of technical knowledge or use of technical knowledge.** As seen from the paper book placed on record, what assessee got is in the form of two magazines which are published by the Harvard Business School with a title 'Balanced Scorecard Report'. This magazine, short of management jargon, is nothing but a periodical magazine with various write-ups, which cannot be considered as a right to use a copy right. Assessee being management consultant, the agreement with M/s. Balanced Scorecard Collaborative inc. of USA, had this high sounding management terminology, but put it simply, assessee has paid only the affiliation fee and not a fee for consultation or for technical knowledge. Since there is no transfer of technical know-how or technical knowledge or use of technical knowledge, the definition 'royalty' either under IT Act or under the DTAA does not apply to the present payment of affiliation fee. **Since U.S. company does not have any PE in India, the payment itself *per se* does not attract any TDS provisions.** Since the payment of affiliation fee alone does not result in either providing any technical service or use of technical knowledge, both the A.O. and CIT(A) have erred in considering the fee as in the nature of royalty. Since there is no transfer of technology or use of any technology and payment is only simply for affiliation, the above amount cannot be considered as 'royalty' either under the provisions of Income Tax Act or under the provisions of DTAA.

Cases relied upon :

(i) *GE India Technology Centre (P.) Ltd.* v. *CIT* [2010] 327 ITR 456/193 Taxman 234 (SC)

(ii) *DIT* v. *Sheraton International Inc.* [2009] 313 ITR 267/178 Taxman 84 (Delhi)

(iii) *Hughes Escort Communications Ltd.* v. *Dy. CIT* [2012] 51 SOT 356/21 taxmann.com 171 (Delhi)

(iv) *Tata Consultancy Services* v. *State of Andhra Pradesh* [2004] 271 ITR 401/141 Taxman 132 (SC)

(v) *DIT* v. *Ericsson A.B.* [2012] 343 ITR 470/204 Taxman 192/[2011] 16 taxmann.com 371 (Delhi)

(vi) *CIT* v. *Vinzas Solutions India (P.) Ltd.* [2017] 77 taxmann.com 279/245 Taxman 289/392 ITR 155 (Mad.)

(vii) *GE India Technology Centre (P.) Ltd.* v. *CIT* [2010] 327 ITR 456/193 Taxman 234/7 taxmann.com 18 (SC)

8) Fidelity Business Services India (P.) Ltd. *vs.* ACIT

[2018] 95 taxmann.com 253 (Karnataka HC)

ITA NO. 512 OF 2017

Order Dated : 23.07.2018

RATIO: Tribunal has the power to give directions for fresh enquiry into the aspects of the subject matter of appeal filed before it which have not been investigated or enquired into by the lower Authorities earlier and which may result in enhancement of tax liability of the assessee.

FACTS : The appellant assessee company bought back its own shares from its holding company at Mauritius named **M/s. FIS Holding Muritian Ltd.** to the extent of **2,933 Shares** having face value of **Rs. 10/- per share** at a hugely high price of **Rs. 2,85,108/- per share** during the relevant previous year. The learned **Income Tax Appellate Tribunal, Bangalore Bench "B"**, vide its Order dated **22/02/2017** for **AY 2011-12** held partly in favour of the Appellant – Assessee that Appellant Assessee was not liable to pay tax on **'Distribution of Dividend'** as defined under **Section 2(22)(d)** of the Income Tax Act, 1961 in terms of **Section 115-O** of the Act on the pay-out by it for buy-back of its

own shares from its foreign Holding Company, **M/s. FIS Holding Muritian Ltd.** incorporated **in Mauritius.** The learned Tribunal held that after insertion of **Section 115-QA** of the Act with effect from **01/06/2013,** the purchase of its own shares by the Company in accordance with the provisions of **Section77-A** of the Companies Act, 1956 is chargeable to income tax as **Distribution Dividend Tax (DDT)** but since the transaction in the present case of buy-back of shares took place prior to **01/06/2013,** such buy-back of the shares between the period **01/04/2000 to31/05/2013** would be taxed as **'Capital Gains'** in the hands of the recipient in accordance with the provisions of **Section 46-A** of the Act and no such amount would be treated as dividend in view of exclusion part of **Section 2 (22)(iv)** of the Act. The Assessing Officer also held that the Capital Gains in the hands of the Holding Company (Mauritius Company) was also not chargeable to tax in India as per the provisions of **Article 13(4)** of the **Indo-Mauritius Double Taxation Avoidance Agreement (DTAA)**.

However, the learned Tribunal observed that there is another aspect of this transaction of buy-back at an abnormally high price of **Rs. 2,85,108/- per share** having face value of **only Rs. 10/- per share** and therefore the payment made by the Assessee - Indian Company over and above the fair market price of the shares of the Assessee would not be treated as part of the purchase price because, the transaction is between the two closely related parties and not at the Arm's Length Price (ALP) and therefore the payment for buy-back in excess of the fair market price of shares of the Assessee - Indian Company, would certainly fall within the ambit of **Section 2(22)(e)** of the Act and could be taxed as Dividends, in the hands of the Assessee Company.

The learned Tribunal said that since this aspect of the matter was not examined by the Authorities below and it could be treated as a device for transfer of substantial 'Reserves and Surpluses' by the Indian Company to the Holding Company at Mauritius as **BEPS -Base Erosion and Profit Shifting** and it could be a colourable device and a dubious method of avoiding tax in the garb of buying back of shares at a highly unrealistic and inflated price, therefore, the matter deserved to be examined again by the Assessing Authority on the said issue of fair market price of shares, vis-à-vis buy-back price of the shares by the assessee Indian Subsidiary Company.

FINDINGS : "SATYAMEV JAYTE" (Truth alone Triumphs) is the quote from Mundaka Upanishad, the concluding part of the sacred Hindu Vedas and it is the North Star of our Judicial System inscripted at the bottom of our National Emblem, Ashok Stambh and Dharm Chakra.

It tells us that, the 'truth' should be the Guiding Star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

Tribunal has the power to give directions for fresh enquiry into the aspects of the subject matter of appeal filed before it either *suo motu* or on any grounds raised by either party to the appeal which have not been investigated or enquired into by the lower Authorities earlier and which may result in enhancement of tax liability of the assessee.

In this case, the Tribunal was right and within its jurisdiction in directing the examination of the fair market value of the shares bought back by it for the **A.Y.: 2011-12** in question.

The Appeal of the Appellant -Assessee Company was dismissed.

9) DCIT-1(1)(2), Mumbai vs. M/s. Gilbarco Veeder Root India (P) Ltd.

ITA NO. 1003/MUM/2017

Order Dated : 20/06/2018

(SOURCE : itatonline.org)

RATIO : Deemed dividend u/s 2(22)(e) can be taxed only in the hands of a registered shareholder. Apex court decision in the case of Gopal & Sons (HUF) is distinguishable on facts.

FACTS : Assessee company is engaged in the business of manufacture and sale of petrol dispensers, related accessories apart from carrying on maintenance services and research & development activity. An addition was made by the A.O. for a sum of Rs. 90 crores by invoking Sec. 2(22)(e) treating the same as 'deemed dividend'.

Assessee had received a sum of Rs.90 crores from one, M/s. Portescap India Pvt. Ltd. There was common shareholder, both in the assessee-company and Portescap. The 100% shareholding of assessee-company is held by one, M/s. Kollmorgen India Investment Company, Mauritius. The A.O. held that every kind of lending would be covered by the expression 'loan' and 'advance' for the purposes of Sec. 2(22)(e) of the Act. On the alternate plea, the A.O. inferred that the impugned sum was covered by the

second category of payments referred to in Sec. 2(22)(e) of the Act, namely, the recipient of the amount being a concern in which the shareholder has a substantial interest. For the said reason, the A.O. treated the receipt of Rs.90 crores from Portescap as deemed dividend u/s 2(22)(e) of the Act.

FINDINGS : Sec. 2(22)(e) covers within its sweep three categories of payments. Firstly, the payment by way of loan or advance to a shareholder; Secondly, payment to any concern in which such shareholder is a member or a partner; and, thirdly, any payment made on behalf of or for the individual benefit of any such shareholder. Ostensibly, assessee-recipient is not a shareholder in the payer company, i.e. Portescap and, therefore, it is not covered by the first category of payment. In fact, it is the second category which is sought to be invoked by the A.O. There is a common shareholder, both in the assessee-company and Portescap, and even if we were to assume that the amount received by the assessee-company is for the benefit of the stated aforesaid common shareholder, yet, it could only be assessed in the hands of such registered shareholder and not in the hands of the assessee-company.

In the result, this case is in favour of the assessee.

IMP. NOTE: The Tribunal in the instant case has distinguished the Apex court decision in the case of *Gopal & Sons (HUF) 77 taxmann.com 71* in the following words :

"So far as the reliance placed by the Revenue on the judgment of the Hon'ble Supreme Court in the case of Gopal and Sons (HUF) (supra) is concerned, the same, in our view, is quite inapplicable to the facts of the present case. Firstly, the assessee before the Hon'ble Supreme Court was a HUF and the issue was as to whether the loans and advances received by the HUF could be treated as 'deemed dividend' within the meaning of Sec. 2(22)(e) of the Act. Notably, in the case before the Hon'ble Supreme Court, the payment was made by the company to the HUF and the shares in the company were held by the karta of the HUF. It is in this context that the Hon'ble Supreme Court upheld the addition in the hands of the HUF as factually the HUF was the beneficial shareholder. The fact-situation in the case before us stands on an entirely different footing inasmuch as the assessee-recipient of money is neither the registered nor the beneficial shareholder of the payer company, i.e. Portescap. Ostensibly, the common registered as well as beneficial shareholder of assessee-company and Portescap is Kollmorgen and not the assessee-company. Therefore, the decision of the Hon'ble Supreme Court in the case of Gopal and Sons (HUF) (supra) is inapplicable to the facts of the present case."

Cases referred to :

(i) PCIT vs M/s. Ennore Cargo Container Terminal P. Ltd., T.C (A) Nos. 105 and 106 of 2017 dated 27.03.2017

(ii) CIT vs Universal Medicare (P.) Ltd., 324 ITR 263 (Bom.)

(iii) CIT vs Impact Containers, 367 ITR 346 (Bom.)

(iv) CIT vs NSN Jewellers (P) Ltd., [ITA no. 2312 of 2011] (Bombay HC)

10) DCIT, Circle- 2(1), Hyd vs. Inventaa Industries (P) Ltd.

[2018] 95 taxmann.com 162 (Hyderabad - Trib.) (Spl Bench)

IT APPEAL NOS. 1015 TO 1018(HYD.) OF 2015

Order Dated : 9.07.2018

RATIO : Sec 10(1) - Just because mushrooms are grown in controlled conditions, it does not negate the claim of the assessee that the income arising from the sale of such mushrooms is agricultural income.

FACTS : The assessee was treating the income from growing mushrooms (Edible white button mushroom) as "income from agriculture" and hence exempt u/s. 10(1) of the Income Tax Act, 1961. A survey operation u/s. 133A was conducted at the mushroom growing unit of the assessee-company. During the course of survey, statements were recorded from two Vice Presidents of the company.

FINDINGS : Basic operations are performed by expenditure of human skill and labour on land by the assessee, which results in the raising of the 'product' called "Edible white button mushroom" on the land and as this product has utility for consumption, trade and commerce, the income arising from the sale of this product is agricultural income and hence exempt u/s. 10(1) of the Act.

With the advancement of modern technology, most of the crops, fruits, vegetables and flowers are being grown in controlled conditions, in green houses and in pots. In these advanced scientific agricultural techniques, soil is removed from the land and is placed in different containers such as pots, trays and stands etc. and agricultural operations are performed on them to yield the desired results of production of products which have some utility.

Just because mushrooms are grown in controlled conditions it does not negate the claim of the assessee that the income arising from the sale of such mushrooms is agricultural income.

ITAT upheld the order of the Ld. CIT(A) on this issue in

favour of the assessee.

Cases referred to :

(i) *M/s. Venkateswara Hatcheries Pvt Ltd (237 ITR 174)*

(ii) Chander Mohan v. *ITO [52 taxmann.com 203] (Chandigarh- Trib*)

(iii) CIT v. *Raja Benoy Kumar Sahas Roy* [1957] [32 ITR 466]

(iv) *CIT v. K.E. Sundara Mudaliar [1950] 18 ITR 259 (MAD.)*

(v) Panadai Pathan v. Ramasami Chetti [1922] ILR 45 Mad

(vi) Commissioner of Income-tax v. *Soundarya Nursery* [2000] 241 ITR 530 (Madras)

(vii) *CIT, Chennai* v. *K.N. Pannerselvam* [2016] 75 taxmann.com 98 (Madras)

(viii) *DCIT* v. *Best Roses Biotech Ltd. (2012)17 taxmann.com 56 (Ahd.)*

11) Titagarh Industries Ltd. vs. DCIT, Circle- 4(1), Kolkata

[2018] 95 taxmann.com 288 (Kolkata - Trib.)

IT APPEAL NO. 1052 (KOL.) OF 2017

Order Dated : 04.07.2018

RATIO : Sec. 50- When assessee had sold plant and machinery along with capital WIP, cost incurred on capital WIP was required to be reduced as 'cost of acquisition' while arriving at taxable amount of capital gain/loss under sec. 50.

FACTS : During the relevant year, the assessee had sold its scrap paper manufacturing plant including capital work-in-progress ('Capital WIP') for consideration of Rs. 27.50 crores to M/s. Ajmera Steels Pvt. Ltd. (ASPL). The Commissioner took a view that in terms of section 50(2), capital WIP did not form part of block of assets and for that reason did not qualify to be called capital asset. In his opinion the cost of capital WIP would not be taken into account in arriving at short-term capital gain chargeable under section 50. In his opinion the subject matter of sale to ASPL was only scarp paper machinery and not capital WIP. He thus passed a revisional order under section 263 directing A.O. to compute short-term capital gain after excluding cost of acquisition of capital WIP.

FINDINGS : On the facts of the case, since the assessee had sold the plant and machinery along with the capital WIP, the cost incurred on capital WIP was required to be considered and reduced as and by way of 'cost of acquisition' while arriving at the taxable amount of capital gain/loss. On this count also the Principal Commissioner's allegation in the show cause notice that the cost of acquisition of capital WIP could not be considered for computing the short-term capital loss is rejected.

In the impugned order the only reason given by the Principal Commissioner for not accepting the cost of acquisition of capital WIP was required to be reduced from the sale consideration for arriving at the taxable capital gain/loss was that no evidence was furnished to show that the consideration was also received towards the capital WIP and not the plant and machinery alone.

In this regard, it is, however, found that the terms of the agreement between the appellant and ASPL sufficiently establish that the assessee had in fact sold the plant and machinery along with the capital WIP as can be seen from the subject agreement. This contemporaneous piece of evidence clearly goes on to show that the sale consideration of Rs. 27.50 crores was paid for purchasing the plant and machinery and the capital WIP lying at the assessee's factory. There is sufficient merit in the assessee's submission that no prudent businessman would spend Rs. 27.50 crores to purchase fixed assets whose useful value as per the provisions of the Companies Act, 1956 was Rs. 3,04,49,393 and the WDV for tax purpose was only Rs. 5,38,761. In fact the original cost of the fixed assets at the time of purchase by the appellant/assessee was Rs. 4,12,55,831.

In the circumstances, by no stretch of imagination one can argue that any blind person would pay a consideration of almost seven times of the actual cost at which the machinery was originally acquired but at the relevant time of sale have been used, old, depreciated and worn out scrap item. Indeed therefore, the assertion of assessee that the capital WIP was sold along with the plant and machinery which were lying idle in the appellant/assessee's factory whose business was under suspension is correct. Accordingly, both the assessee as well as the Assessing Officer were right on the facts and in law in taking into account the cost of acquisition of capital WIP for computing the overall loss accruing on sale of fixed assets including capital WIP. For the reasons set out above, the Principal Commissioner's finding in the impugned order that no evidence was furnished before him satisfying the claim raised by the assessee is not tenable and, therefore, the jurisdiction invoked for exercising his revision jurisdiction is not tenable in the eyes of law and, therefore, the impugned order passed by the Principal Commissioner is quashed.

In the result, appeal of the assessee was allowed.

Cases referred to :

(i) *Malabar Industrial Ltd.* v. *CIT* [2000] 243 ITR 83/109 Taxman 66 (SC)

(ii) CIT v. *J.L. Morrison (India) Ltd.* [2014] 366 ITR 593/225 Taxman 17/46 taxmann.com 215 (Cal.)

(iii) *Jt. CIT* v. *Graphite India Ltd.* [2004] 89 ITD 415 (Kol.)

An Overview of The Prevention of MoneyLaundering Act, 2002

CA. Sumantra Guha

Meaning of money laundering

The term "money laundering" is said to have originated from the Mafia ownership of Laundromats (a self – service laundry service mark laundromat) in the United States. In Black's Law of Lexicon the term laundering is referred to as "investment or other transfer of money flowing from racketeering, drug transactions and other sources (illegal sources) into legitimate channels so that its original source cannot be traced."

Common Sources of Illegal Money

Following are some of the most common criminal activities that generate illegal money.

Drug trafficking

Organised crime, e.g., extortion, loan sharking, kidnapping, contract killing, gambling, protection money, adulteration, bank frauds, corruption, etc.

Slush funds maintained by corporations, e.g., bribery, payment to political parties, politicians, etc.

International trafficking in arms

International trafficking in human beings

Smuggling

Basic Money Laundering Cycle

Money laundering is a single process however; its cycle can be broken down into three distinct stages:-

1. Placement: It is the first and the initial stage when the crime money is injected into the formal financial System.

2. Layering: Under the second stage, money injected into the system is moved or spread over various transactions in different accounts and different countries. Thus, it will become difficult to detect the origin of the money.

3. Integration: Under the third and final stage, money enters the financial system in such a way that original association with the crime is sought to be obliterated so that the money can then be used by the offender or person receiving as clean money.

Method of Money Laundering

The following methods show the means or the medium through which launderers carry out their activities:

a. Structuring ("Smurfing")
b. Bank Complicity
c. Money Services and Currency Exchanges
d. Asset Purchases with Bulk Cash
e. Electronic Funds Transfer
f. Postal Money Orders
g. Credit Cards
h. Casinos
i. Refining
j. Legitimate Business / Co-mingling of Funds
k. Value Tampering
l. Loan Back

The prevention of Money Laundering Act, 2002 (PMLA 2002) and the rules notified there under came into effect on July 1, 2005. Director, FIU-IND and Director (Enforcement) have been conferred with exclusive and concurrent powers under relevant sections of the Act to implement the provisions of the Act. It consists of ten Chapters containing 75 sections and one Schedule.

Offence of Money Laundering

Section 3 of the Act, States that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

Section 2(1)(u) defines **" Proceeds of crime"** as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken/held outside the country, then the property equivalent in value held within the country.

The term "Scheduled offence" has been defined in clause (y) of sub –section (1) of section 2. It means -

i. The offences specified under part A of the schedule; or

ii. The offences specified under part B of the schedule if the total value involved in such offences is one crore rupees or more; or

iii. The offences specified under part C of the schedule.

Schedules

Part A

1. Certain Offences under the Indian Penal Code
2. Certain Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985
3. Certain Offences under the Explosive Substances Act, 1908
4. Certain Offences under the Unlawful Activities (Prevention) Act, 1967
5. Certain offences under the Arms Act, 1959
6. Certain offences under the Wildlife (protection) Act, 1972
7. Certain offences under the Immoral Traffic (Prevention) Act, 1956
8. Certain offences under the Prevention of Corruption Act, 1988
9. Certain offences under the Explosives Act, 1884
10. Certain offences under the Antiquities and Arts Treasures Act, 1972
11. Certain offences under the Securities and Exchange Board of India Act, 1992
12. Certain offences under the Customs Act, 1962
13. Certain offences under the Bonded Labour System (Abolition) Act, 1976
14. Certain offences under the Child Labour (Prohibition and Regulation) Act, 1986
15. Certain offences under the Transplantation of Human Organs Act, 1994
16. Certain offences under the Juvenile Justice (Care and Protection of Children) Act, 2000
17. Certain offences under the Emigration Act, 1983
18. Certain offences under the Passports Act, 1967
19. Certain offences under the Foreigners Act, 1946
20. Certain offences under the Copyright Act, 1957
21. Certain offences under the Trade Marks Act, 1999
22. Certain offences under the Information Technology Act, 2000
23. Certain offences under the Biological Diversity Act, 2002
24. Certain offences under the Protection of Plant Varieties and Farmers' Rights Act, 2001
25. Certain offences under the Environment Protection Act, 1986
26. Certain offences under the Water (Prevention and Control of Pollution) Act, 1974
27. Certain offences under the Air (Prevention and Control of Pollution) Act, 1981
28. Certainoffences under the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002

Part B

1. Offence under Section 132 of the Customs Act, 1962 relating to false declaration, false documents etc.

Part C

An offence which is the offence of cross border implications and is specified in, -

1. Part A; or

2. The offences against property under Chapter XVII of the Indian Penal Code.

3. The offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

PunishmentforOffence of Money Laundering

Section 4 of the Act, States that whoever Commits the offence of money – laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and also be liable to fine. But where the proceeds of crime involved in money –laundering relate to any offence specified under paragraph 2 of Part A of the Schedule (i.e. Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985), the maximum punishment may extend to ten years instead of seven years.

Attachment of Property Involved in Money Laundering

Section 5 of the Act, States that where the Director or Deputy Director authorized by him on the basis of material in his possession has reason to believe (which should be recorded in writing) that –

a. Any person is in possession of any proceeds of money laundering and

b. Such proceeds of crime are likely to be concealed, transferred or dealt with in any matter, which may result in frustrating any proceedings relating to confiscation of such proceeds of crime, then he may provisionally attach such property for a maximum period of 180 days from the date of order. Every order of attachment shall cease to have effect after the expiry of 180 days or the

date of order made under section 8(2) by the Adjudicating Authority whichever is earlier.

Adjudication

On receipt of complaint under sub section (5) of section 5, or application made under sub section (4) of section 17 or under sub section (10) of section 18, if the adjudicating authority has reasons to believe that offence u/s 3 has been committed by a person, then he may serve a notice of minimum 30 days to call upon such person to indicate the source of income/earnings by means of which he has acquired the attached property and to give him a chance to prove his innocence.

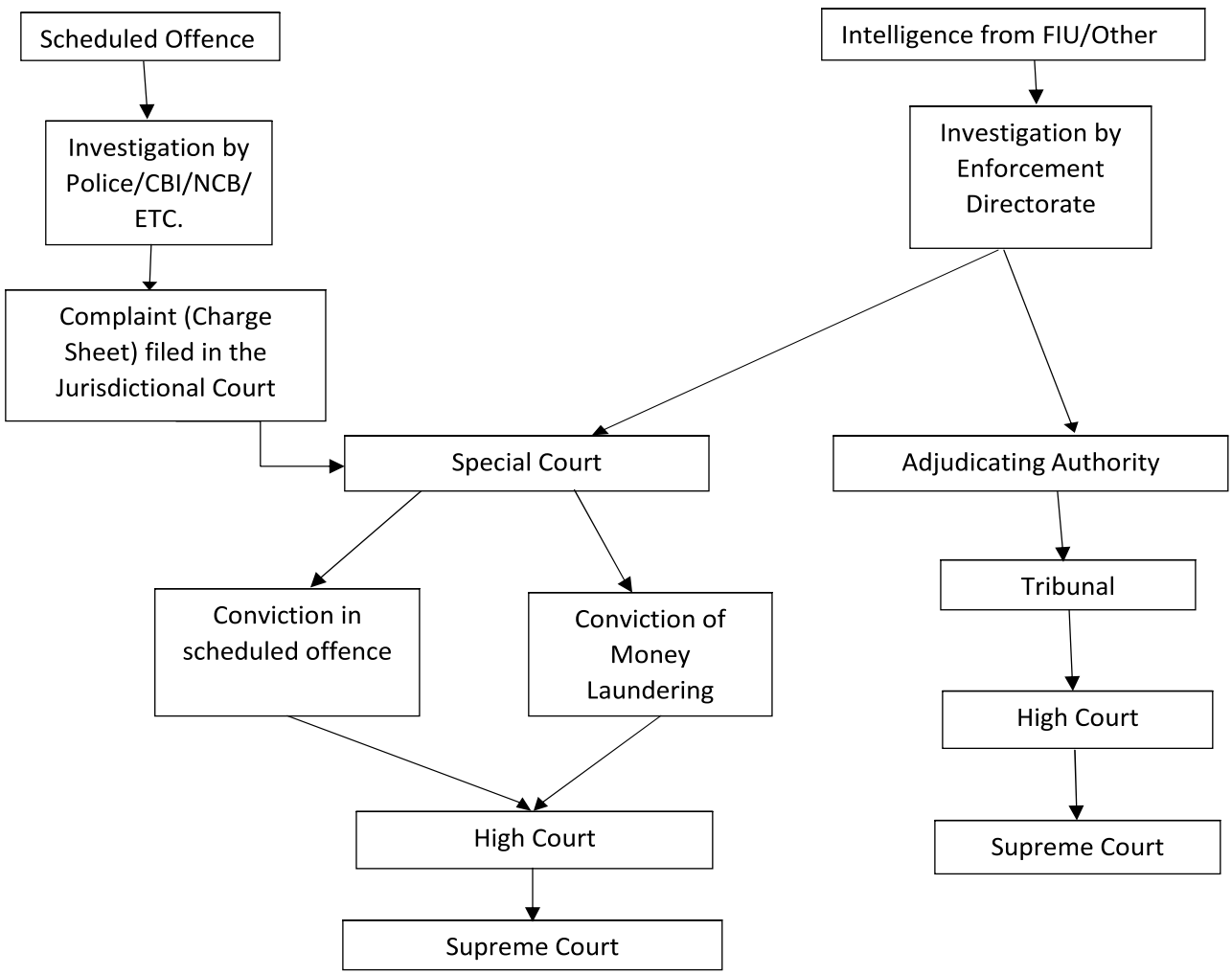
If the adjudicating Authority decides under section 8(2) that any property is involved in money-laundering, he shall confirm the attachment of property made under section 5(1) or retention of the property.

Vesting of Property in Central Government

Section 9 of the Act states that where an order of confiscation has been made under sub section (5) of sub section (7) of section 8 or section 58B or sub section (2A) of section 60 in respect of any property of a person, all the rights and title in such property shall vest absolutely with the Central Governmentfree from all encumbrances.

The Reporting Entities shall furnish to the Director (Financial Intelligence Unit) within such time as may be prescribed information relating to such transactions whether attempted or executed, the nature and value of which may be prescribed under Rule 7 & 8 of PMLMR Rules. The Director also has power to impose fine and u/s 13 of the Act, **he may direct such reporting entity to get its records audited by a Chartered Accountant from among the panel appointed by the Central Govt.** The expenses for such audit will also be borne by the Central Govt. The Enforcement Directorate also has powers of survey, search & seizure, arrest, retention of property & records, to prefer appeals before the Appellate Tribunal and also to file complants before the special court.

The flow chart of the activity process of the Enforcement Directorate is enumerated below –



A glimpse of the Recent Amendments in GST

CA Subham Khaitan

The following amendments have been notified by the Government in GSTrecently:

- For persons who had only received the Provisional ID but could not file the Form GST REG-26 by 31st December 2017 can now apply for GSTIN. The process of migration for such taxpayers has been enabled through a special procedure as per Notification no. 31/2018-Central Tax dated 6th August 2018.
- The following are the due dates prescribed for the various return forms from the period July 2018 to March 2019:

Forms	Turnover	Period	Periodicity	Due date
GSTR 3B	Any turnover	July-March	Monthly	20th of the next month
GSTR 1	>Rs. 1.5 crore in the PFY	July-March	Monthly	11th of the next month
GSTR 1	<Rs. 1.5 crore in the PFY	July-September	Quarterly	31st October 2018
GSTR 1	<Rs. 1.5 crore in the PFY	Oct-Dec	Quarterly	31st January 2019
GSTR 1	<Rs. 1.5 crore in the PFY	January - March	Quarterly	30th April 2019

- Exemption from payment of tax under reverse charge mechanism under section 9(4) has been extended till 30th September 2019 as per Notification no. 22/2018-Central Tax (rate) dated 6th August 2018.
- Inspite of being under inverted duty structure i.e. rate of tax on inputs being higher than rate of tax on output supplies, refund of unutilised input tax credit is not allowed on certain items under GST. Notification no. 5/2017-Central Tax (rate) contains the list of all the items on which no such refund will be available. With effect from 1st August 2018, the **refund of unutilised input tax credit** on account of **inverted duty structure** has been **allowed** on the following:

Sl No	HSN	Description
1	5007	Woven fabrics of silk or of silk waste
2	5111 to 5113	Woven fabrics of wool or of animal hair
3	5208 to 5212	Woven fabrics of cotton
4	5309 to 5311	Woven fabrics of other vegetable textile fibres, paper yarn
5	5407, 5408	Woven fabrics of manmade textile materials
6	5512 to 5516	Woven facbrics of manmade staple fibres
7	60	Knitted or crocheted fabrics
6A	5608	Knotted netting of twine, cordage or rope; made up fishing nets and other made up nets, of textile materials
6B	5801	Corduroy fabrics
6C	5806	Narrow woven fabrics, other than goods of heading 5807; narrow fabrics consisting of warp without weft assembled by means of an adhesive (bolducs)"

Surprisingly, it has also been stated that the substantive right of a taxable person in the form of unutilised balance of **input tax credit** after payment of tax for and upto July 2018 on the inward supplies received **up to 31st July 2018 will lapse**. This provision seems to be regressive and difficult to implement as finding out the input tax credit accumulated on account of inverted duty structure may be very difficult to calculate. This provision may be subject to litigation as the GST Acts do not give power to the Government to notify lapsing of input tax credit in any situation.

Notification no. 20/2018-Central Tax (rate) dated 26th July 2018

Notification no. 21/2018-Integrated Tax (rate) dated 26th July 2018

Notification no. 20/2018-Union Territory Tax (rate) dated 26th July 2018

- On certain **handicraft items**, the **rate of GST** has been **reduced** significantly. The maximum rate on these handicraft items is now given as 12%. Handicraft goods have been defined as follows:

  "Goods predominantly made by hand even though some tools or machinery may also have been used in the process; such goods are graced with visual appeal in the nature of ornamentation or in-lay work or some similar work of a substantial nature; possess distinctive features, which can be aesthetic, artistic, ethnic or culturally attached and are amply different from mechanically produced goods of similar utility"

  Notification no. 21/2018-Central Tax (rate) dated 26th July 2018

  Notification no. 22/2018-Integrated Tax (rate) dated 26th July 2018

  Notification no. 21/2018-Union Territory Tax (rate) dated 26th July 2018

- The rate of tax on services has been amended as follows:
  - Supply of **food** and drinks in restaurant, mess, canteen, eating joints and such supplies to institutions (educational, office, factory, hospital) **on contractual basis** will not be taxable at GST rate of **5%**. It has been stated that the scope of outdoor catering under 7(v) is restricted to supplies in case of **outdoor/indoor functions** that are **event based** and occasional in nature wherein the rate will be **18%**.
  - Supply of **food** or article for human consumption by **Indian Railways** or IRCTC in trains or platforms will be taxable at **5%**
  - GST rate slabs on **accommodation service** will now be based on **transactionvalue** instead of declared tariff which is likely to provide major relief to the hotel industry.
  - In case of **multimodal transportation** of goods i.e. by atleast two different modes of transport from the place of acceptance of goods to the place of delivery by a multimodal transporter, the rate will be **12%**.
  - The rate of tax on **e-books** has been prescribed as **5%**.

  Notification no. 13/2018-Central Tax (rate) dated 26th July 2018

  Notification no. 14/2018-Integrated Tax (rate) dated 26th July 2018

  Notification no. 13/2018-Union Territory Tax (rate) dated 26th July 2018

- Services by the **Central Government, State Government, Union territory or local authority** in relation to a function entrusted to a **Municipality** under Article 243W or 243G to the Panchayat will be considered as **neither supply of goods nor supply of services**. Earlier, the said function was exempt which has now been rationalized.

  Notification no. 16/2018-Central Tax (rate) dated 26th July 2018

  Notification no. 17/2018-Integrated Tax (rate) dated 26th July 2018

  Notification no. 16/2018-Union Territory Tax (rate) dated 26th July 2018

- The following services have been **exempted** from GST:
  - Services by an **old age home** run by Central Government, State Government or by an entity registered under section 12AA of the Income-tax Act, 1961 (43 of 1961) to its residents (aged 60 years or more) against consideration uptotwenty five thousand rupees per month per member, provided that the consideration charged is inclusive of charges for boarding, lodging and maintenance.
  - Services supplied by **electricity distribution** utilities by way of construction, erection, commissioning, or installation of infrastructure for extending electricity distribution network **upto the tube well of the farmer** or agriculturalist for agricultural use.
  - Exemption on Services by way of

transportation of goods by an aircraft from **customs station of clearance in India to a place outside India** and Services by way of transportation of goods by a vessel **from customs station of clearance in India to a place outside India** has been extended till 30th September 2019

- Services by way of **warehousing of minor forest produce**.
- Services by **Coal Mines Provident Fund Organisation** to persons governed by the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (46 of 1948).
- Services by **National Pension System (NPS)** Trust to its members against consideration in the form of administrative fee.
- Services supplied by Central Government, State Government, Union territory to their undertakings or **Public Sector Undertakings(PSUs**) by way of **guaranteeing** the loans taken by such undertakings or PSUs from the financial institutions.
- Services by way of licensing, registration and analysis or testing of food samples supplied by the **Food Safety and Standards Authority of India (FSSAI)** to Food Business Operators.
- Services by way of **artificial insemination of livestock** (other than horses).
- Services supplied by a **State Government to Excess Royalty Collection Contractor (ERCC)** by way of assigning the right to collect royalty on behalf of the State Government on the mineral dispatched by the mining lease holders subject to certain conditions
- Services provided by an **unincorporated body or a non-profit entity** registered under any law for the time being in force, engaged in,- (i) activities relating to the welfare of industrial or agricultural labour or farmers; or (ii) promotion of trade, commerce, industry, agriculture, art, science, literature, culture, sports, education, social welfare, charitable activities and protection of environment, to its own members against consideration in the form of **membership fee upto an amount of one thousand rupees (Rs 1000/-) per member per year.**
- It has been clarified that the **Central and State Educational Boards** shall be treated as **Educational Institution** for the limited purpose of providing services by way of conduct of examination to the students.

Notification no. 14/2018-Central Tax (rate) dated 26th July 2018

Notification no. 15/2018-Integrated Tax (rate) dated 26th July 2018

Notification no. 14/2018-Union Territory Tax (rate) dated 26th July 2018

- In case of services supplied by **Individual Direct Selling Agents (DSAs)** other than a body corporate, partnership or limited liability partnership firm **to a banking company** or a non-banking financial company, located in the taxable territory, it has been prescribed that the recipient will be liable to pay taxes under **reverse charge** under Section 9(3) of the CGST Act.

Notification no. 15/2018-Central Tax (rate) dated 26th July 2018

Notification no. 16/2018-Integrated Tax (rate) dated 26th July 2018

Notification no. 15/2018-Union Territory Tax (rate) dated 26th July 2018

- An explanation has been inserted in the rate notification for services (Notification no. 11/2017-Central Tax (rate) dated 28th June 2017) that the term **'business'** shall **not include** any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are **engaged as public authorities**

Notification no. 17/2018-Central Tax (rate) dated 26th July 2018

Notification no. 18/2018-Integrated Tax (rate) dated 26th July 2018

Notification no. 17/2018-Union Territory Tax (rate) dated 26th July 2018

- On the following items, the rate of **compensation cess** has been prescribed as **NIL**:
  - Coal rejects supplied by a coal washery, arising out of coal on which compensation cess has been paid and no input tax credit thereof has not been availed by any person
  - Fuel Cell Motor Vehicles

Notification no. 2/2018-Compensation Cess (rate) dated 26th July 2018

TECHNICAL ANALYSIS OF THE GST ACT

CA Birendra Goyal

AN in-depth study of the provisions of the Central GST and the rules made there under has been made and an analysis of the same has been made. The aim of this article is to provide 'food for thought'. Relevant portions of the Act have been given first followed by its analysis and then by an example (if required).

PROVISION:

Section 7(1):

For the purposes of this Act, the expression “supply” includes—

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

Schedule II

2. Land and Building

(a) any lease, tenancy, easement, licence to occupy land is a supply of services;

(b) any lease or **letting out of the building including a commercial**, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

ANALYSIS:

Section 7(1) gives an inclusive definition of supply which includes activities and transactions referred to in clause (a) to clause (d), out of which we shall discuss only about activities or transactions referred to in clause (a) and (d). Clause (a) refers to all forms of supply made for a consideration and the supply should be made in the course or furtherance of business. When it includes all forms of supply then there is no need for any other inclusion. The fourth inclusion refers to activities referred to in Schedule II of the Act but unlike clause (a) it does not stipulate any conditions relating to 'consideration' or 'in the course or furtherance of business'. Schedule II **decides only** whether a particular activity is a supply of goods or a supply of service. The activities referred to in Schedule II are obviously included in clause (a) because clause (a) includes all forms of supply. Now the question is whether the activities referred to in Schedule II should fulfill the conditions relating to "consideration" and "in the course or furtherance of business" to be treated as a supply. In my opinion, clause (a) and clause (d) are contradictory in nature.

EXAMPLE:

I have let out my office to a friend free of rent. This activity is neither made in the course or furtherance of business nor is made for a consideration. As such, it cannot be treated as a supply. The letting out of immovable property is also covered under Item 2(b) of Schedule referred to in clause (d) of 7(1) and this clause simply says that any activity referred to in Schedule is shall be treated as a supply and clause 7(1)(d) does not speak about 'consideration' and 'in the course or furtherance of business'. As such it is a supply as per this clause.

REMARKS

Now the Parliament has amended Section 7 of the CGST Act and removed clause (d) from Sub section (1) and inserted such provision as sub section (1A) of section 7 which stipulates that if these activities or transactions constitute a supply under section 7(1), Schedule II shall decide only whether such supply is a supply of service or a supply of goods. The contradiction between clause (a) and clause (d) of section 7(1) has been removed.

PROVISION

Entry 53 of List II-State list in the Seventh Schedule of the Constitution refers to taxes on sale and consumption of electricity. The State Government has exclusive powers to deal with or levy taxes on activities referred to in the State list.

Notification No. 2/2017-CT(R) dated 28.06.2018: In exercise of the powers conferred by section 11(1), the Central Government has exempted supply of certain goods vide this notification which includes Electrical

energy (HSN code no. 2716 0000).

ANALYSIS

Since the GST Act does not exclude 'electrical energy' from the definition of goods and/or services, it means that supply of electrical energy is within the ambit of GST Act. Inclusion of 'electrical energy' in notification no. 2/2017-CT(R) dated 28.06.2018 means that 'electrical energy' is treated as an exempted goods. It may be mentioned here that distribution and transmission of electrical energy by a Distribution and Transmission Company has been exempted vide entry no. 25 of notification no. 12/2017-CT(R) dated 28.06.2018. Under the GST Act, both the Central Government and the State Government has power to levy taxes on sale and purchase of goods. When both the Governments have the power to levy tax on electricity, then entry 53 of List II-State List should have been omitted. List II refers to those matters in relation to which the State Government has exclusive powers to deal with. Further how can the State Government levy tax twice on the same transaction, first under Entry 53 of List II of the Seventh Schedule of the Constitution and again under the West Bengal GST Act, 2017.

In the case of commercial establishments like malls or office buildings, the electricity company sells electricity to the owners or operators of such commercial establishments on principal to principal basis and not on principal to agent basis. It means that owners or operators are selling electricity to the occupants of the mall owner, on their own account and not distributing electricity on behalf of any other person, irrespective of the fact whether or not,they have the right to do so. Now since electricity has been exempted vide above notification, tax cannot be collected on the same. Section 32(2) of the CGST Act prohibits registered persons from collecting tax on exempted goods and services. As such any person collecting tax on supply of electricity is violating the provisions of section 32(2) of the Act. Any aggrieved person may seek refund of the tax wrongfully collected from him.

PROVISION:

Provision of Section 2 (62)

"input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—

(d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective **State Goods and Services Tax Act;** or

(e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the **Union Territory Goods and Services Tax Act**

Section 49 (5):

The amount of input tax credit available in the electronic credit ledger of the registered person on account of—

(f) the State tax or Union territory tax shall not be utilised towards payment of central tax.

ANALYSIS:

According to Section 2(62) 'Input Tax' includes State tax or UT tax charged on any supply including taxes payable under section 9(3) and 9(4) of the State Tax Act or under section 7(3) and 7(4) of the UT Tax Act. What is the purpose of such inclusion, when clause (f) of section 49(5) prohibits the utilization of the State tax or UT tax towards payment of Central tax. We all know that state tax or UT tax cannot be utilized for payment of central tax and vice versa The Act is not clear and creates ambiguity.

Provision:

Section 1:

(2) The GST Act extends to the whole of India except the State of Jammu and Kashmir.

(56) "India" means the territory of India as referred to in article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters;

(79) "non-taxable territory" means the territory which is outside the taxable territory;

(109) "taxable territory" means the territory to which the provisions of this Act apply;

Section 7(2) of the IGST Act:

Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

ANALYSIS

According to the above provisions, if an importer supplies the goods after the goods enter the territorial waters of India but before they cross the customs frontier of India, he shall be liable to charge IGST on such supply. After paying tax to the supplier, when the

recipient, or the final importer, clears the goods from the customs, he shall have to pay the IGST again as per the tax determined under section 3 of the Customs Tariff Act, 1975. The final importer shall have to pay the IGST twice on the same goods. Although he is eligible to claim ITC against taxes paid on both the occasions, but his capital will be blocked and most probably he may not be able to consume the total ITC and the amount may remain blocked.

EXAMPLE:

'A' imports goods worth Rs. 100000/- from China and after it enters the territorial waters of India but before it crosses the customs clearance station of India, sells the goods to 'B'. 'B' shall have to pay IGST, say Rs. 18000/-, i.e. 18% on Rs. 100000/-, charged by 'A' and again when he clears the goods from the Customs, he shall have to pay IGST again determined as per section 3 of the Customs Tariff Act, 1975, say, 18000/-. It means that B shall have to pay 36000/- on imports of Rs. 100000/-. Now when he sells the goods, say at Rs. 120000/-, he shall charge Rs. 21600 /- from the customer. Out of ITC of 36000/- he will adjust 21600/- and the balance credit of Rs. 14400/- shall remain idle in his Electronic Credit Ledger.

REMARKS:

Now, goods sense has prevailed over the Government and it has inserted two entries, namely entry number (7) and (8) in Schedule III which decides whether a particular activity is to treated as a supply of goods or as a supply of service. The two entries inserted in Schedule III are as follows:

"7. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.

8. (a) Supply of warehoused goods to any person before clearance for home consumption;

(b) Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption."

Hence, finally the issue of double taxation has been resolved by the Government by amending the relevant provisions of the Act.

PROVISION:

Section 2(82):

"output tax" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him **or by his agent** but excludes tax payable by him on reverse charge basis;

Section 16(1):

Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any **supply of goods or services or both to him** which are used or intended to be used in the course or furtherance of **his business** and the said amount shall be credited to the electronic credit ledger of such person.

Section 41

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.

(2) The credit referred to in sub-section (1) shall be utilised only for payment of self-assessed output tax as per the return referred to in the said sub-section.

ANALYSIS:

If we read the above three provisions together, we find that the above provisions are not in consonance with each other. According to section 2(82), the output tax liability of an agent shall be included in the output tax liability of the Principal. The Principal cannot be made liable for the output tax liability of an agent, supplying goods or services on behalf of the Principal when the law provides that the agent has to mandatorily obtain registration as per the provisions of Section 24 (vii) of the CGST Act. And once the agent obtains registration, all the provisions of the Act and the rules made there under shall apply to him. It means that he shall have to make payment of his output tax liability either by utilizing ITC available to him or by cash.

Section 2(82) read with Section 41(2) contradicts the provisions of Section 16(1). Section 2(82) read with Section 41(2) provides that the tax credit available in respect of supply of goods or services made to the Principal can be utilized also against the output tax liability of the agent, whereas Section 16(1) stipulates that tax credit available in respect of supply of goods or services to the agent only can be utilized against his output tax liability.

PROVISION:

Section 2-

(6) “aggregate turnover” means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess;

(112) “turnover in a State” or “turnover in Union territory” means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis) and exempt supplies made within a State or Union territory by a taxable person, exports of goods or services or both and inter-State supplies of goods or services or both made from the State or Union territory by the said taxable person but excludes central tax, State tax, Union territory tax, integrated tax and cess;

Section 35

(5) Every registered person whose turnover during a financial year exceeds the prescribed limit shall get his accounts audited by a chartered accountant or a cost accountant and shall submit a copy of the audited annual accounts, the reconciliation statement under sub-section (2) of section 44 and such other documents in such form and manner as may be prescribed.

ANALYSIS:

Sub sections (6) and (112) of section 2 are almost same except that "aggregate turnover" refers to aggregate value of all supplies of persons having the same PAN where as "turnover in a state refers to all supplies made by a taxable person from the State or UT. Now when we analyze the above two provisions, the following queries comes to our mind:

a. When "aggregate turnover" means all taxable supplies then what is the necessity of separately mentioning 'export of goods or services or both' and 'inter-state supplies'□

b. Why is zero rated supplies not mentioned in both the definitions□

c. If a person has two different business verticals registered in a state, then whether the turnover of both the verticals shall be aggregated for the purpose of calculating turnover in a state□

d. A person has two registrations, one in a specified category state having a turnover of 5 lacs and the other in West Bengal having a turnover of six lacs. According to section 22, the person in the specified category state is liable to obtain registration as the aggregate turnover is above ten lacs. But is the distinct person in WB liable to obtain registration as the aggregate turnover is below 20 lac.

e. Section 35(5) prescribes that any person whose turnover exceeds the prescribed limit shall get his accounts audited. Turnover is not defined anywhere in the CGST Act. As such either it should be "aggregate turnover" or "turnover in a state or UT". The threshold limit of "aggregate turnover" is prescribed in Rule 80(3) of the CGST Rules but the same has not been prescribed for turnover or turnover in a state. As such, it is not clear, whether we should consider the "turnover in a state or UT" or "aggregate turnover" for being subjected to audit.Now, if a person has, say, ten registrations, whether in the same state or in different states or UT, and if one registered person has a turnover exceeding two crores, then all the persons registered under the same PAN shall have to get their accounts audited, regardless of their turnover.

PROVISION:

1. "Exempt supply means a supply which has been exempted under section 11 of the CGST Act or section 6 of the IGST Act."

   The central government has the power to transfer any supply from the exempted list to taxable list or vice versa without obtaining the approval of the parliament.

   Example: Goods notified under notification no. 2/2017-CT(R) and services notified under notification no. 12/2017-CT(R) can be made taxable or taxable supplies can be exempted in exercise of powers conferred by section 11(1) of the CGST Act.

2. Non taxable supply means a supply on which tax is not leviable under the Act.

   The central government can transfer any supply from 'non taxable' category to 'taxable' category or vice versa but it has to take the approval of the parliament.

   Example: Alcoholic liquor for human consumption and (at present) 5 petroleum products.

3. Non GST supply is a supply which is outside the jurisdiction of GST.

   The central government cannot transfer any supply from the 'non GST' category to 'GST' category even with the concurrence of the parliament without

amending the provisions of the Constitution.

Example: Activities referred to in Schedule III or any activity which is included in the state list or any supply where the place of supply is outside India. Even supplies made before 1st July, 2017 are non GST Supplies as because even the Parliament does not have the power to levy tax on these supplies. As such, the supplies made before 1st July, 2018 should not be considered for calculating the 'aggregate turnover' of the financial year 2017-18.

REQUEST:

Please inform if there is any difference of opinion.

PROVISION:

Section 16(*2*)

Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(*a*) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(*b*) **he has received the** goods or **services** or both.

Section 2(33):

"continuous supply of services" means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;

ANALYSIS:

On plain reading of provisions of section 16(2), there are no issues regarding claim of ITC. But when it is read with section 2(33), an issue arises as to the point of time when a service can be treated as received for becoming eligible to claim ITC under Section 16(2). There is no issue in the receipt of goods as it has physical existence. Even in a continuous supply of goods, the receipt of goods can be quantified, whether the goods are delivered to the recipient or to a third person on the directions of the recipient, and ITC can be taken accordingly. But in a continuous supply of services, quantification of receipt of service is not possible because it has no physical existence. What is the mechanism for quantifying the receipt of service for claiming ITC□

EXAMPLE:

A registered person pays insurance premium for insurance of his factory. The insurance company issues the invoice along with the money receipt at the beginning of the period as soon as the premium is paid but the service spreads over a period of, generally, one year. Similarly if a person gives a contract of AMC for computers installed in his office, the contractor issues the invoice at the beginning of the period. In both the cases, the registered person receives the invoice at the beginning of the contract period. He has to fulfill the condition of receiving the service before claiming ITC. When will he be deemed to have received the service. Can he claim that he has received the service at the beginning of the period and claim full ITC charged to him on such services□

Delving into Asset Finance Companies

CA Anita Baid

Introduction

For an economy as diversified as India, even the financial sectorconsists of several intermediaries. Apart from banking entities, there are several other entities that offer financial services and may be broadly classified as non-banking financial institutions. In India, the term 'non-banking financial companies (NBFCs)'generally refer to such entities which are not banks, and yet carry lending activities almost at par with banks. Some of them may also accept deposits, however, these are term deposits and not demand deposits.

The significance of NBFCs in India lies in the massive capabilities of NBFCs. Apart fromthe disability of not accepting demand deposits and undertaking remittance function, the ease of entry and lightness of regulation applicable to NBFCs makes it a tremendous focus of interest, particularly for foreign investors wanting to enter India's financial sector.

NBFCs are broadly classified in terms of the type of liabilities- deposit and non-deposit accepting NBFCs and by the kind of activity they conduct- such as Asset Finance Company (AFC), Investment Company (IC), Loan Company (LC), Infrastructure Finance Company (IFC), Systemically Important Core Investment Company (CIC-ND-SI), Infrastructure Debt Fund, Micro Finance Institution (NBFC-MFI), Non-Banking Financial Company – Factors (NBFC-Factors) and others.

The **Mid-term Review of Annual Policy for the Year 2006-07, was the first document that stated thatRBI shall be introducing guidelines for the** re-classification of NBFCs, to provide a separate classification for NBFCs engaged in financing tangible assets, as a consequence of requests received from representatives of NBFCs.Earlier to 2007, NBFCs were classified into four different groups for the purpose of acceptance of deposits by NBFCs, namely:

(i) Equipment Leasing (EL) company thatcarried on as its principal business, the activity of leasing of equipment;

(ii) Hire-Purchase (HP) company that carried on as its principal business, the activity of hire purchase transactions;

(iii) Investment Companies (IC) company that carried on as its principal business, the acquisition of securities; and

(iv) Loan Companies (LC) company that carried on as its principal business the providing of finance whether by making loans or advances or otherwise for any activity other than its own but did not include an equipment leasing company or a hire-purchase finance company

Subsequently, it was proposed to re-group such NBFCs as asset financing companies and RBI came up with its notification no RBI / 2006-07/200DNBS.PD. CC No. 85 / 03.02.089 /2006-07 dated December 06, 2006. Upon re-classification of NBFCs, companies financing real/physical assets for productive / economic activity were classified as Asset Finance Company (AFC) as per the prescribed criteria. The remaining companies continued to be classified as loan/investment companies. Accordingly, the following categories of NBFCs emerged:

(i) Asset Finance Company

(ii) Investment Company

(iii) Loan Company

Asset Finance Company- Eligibility Criteria

As per the aforesaid notification, the then existing classification in the Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 1998 was modified as follows:

> *AFC would be defined as any company which is a financial institution carrying on as its principal business the financing of physical assets supporting productive / economic activity, such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipments, moving on own power and general purpose industrial machines. Principal business for this purpose*

is defined as aggregate of financing real/physical assets supporting economic activity and income arising therefrom is not less than 60% of its total assets and total income respectively.

Currently, the **Master Direction - Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 2016** (updated till May 31, 2018), ("Master Directions for NBFC-D") continues to use the same definition for"Asset Finance Company" as mentioned above in the erstwhile directions.

Relevance of classification

The category of AFCs was created by merging leasing/hire purchase companies into a common category. The intent of the AFC category is clearly to distinguish AFCs from loan companies. Loan companies give monetary loans, whereas AFCs assist borrowers by providing funds directly linked with physical assets used in economic/productive activity. Therefore, the critical element in categorization as an AFC is not the physical asset, but the use of the physical asset acquired by the borrower, into a manufacturing/productive/economic activity, as opposed to consumer assets.

Loan Company and AFC

Categorisation of a company as an NBFC depends on the principal business of the company.The principality of business is defined by the RBI. Where the financial assets of the companyare more than 50% of the total assets and the financial income generated by the company ismore than 50% of the its total income, then the company is required to register itself as anNBFC. Where the principal business of any company is to carry out financial activity, thecompany shall be deemed to be an NBFC and shall require registration with RBI.

Further, based on the type of activity conducted, there is a difference between a Loan Company (LC) and an AFC. A LC means any company which is a financial institution carrying on as its principal business the providing of finance whether by making loans or advances or otherwise for any activity other than its own but does not include an AFC. On the other hand, any NBFC carrying out asset-backed lending business is categorised as asset finance company or NBFC-AFC.

However, the principality in case of NBFC-AFC is different from that of a LC. In case of an AFC the aggregate of financing real/physical assets supporting economic activity and income arising therefrom shall not be less than 60% of its total assets and total income respectively. Further, an NBFC-AFC can either be registered as a deposit taking NBFC or a non-deposit taking NBFC. Accordingly, the classification would be incorporated in the Certificate of Registration issued by the Bank as NBFC-Asset Finance Company; NBFC-D-AFC if accepting deposits and NBFC-ND-AFC, if not accepting deposits.List of AFCs registered with RBI is available at RBI official site. As on June 30, 2018, there were a total of 362 Asset Finance Companies (AFCs) in India registered with RBI.

RBI guidelines

Master Directions for NBFC-Dprescribes the ceiling on quantum of deposit and **restrictions on investments in land and building and unquoted shares for an NBFC-AFC:**

1. An AFC having minimum Net Owned Fund (NOF) as stipulated by the Bank, andcomplying with all the prudential norms,shall accept or renew public deposit, together with the amounts remaining outstanding in the books of the company as on the date of acceptance or renewal of such deposit, not exceeding one and one-half times of its Net Owned Fund (NOF).
2. An AFC, which is accepting public deposit, cannot invest in land or building, except for its own use, an amount exceeding ten per cent of its owned fund; and in unquoted shares of another company, which is not a subsidiary company or a company in the same group of the non-banking financial company (excluding the permitted limit in equity capital of an insurance company), an amount exceeding ten per cent of its owned fund.

However, Master Direction - Non-Banking Financial Company - Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016 ("Master Directions for NBFC-SI") do not lay down any specific guidelines for NBFC-AFCs. The regulations as applicable on an NBFC-ND-SI are as a whole applicable on NBFC-AFCs as well.

Benefits of Classification

Acceptance of External Commercial Borrowings (ECBs)

Earlier, AFCs were permitted to avail ECBs for financing the import of infrastructure equipment for leasing to infrastructure projects, however, LCs were not allowed to avail ECBs.Subsequently, NBFCs categorized as

AFCs, along with NBFC-IC and CICs, havebeen allowed to avail of ECBunder the three tracks, i.e. Tack I, Track II and Track III, whereas all other remaining NBFCs coming under the regulatory purview of the RBI, fall under Track III. The end-use prescriptions for ECB raised under the respective track has also been prescribed.

Further, the individual limits of ECB that can be raised by eligible entities under the automatic route per financial year is up to USD 750 million or equivalent for NBFC-AFCs under Track I, however, for remaining NBFCs falling under Track III, the limit is up to USD 500 million or equivalent.

Bank's finance

As per the Basel III framework, commercial banks are required to assign risk weights on their investments in NBFCs for the purpose of determining capital adequacy. The risk weighting of the investments made by the banks in AFCs, is done on the basis of the credit rating of the Company. Thus, investments in an AFC with higher rating will attract lower risk weight and is more favoured by the banks to make investments. On the other hand, any exposure of the banks in NBFCs other than IFC and AFC are subject to a risk weighting of 100%. This is a very significant advantage enjoyed by deposit taking NBFC-AFCs over other NBFCs, for availing bank finance.

Qualifying Assets under AFC- Treatment of various financing transactions

Asset finance by NBFCs predominantly takes the form of secured loan or leasing. Asset financing has a wide coverage from cars to healthcare, education, IT equipments, commercial vehicles, used vehicles, construction equipment, air-planes, windmills, solar panels, etc. However, it is significant to examine whether such financing is directly linked with physical assets used in economic/productive activity.

Thoughthe category of AFCs was created by merging leasing/hire purchase companies, however, the criteria for an asset to qualify under AFC, as mentioned earlier, suggests that the physical assets must support productive/economic activity. By applying the rule of interpretation, i.e. *ejusdem generis*, it can be inferred that the term 'physical asset supporting productive/economic activity' is describing asset such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipments, moving on own power and general purpose industrial machines. The assets that support productive or economic activity have a multiplier effect on the economy by generating incomes, employment, etc. On the contrary, general purpose lending or pure consumer credit may lead to expansion of credit, without any direct consequential economic benefits. In addition, the use of the asset should be directly into economic or productive activity; indirect or consequential economic benefit may arguably appear in every case, however, that is not the intent of the AFC classification.

Based on the above rationale, various asset types that are usually funded by an NBFC can be evaluated for consideration as an eligible asset under AFC:

Infrastructure Sector

As the market is holding a very bullish view on the development of the infrastructure being a sine quo non to the development of the economy, the sector offers huge demand. Assets like dumpers, excavators, crushers, utility assets like cranes etc are being leased out. Since mining activity is looking to revive demand for earth moving mining equipment is on a rise as well. All such asset are eligible to be considered under AFC classification.

Office Infrastructure/Furniture and Fittings

The financing towards office equipmentis not to acquire an asset supporting productive/economic activity. Even if the property is used for commercial purpose but is not supporting any productive or economic activity. Hence, financing towards such furniture and fixtures cannot be regarded as an eligible asset for AFC classification.

Automobile Financing

Passenger Vehicle (Auto lease)

Most of the larger corporates enable acquisition of vehicles by their employees through the leasing route. At the end of lease term the asset gets transferred to the employee. This is being used as a device to encourage employees to own up their cars. These cars used by employees are not supporting any economic activity. It is a means of communication used for convenience of the employees and is not directly or indirectly linked with any productive/economic activity and seeming is merely a facility provided to the employees by the employer. The same cannot be considered as an eligible asset under AFC.

Commercial Vehicle (finance/refinance)

Commercial vehicle such as those used by small contractors, taxi operators and small road transport operators, are also financed by NBFCs. The owner of such asset earns revenue by plying these vehicles. Funding is given usually for the acquisition of such commercial vehicle, including used cars, and refinance

is towards upgrading the quality of such vehicles. Here, the fact whether it is a new or second hand asset does not make a difference. The intent of the financing facility should be to provide financing for commercial vehicle supporting the economic activity of such transport operators. If the user in these cases have an existing asset (say a truck), and he acquires funding against the same, the financier is anyways releasing the money that went directly into the acquisition or holding of the asset which otherwise would qualify as productive asset.

Repossessed Assets

Repossessed assets get either released back to the customers, who continues to use the asset, on payment of due amount or are sold to a third party and the asset automatically moves out of the book. While on the books, it can be considered as an eligible asset in case the original financing was towards an asset supporting productive/economic activity. Only such repossessed assets can be considered as supporting a productive/economic activity and hence, shall be an eligible asset under AFC.

Office IT Equipment

Nowadays, IT equipments both hardwares and softwares and other technical equipment are very commonly taken on lease. IT equipments used in the IT Industry, Business Processing Outsourcing (BPO) or Knowledge Process Outsourcing (KPO) sector forms an integral part of their business. Any funding or financial facility towards the acquisition of such IT equipments shall qualify as an eligible asset since they are supporting the economic activity of such BPO/KPO. In such cases the asset qualifies as productive asset.

Finance towards softwares & licenses

Looking at the examples set out in definition of asset finance business, wherein it states that the principal business should be of financing of real/ physical assets supporting productive/ economic activity such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipments, moving on own power and general purpose industrial machines – it will be difficult to establish that financing of software & licenses will be included in the calculation, for the purpose of asset finance classification. The fact that financing of an asset should lead to income generation, may be directly or indirectly. Financing of software & licenses in this regard will fail this test, is not in lines with the examples cited above and may not meet the test of being physical asset as well.

Medical Equipment Finance

Generally assets in this segment are highly capital intensive and have huge cost implications. Further, most of the equipment required are imported. Financing the acquisition of such medical equipments for hospitals, diagnostic centers and clinics can be done by way of leasing as well as secured loans. It is to be noted that these assets or machines are the backbone of the medical industry and support economic activity of the medical institutions. Hence, they shall also qualify as an eligible asset under AFC.

Commercial real estate

The financing is against real estate and not necessarily to acquire an asset supporting productive/economic activity. Though the property can be commercial in nature but is not supporting any productive or economic activity. Hence, the answer whether it shall be considered as an eligible asset is very clearly negative.

Loan against Property (LAP)

In case of LAP, the financing is against an existing real estate and not necessarily to acquire an asset supporting productive/economic activity. In this case the end use is not regulated by the NBFC. Further, at time even if the NBFC takes a confirmation from the borrower, the same cannot be considered as an eligible asset under AFC.If we take a contrarian approach, then by the same analogy even normal loan transaction would have been classified as eligible asset by obtaining an end use confirmation from the borrower. Since the latter is not considered as an eligible asset, LAP shall also fall out of the eligible asset criteria.

PTCs and SRs

As per RBI guidelines on securitization transaction DNBS. PD. No. 301/3.10.01/2012-13 dated August 21, 2012, originating NBFCs are required to have a continuing stake in the performance of securitized asset for the entire life of securitization process by way of Minimum Retention Requirement (MRR). The guidelines make it mandatory for the securitizing NBFC to retain the minimum investment in its books. There can be instances where had the Company not securitized these assets, it would have continued to be in the books and would have been eligible towards the asset financing criteria. In case of such securitization transactions, if the loan portfolio was originally eligible as an asset under AFC, the exposure in form of PTCs shall also qualify as an eligible asset.

Further, similar analogy can be drawn in case of

security receipts (SRs) issued by a securitization company or reconstruction company to any qualified institutional buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in the securitization. The loan portfolio can be standard or non-performing assets (NPA), as the case may be, but must be eligible under the AFC criteria for the PTCs or SRs to qualify under asset financing criteria.

Solar power assets

Whether roof-top solar equipment or solar parks, lease of solar equipments has been doing really well in India. While the solar power industry is inits nascent stage of growth, the government though its policies has mandated usagedomestically manufactured solar cells and modules and has set aggressive targets forincreasing solar power generation stimulating growth in solar equipment finance.These solar asset can either be used commercial purpose or retail. Depending upon the end user, the eligibility shall be determined. Retail shall not qualify to be supporting any economic or productive activity whereas commercial may qualify as an eligible asset under AFC.

Windmills

Windmills and any specially designed devices which run onwindmills installed and any special devices including electric generators and pumpsrunning on wind energy installed, work towards generation of wind energy. The definition of asset finance business states that the principal business should be of financing of real/ physical assets supporting productive/ economic activity such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipments, moving on own power and general purpose industrial machines -generation of wind energy is also an economic activity for the purpose of asset finance classification -in line with the examples cited above.

Conclusion

The quantum of NBFC-AFCs is quite less compared to the total strength of NBFCs in the country, since the discretion lies with the RBI to classify a company which is a financial institution as a loan company or an investment company or an asset finance company. Considering the difference of opinion in the treatment of several asset eligible as qualifying under AFC criteria,the final call is taken by the RBI, having regard to the principal business of the company and other relevant factors.

BIG DATA AND SMES – IS BIG DATA TOO BIG FOR SMALL BUSINESSES?

CA Sanjib Sanghi

It's not what you know. It's what you** do **with what you know. That's something companies worldwide will be learning, for better or worse in the coming year when it comes to big data. Big Data and analytics techniques may have received a lot of attention in recent years, but they still have a very low adoption rate among SMEs (Small and Medium Enterprises). Is it true that these developments have little practical relevance to most small businesses? Or are small businesses missing out on real possibilities to improve their performance?

Small businesses are often described as the "backbone" or "engine" of our economy. They're also a key market for our profession; the majority of small businesses take the services of professionals and many regard their chartered accountant as their most trusted business adviser. So we play a huge role in the growth and success of SMEs and in helping them to build their resilience and durability.

So Do SMEs really have 'big data'□And is 'big data' a useful way to engage with SMEs□While the term has a wider meaning and can attract attention, it can also switch a lot of businesses off as they feel that it isn't relevant to them.

SO WHERE DOES THE CHALLENGE LIES? - *THE INTEGRATION CHALLENGE*

One of the biggest practical challenges for most SMEs are poor integration systems. Some of them are:

- **Integration of Different Software:** Despite small IT environments, SMEs buy different point solutions – such as different software for finance, different software for CRM (Customer Relationship Management) etc. This makes integration and consolidation of data difficult.
- **Lack of Data Standards (Formats):** Similarly, the lack of clear data standards in many industries leads to many different data formats which makes the data useless. This means that significant amounts of work is often required to clean-up data before it can be used for more sophisticated analysis.

Focusing only on analytic skills and knowledge therefore misses the need for getting the resources in right shape, quantity and quality. Without this, SMEs will

never be able to maximise the value of their data.

SO HOW TO GO ABOUT IT?

If you're worried that your business may have missed the big data boat, you are on the right track. According to a survey, a majority of today's businesses are "nowhere close" to recognizing the value, the analytics can bring. The reasons are all-too familiar: Lack of vision, lack of communication, lack of an actual plan. The good news: you *can* do something about it. Below are just a few things to keep in mind as you assemble or re-assemble the strategic big data plan.

Data Clean-up: First, you could end-up with dirty data, which is worthless when it comes to making good, solid business decisions. Second, you could amass tons of amazing data insights that are never utilized by your executive teams. So, train your team for data clean-up to ensure that data collection is a success because collecting meaningful data is as important as its analysis.

Data Purity: Many companies don't even know what types of data they have or whether that data is accurate or not. If nothing else, your data needs to be pure. That means someone needs to be accountable for keeping it that way.

Data CEO: One of the biggest mistakes companies make is not having a system in place to support their analytics efforts. Who is managing it Reporting on it Gathering the information Inputting the data How to do it How often to report it And what about post-collection Who analyzes the information, and how If you haven't outlined these processes, your data will never pay. Getting those systems in place on *front end* is very important before your information gathering even starts.

Establishing Clear and Simple Data Goals: If you don't know what you're trying to find, you'll never find it. Make time to answer questions like: How will we measure success, effectiveness, and value And even more importantly, *what will we do with the information when we find it?* Keep your goals simple, at least initially.

The amount of information flowing our way at any given moment can be overwhelming. In fact, in 2015, IBM noted the world creates 2.5 quintillion bytes of data every single day. Even more startling: at the time, the company estimated 90 percent of the world's data had been created in the last two years alone. Imagine what we're producing now! To help, try to avoid complex analytical goals. Start slow, and learn to trust your data through clean, clear results before taking on overly-complicated initiatives.

SO ARE YOU READY TO EMBRACE THE CHANGE?

When used effectively, analytics do far more than validate a company's path to success. They can offer a new pathway to *successful change*. If you aren't open to using them to their fullest, you'll be compelled to sit out of the game.

Analytics have the power to disrupt nearly every part of today's economy, changing everything from how we run our businesses to the type of businesses we run. Big data is here to stay. Embracing its potential is necessary as it could lead your company to unimaginable levels of success.

This can also help to drive the cultural change that encourages decisions based on data rather than the gut instinct of managers or owners. Participants suggested that this shift requires the leadership of a numerate CEO who is interested in change, and connecting with like-minded people, who can support this process.

Many businesses struggle to define how data can be used to drive business growth or improve management of operations and risks. Small businesses can seem to have advantages here. Their size and agility means they could be well-placed to adopt new practices or change their approach quickly. However, this process requires time and space to think about strategy and future planning. This presents particular difficulty for smaller businesses, as they are often heavily focused on day-to-day operations and don't usually have the time to focus on these questions.

Big Data is getting really big and opening-up plethora of opportunities for professional and empowering them by presenting fantastic opportunities to exhibit their analytical skills in a powerful way.

Major amendments introduced in Insolvency and Bankruptcy Code, 2016

CA Binay Kumar Singhania

The amendment ordinance passed in the month of June closely followed by an amendment in CIRP regulation in the month of July, development apart from offering relief to the distraught home buyers and the defaulting promoters of micro, small and medium enterprises (MSME) the amendment also provides clarity in various provisions getting rid of the existing loopholes.

The majorhighlightsof the amendments are enlisted below:-

- ***Advance paid towards purchase of real estate: Financial Debt***

Insertion of explanation in section 5(8) of the Code which states thatany amount given as an advance towards purchase of real estate shall be treated as Financial Debt.

Till now though as seen in various rulings the home buyers under assured return projects were considered to be Financial Creditors, whereas the ordinary home buyer did not get any preferences. The June,2018 amendment ordinanceshall prove to be a very stern step for the real estate developers as CIRP against the company could initiated by any home buyers upon delay in delivery/ refund to the flat buyer, though this new insertion shall protect the interest of the home buyers by giving them an important role to play in the CIRP by making them a part of the CoC.

- ***Insolvency Professional representing class of creditor.***

On one hand where the ordinance provided the home buyers relief by categorising them as Financial Creditor the amendment in the regulations made sure that their interest is protected by inserting a new regulation in relation to appointing Insolvency Professional who shall represent*classes of creditors when a corporate debtor has* at least ten creditors in the class, the IRP appointed shall offer the creditors a choice of three insolvency professionals in the public announcement, who shall act as the authorised representative of creditors in each class. A creditor may indicate its choice of an insolvency professional amongst the three choices provided by the IRP. The insolvency professional having highest number of votes of creditors in the class, shall be appointed as the authorised representative of the creditors of the respective class.

- ***Withdrawal of petition after admission***

The Code previously did not provide for withdrawal of the Insolvency application once the application is admitted by the Adjudicatory Authority under any section. In absence of a specific provision in the matter of *Lokhandwala Kataria Constructions*and Uttara Foods and Feeds relief was granted to the partiesunder article 142 by the Hon'ble Supreme Court by using its inherent power to record the mutual settlement undertaken by the parties post admission of application initiating CIRP. Through the Ordinance section 12A was inserted which gave the Adjudicating Authority (NCLT) power to allow the withdrawal of the application made by the applicant with the approval of ninety percent voting shares of the committee of creditors.

- ***Regulations pursuant to Section 12A: Withdrawal of application post admission***

An application for withdrawal of an application admitted under section 7, 9 or 10 of the Code may be submitted to the IRP or the RP, as the case may be, *before issue of invitation for expression of interest*, **along with a bank guarantee towards estimated cost incurred for certain purposes under the process**. The committee of creditors (CoC) shall consider the application within seven days of its constitution or seven days of receipt of the application, whichever is later. If the application is approved by the CoC with 90% voting share, the resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

- **Changes in *voting percentage to claim Majority.***

The Code's objective was to resolve the insolvency and ensure maximisation of the value of Assets by aiming for revival of the troubled corporate and taking liquidation as the last resort. The former requirement of 75 per cent majority for every minute decision and transaction proved to be a difficult task which almost led to derailing the entire process.

Similar situation was experienced in the matter of *Kamineni Steels,* where the COC could notachieve the approval of 75% of the member due to various reasons and the resolution plan was passed by a lower percentage of COC votes was accepted by NCLT, Hyderabad Bench to avoid failure of the Resolution

Process. Having witnessed such situations, the authorities sort an amendment with the view that minority votes does not result in failure of the insolvency resolution process. Hence in the recent ordinance the threshold of 75% has been brought down to 66% for important decision like appointment of RP, raising of finances, selling of assets, and approval of resolution plan, for routine decisions the threshold has been set at 51%.

- ***Voting share of Financial Creditor in absence of pre-determined rate of interest.***

With the insertion of explanation to Section 5(8) which made the home buyers financial creditor, it was necessary to determine the rate of interest as the quantum of total debts which includes the principal amount and interest is considered as the base to determine Voting Share of the financial Creditor. When such rate has not been pre-determined between the parties it may lead to controversies hence, amendmentprovided that where rate of interest has not been agreed to between the parties in case of creditors belonging to a particular class, the voting share of such a creditor shall be in proportion to the financial debt that includes *an interest at the rate of* ***eight per cent per annum***.

- ***Relief to Micro, Small and Medium Enterprises and changes to 29A***

With respect to the MSME sector, the latest amendments also give power to the central government to allow further exemptions or modifications, if it is required in the public interest.

The Amendment Ordinance has inserted section 240A, which highlights the application of this Code to micro, small and medium enterprises. Section clearly states that the provisions of section 29A in relation to promoters having an NPA or being a promoter of a company under CIRP shall not apply to the resolution applicant in respect of corporate insolvency resolution process of any micro, small and medium enterprises.As per the ordinance now promoters of MSME shall be able to bid for their enterprise undergoing Corporate Insolvency Resolution Process (CIRP), provided the person is not a wilful defaulter and does not attract other stated disqualifications under section 29A.

- ***Tenure of IRP***

The Interim Resolution Professional is appointed for a period of 30 days, in case of delay of appointment of Resolution Professional, the IRP is supposed to continue to operate the management of Corporate Debtor. Where the appointment of resolution professional is delayed, the interim resolution professional shall perform the functions of the resolution professional from the 40thday of the insolvency commencement date till a resolution professional is appointed.

- ***Publishing of Expression of Interest***

The RP shall publish an invitation for expression of interest (EoI) by the 75th day from the insolvency commencement date.

The invitation shall specify the following:-

1. criteria,
2. ineligibility,
3. the last date for submission of EoI
4. and other details as required by the CoC

The submission of Expression of Interest shall not require anypayment of non-refundable deposit and any Expression of Interest received after the specified time shall be rejected.

The resolution professional shall conduct due diligence based on material on record and issue a provisional list of prospective resolution applicants within 10 days of the last date of submission of Expression of Interest. On considering objections to the provisional list, the resolution professional shall issue the final list of prospective resolution applicants, within 10 days of the last date for receipt of objections.

- ***Contents of the Request For Resolution Plans (RFRP)***

The RFRP shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with corresponding timelines.

The resolution plan needs to demonstrate that

(a) it addresses the cause of default;

(b) it is feasible and viable;

(c) it has provisions for its effective implementation;

(d) it has provisions for approvals required and the timeline for the same; and

(e) the resolution applicant has the capability to implement the resolution plan.

The CoC shall evaluate the resolution plan strictly as per the evaluation matrix to identify the best resolution plan and may approve it with the required majority. If approved by the CoC, the resolution professional shall endeavour to submit the resolution plan approved by the CoC to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process, along with a compliance certificate in the specified Form.

➢ ***Submission of Resolution Plan***

The resolution professional shall issue the following within five days of issue of the provisional list to the prospective resolution applicants:-

ii) information memorandum,

iii) the evaluation matrix and

iv) the request for resolution plans (RFRP),

At least 30 days shall be allowed to the Resolution Applicants for submission of resolution plans.

➢ ***Timeline for CIRP***

The amended regulations also provide for a model timeline of the corporate insolvency resolution process assuming that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days, as under :

Section / Regulation	Description of Activity	Norm	Timeline
Section 16(1)	Commencement of CIRP and appointment of IRP	….	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section15(1)(c) / Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment ofIRP	T+14
Regulation 12(2)	Submission of claims	Up to 90thday of commencement	T+90
Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
Regulation 13(2)	Verification of claims received under regulation 12(2)		T+97
Section 21(6A) (b) / Regulation 16A	Application for appointment of AR	Within 2 days from verification of claims received under regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23
Section 22(1) / Regulation 19(1)	1st meeting of the CoC	Within 7 days of the constitution of the CoC, but with seven days' notice	T+30
Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	……
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed By 40thday of commencement	T+40
Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 40th day of commencement	T+47
Section 12(A) / Regulation 30A	Submission of application for withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10

Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 135 days of commencement	T+135
Regulation 36 (1)	Submission of IM to CoC	Within 2 weeks of appointment of RP, but not later than 54th day of commencement	T+54
Regulation 36A	Publish Form G	Within 75 days of commencement	T+75
	Invitation of EoI		
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+100
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T=180

SHIFTING OF REGISTERED OFFICE FROM ONE STATE TO ANOTHER

Aayushi Jain

Every company shall have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. The company shall intimate the Registrar of Companies (*hereinafter referred to as* 'ROC') the details of its registered office either in the **SPICe Form** during the incorporation of the company or by filing **Form INC 22** within 30 days of its incorporation. Moreover every company on its incorporation, shall state in the Memorandum of Association, the domicile clause. Maintenance of a registered office is mandatory under the provisions of law. A company may shift its registered office for various reasons such as:

Ease in conducting business

Location of majority of customers

Location of majority of its stakeholders

Tax benefits available in the respective state

Better management of the company

Shifting of registered office can be categorized as follows:

A. Change of situation of the registered office within the jurisdiction of the same Registrar.

This method is known as change in the address of the registered office. In this case the company has to file **Form No. INC-22** along with the prescribed fees. **(Rule 27).**

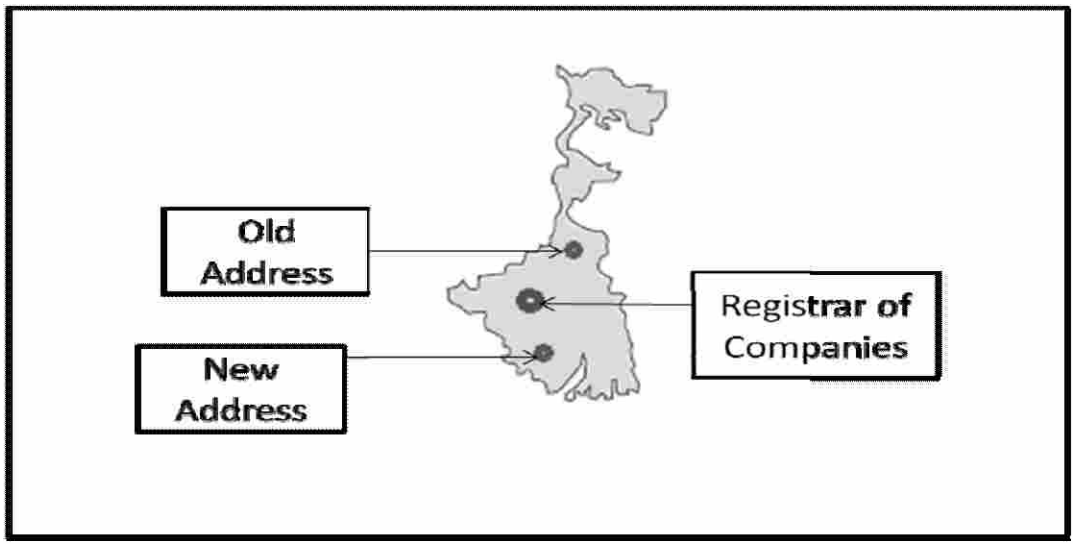


Image showing change in the address of the registered office within the same state.

B. Shifting of registered office from the jurisdiction of one Registrar to another within the same state.

1. No company shall change the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State unless such change is confirmed by the Regional Director on an application made in this behalf by the company in **Form No. INC-23 (Rule 28)** along with the prescribed fees and the following documents:-

   a) Board Resolution for shifting of registered office;

   b) Special resolution passed by the members of the company approving the shifting of registered office;

   c) A declaration given by the Key Managerial Person or any two

directors authorized by the Board, that the Company has not defaulted in payment of dues to its workmen and has either the consent of its creditors for the proposed shifting or has made necessary provision for the payment thereof;

d) A declaration not to seek change in the jurisdiction of the court where cases for prosecution are pending;

e) Acknowledged copy of intimation to the Chief Secretary of the state as to the proposed shifting and the employees interest is not adversely affected consequent to proposed shifting.

2. Once the Regional Director confirms such change the same shall be communicated by them within a period of thirty days from the date of receipt of application by the Regional Director to the company and the company shall file the confirmation with the ROC within a period of sixty days of the date of confirmation. **[Section 12(6)]**
3. The ROC shall register the same and certify the registration within a period of thirty days from the date of filing of such confirmation. **[Section 12(6)].**
4. The certificate referred above shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate. **[Section 12(7)]**
5. If any default is made in complying with the requirements of this section, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every day during which the default continues but not exceeding one lakh rupees. **[Section 12(8)]**

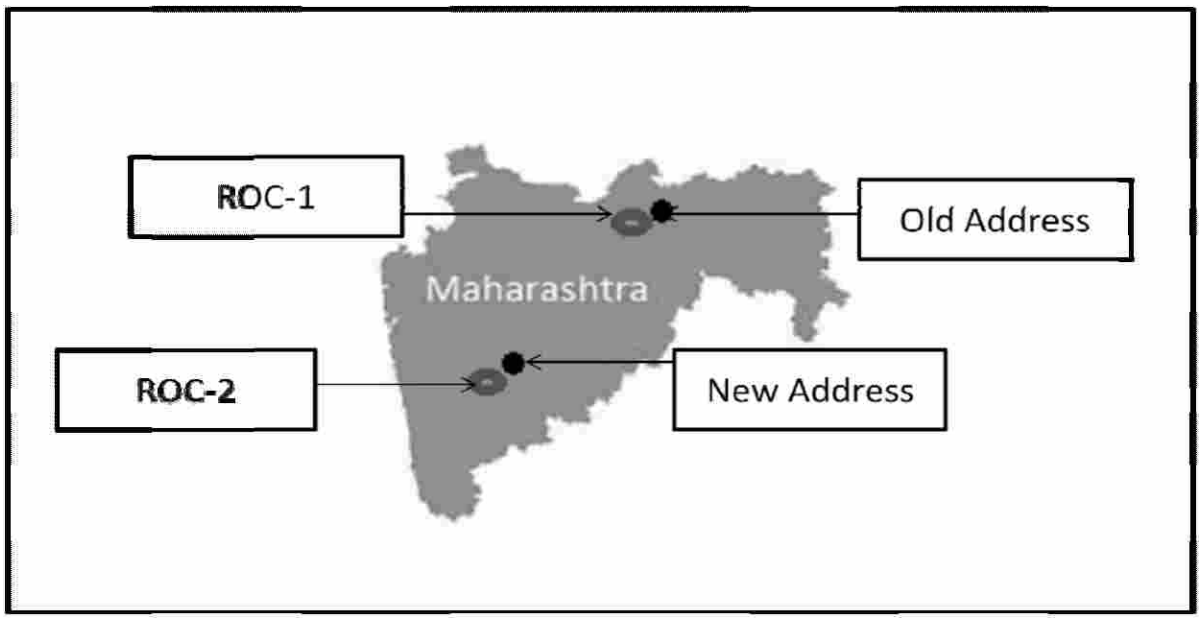


Image showing shifting of registered office from the jurisdiction of one ROC to another within the same state.

C. Change of situation of the registered office from one state to another".

The procedure to shift the registered office from the jurisdiction of one Registrar to another is laid out in **Sections 12 and 13** of the Companies Act, 2013 (*hereinafter referred to as* "the Act") and **Rules 25 to 31 except 29** of the Companies (Incorporation) Rules, 2014 (*hereinafter referred to as* "the Rule").

For the purpose of better understanding we are giving herein the broad contours of the procedure that will be required towards undertaking the arrangement of shifting of the registered office from one state to another:-

1) Board Meeting for the approval of Board of Directors
2) Extra-ordinary General Meeting for the approval of the Shareholders

3) Advertisement & Notices to inform general public and other stakeholders of the Company
4) Intimating the ROC and the other relevant authorities regarding the intent to shift
5) Redress the Objections received, if any, from any of the stakeholders
6) Submission of Application in Form INC 23 to the Central Government regarding the shifting along with the relevant documents
7) Filing of the Order of the Central Government with the ROC.

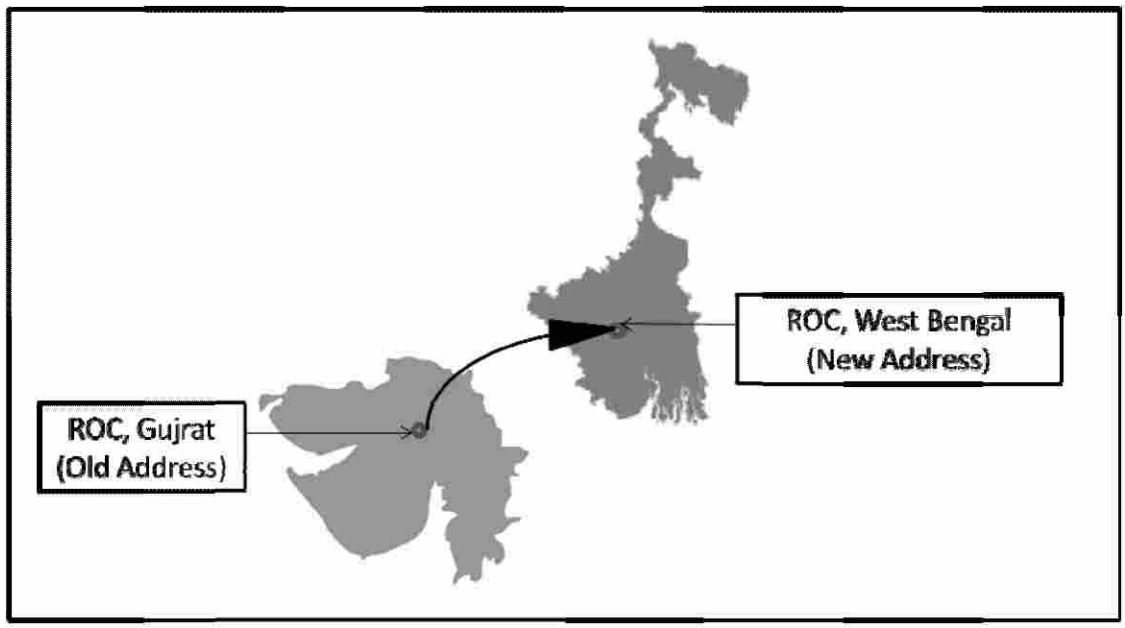


Image showing shifting of registered office from one state to another.

The detailed procedure of shifting the registered office from one state to another is as follows:

I. STEPS PRIOR TO FILING OF FORM INC 23

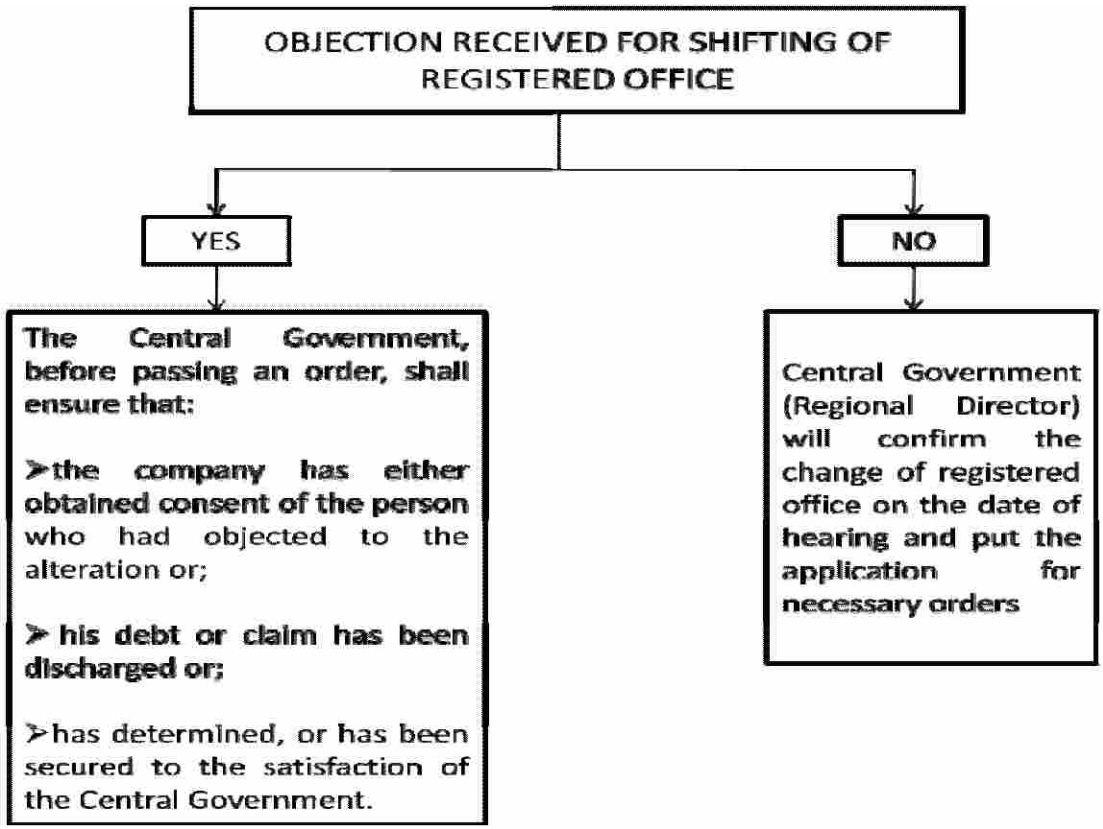
1) To call and hold a **Board Meeting** for the following:
   a) to consider the proposal of shifting of the registered office
   b) To decide the date, time and venue of the General Meeting and
   c) To approve the Notice of Extra-ordinary General Meeting.
2) To hold the **Extra-ordinary General Meeting** and pass the Special Resolution approving the shifting of registered office from one state to another, subject to the approval of the Regional Director, under whose jurisdiction the company falls.
3) **MGT-14** to be filed with the ROC in 30 days of passing the special resolution along with the following document attached therein:
   a) Copy(s) of Special Resolution(s) along with copy of explanatory statement under section 102
   b) Altered Memorandum of Association with an appropriate note that the said alteration is subject to the approval of the Regional Director.
   c) Minutes of EGM
   d) Shorter Notice consent if any.
4) Advertisement to be given in **Form INC 26** in a newspaper, both in the principal vernacular language of the district and in English language in an English newspaper with the widest circulation in the state in which the registered office of the company is situated. The purpose of the advertisement is to, *inter-alia*, inform the general public including the creditors and debenture holders and to invite any objection from such creditors and debenture-holders or any other person being affected by such shifting.

   [NOTE:-A copy of the advertisement shall be served on the Central Government (i.e. Regional Director) immediately on its publication.]
5) Individual Notices has also to be served mandatorily to the creditors and debenture holders by registered post with acknowledgement due

stating the details of the shifting of registered office and asking if they have any objections for the same.

6) Notice has to be served to the ROC under whose jurisdiction the company is falling at present (before shifting) and, in case of listed to the Securities Exchange Board of India. If the company is regulated under any special Act or law for the time being in force then notice regarding the shifting shall be served to it as well.

7)



8) List of **Creditors and Debenture** holders:-

a) Prepare a list of creditors and debenture holders upto the latest practicable date, preceding the date of filing the application to Central Government but not exceeding more than one month setting forth the following details:-

- Name and address of every creditor and debenture holder of the company
- The nature and respective amounts due to them in respect of debts, claims or liabilities as on the date of preparation of the said list.

b) Prepare an affidavit signed by the Company Secretary of the company, if any and not less than two directors of the company, one of whom shall be managing director, if any, to the effect that they have made a full enquiry into the affairs of the company, and having done so, they have formed an opinion that the list of creditors is correct, and that the estimated value as given in the list are proper and that there are no other debts or claims against the company to their knowledge.

[**NOTE**:-A duly authenticated copy of the list of creditors shall be kept at the registered office of the company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment of a sum not exceeding Rs. 10/- per page.]

9) List of **Employees:**

a) Prepare a list of employees upto the latest

practicable date, preceding the date of filing the application to Central Government but not exceeding more than one month.

b) Prepare an affidavit signed by the Company Secretary of the company, if any and not less than two directors of the company, one of whom shall be managing director, if any, to the effect that no employee shall be retrenched as a consequence of shifting of registered office from one state to another.

II. FILING OF FORM INC 23 ALONG WITH ATTACHMENTS

10) Application to be made to the Central Government(Regional Director) in **Form INC 23(Rule 30)** within 30 days of making the public announcement seeking approval for the alteration of Memorandum of Association with regard to shifting of the registered office of the company from one state to another along with the prescribed fees and shall be accompanied by the following documents:-

[**NOTE**: A copy of the application with complete annexures is to be served to the Registrar and Chief Secretary of the State Government or Union Territory]

Sl No.	Particulars	Remarks
1	A copy of the Altered Memorandum And Articles Of Association	The domicile clause should be altered stating the new location of the registered office
2	Certified True Copy of Board Resolution.	On the letter head of the Company.
3	A copy of the Notice Convening The General Meeting along with relevant Explanatory Statement	Refer point 1 above
4	A copy of the Special Resolution sanctioning the alteration by the members of the company; (if possible supported by Attendance sheet)	Refer point 2 above
5	A copy of the Minutes of the General Meeting at which the resolution authorizing such alteration was passed, giving details of the number of votes cast in favor or against the resolution..	Refer point 2 above
6	Form MGT-14 along with paid challan.	Refer point 3 above
7	Copy of News Paper Advertisement (in Form INC 26)	Refer point 4 above
8	Affidavit verifying the Publication of News Paper Notice.	
9	Copy of Speed post of service of notice regarding the shifting of registered office to creditors, debenture holders, SEBI and other regulatory authorities.	Refer points 5 and 6 above
10	The List of Creditors and Debenture Holders entitled to object to the application	Refer point 8(a) above
11	An Affidavit Verifying The List of Creditors; (On Stamp Paper duly notarized)	Refer point 8(b) above
12	A list of Employees.	Refer point 9(a) above
13	Affidavit verifying non-retrenchment of employees. (On Stamp Paper duly notarized)	Refer point 9(b) above
14	Copy of the latest audited balance sheet and profit and loss account of the company along with auditors' and directors' report.	
15	Board resolution authorizing the director to submit the petition.	
16	Memorandum of Appearance and Board resolution authorizing company secretary / Chartered Accountant or advocate.	
17	The document relating to payment of application fee	
18	Acknowledgement of service of a copy of the application with complete annexures served to the Registrar and Chief Secretary of the State Government or Union Territory.	

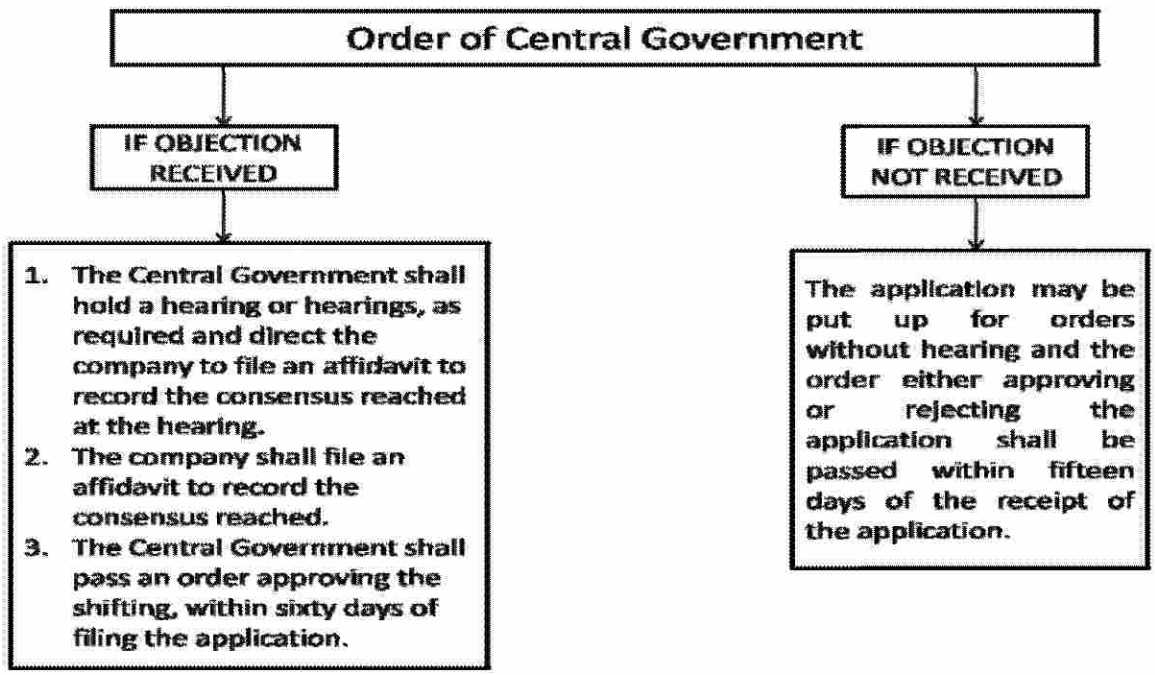
19	Affidavit proving the dispatch and service of notice to the Chief Secretary.	
20	Affidavit from Director that there is no enquiry, inspection, investigation and prosecution is pending against the Company. (On Stamp Paper duly notarized)	
21	Affidavit Verifying the application (On Stamp Paper duly notarized)	

III. STEPS POST FILING THE FORM INC 23

11) The Regional Director shall make an order subject to such terms and conditions and cost as it deems fit.

12) Post filing of application a hearing shall take place at the office of the Regional Director where representation should be made either by the company or practicing professional or advocate. The creditors, if any and the representatives of the company may also represent and are heard before making any order.

13)



14) Obtain certified copies of the order confirming the shifting of registered office from one state to another, passed by the Central Government.

15) The certified copy of the order of the Central Government, approving the alteration of the memorandum for transfer of the registered office of the company from one state to another, shall be filed in **Form INC 28** along with the prescribed fees with the Registrar of the state within 30 days of the receipt of the certified copy of the order. **[Section 13(7) of the Act and Rule 31 of the Rules]**

16) File **E-Form INC 22[Rule 25 of the Rules]** along with the prescribed fees with the Registrar **within 30** days of confirmation of shifting by Central Government along with following documents:-

i. the registered document of the title of the premises of the registered office in the name of the company; or

ii. the notarized copy of lease or rent agreement in the name of the company along with a copy of rent paid receipt not older than one month;

iii. the authorization from the owner or authorized occupant of the premises along with proof of ownership or occupancy authorization, to use the premises by the

company as its registered office; and

iv. proof of evidence of any utility service like telephone, gas, electricity, etc. depicting the address of the premises in the name of the owner or document, as the case may be, which is not older than two months.

If documents are in order, new Certificate of incorporation shall be issued by the Registrar of the state in whose jurisdiction the registered office has shifted to, within 30 days.

IV. ACTIONS TO BE TAKEN POST OBTAINING THE NEW CERTIFICATE OF INCORPORATION:-

Make alteration in the MOA with respect to the state in every copy of Memorandum.

Each stationery, banner, signboard, bills, invoice etc. should show the new address and necessary advice should be sent to shareholders, debenture holders, and other concerned parties.

Necessary changes are required to be made in the letter heads, books, records etc. of the company. The necessary changes are required to be made in PAN, TAN and ST2 etc and inform to all the Government departments, banks, customers and others wherever required.

FAQs:-

1. **What to do if I receive a show cause notice (SCN) for not complying under section 12(1)?**

   The company must ensure that the registered office is functional at all times. The Registrar of Companies (ROC) may send correspondences to the company. In case any letter or document goes undelivered then the Department may issue a Show Cause Notice (SCN) regarding maintenance of registered office. In case of issue of any SCN the company shall have to go for adjudication.

2. **What are the compliances for shifting of registered office of an NBFC Company?**

   In case of a NBFC company a No Objection Certificate (NOC) is required from the Reserve Bank of India (RBI). Any non-compliance is to be first complied with and only then can the company proceed with shifting.

Summary of Forms:

Sl. No.	Form	Section/Rule	Particulars
1	MGT 14	Section117(1)	Filing of Special Resolution with ROC
2	INC 26	Section 13(4) Rule 30	Advertisement in News paper
3	INC 23	Section 13(4) Rule 30	Petition to the Central Government
4	INC 28	Section 13(7) Rule 31	Filing of Central Government's Order with ROC
5	INC 22	Section 12(4) Rule 27	Filing details of new registered office with the new ROC.

Important Updates on Insolvency and Bankruptcy Code

CA Ranjeet Kumar Agarwal, CCM, ICAI

A. Highlights of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018

1. Home buyers recognised as financial creditors which would give them due representation in the Committee of Creditors (COC).
2. MSME Sector provided with a special dispensation under the Code. It does not disqualify the promoter to bid for his enterprise undergoing Corporate Insolvency Resolution Process(CIRP) provided he is not a willful defaulter and does not attract other disqualifications not related to default.
3. Withdrawal by applicant after admission under IBC would be permissible only with the approval of the Committee of Creditors with 90 percent of the voting share. Further withdrawal will only be permitted before publication of notice inviting Expressions of Interest (EoI).
4. Voting threshold has been brought down to 66 percent from 75 percent for approval of resolution plan, extension of CIRP period, etc. The voting threshold for routine decisions has been reduced to 51%.
5. Allows participation of security holders, deposit holders and all other classes of financial creditors that exceed a certain number, in meetings of the COC, through the authorized representation.
6. Section 29(A) of the IBC, 2016 has been modified to exempt pure play financial entities from being disqualified on account of NPA. Similarly, a resolution application holding an NPA by virtue of acquiringitin the past under the IBC, 2016, has been provided with a three-year cooling-off period, from the date of such acquisition.
7. The Resolution Applicant to submit an affidavit certifying its eligibility to bid since there is wide range of disqualifications in Section 29(A).
8. Minimum one-year grace period allowed for the successful resolution applicant to fulfill various statutory obligations required under different laws.
9. Moratorium period not applicable to enforcement of guarantee.
10. Special resolution required for corporate debtors to themselves trigger insolvency resolution under the Code

B. Change of Syllabus wide Press Release of IBBI dt. 31st July 2018

The following are the changes that are made in the Syllabus w.e.f 1st Nov 2018 :

1. Rules and Regulations under IBC notified till 31st October 2018 are part of Syllabus
2. Two more Chapters added in the Companies Act 2013 Part: Chap- XXVIII - Special Courts and Chap- XXIX- Punishments
3. In the Debt and Restructuring Part, Four SEBI Regulations have been added instead of CDR, SDR, S4A (since RBI has withdrawn these Schemes)
4. In the General Awareness Part, Constitution of India, Right to Constitutional Remedies, Provisions of Union Judiciary, Provisions of High Courts in the States have been added
5. The Partnership Act, 1932 now put in the Part of Indian Contract Act, Sale of Goods Act etc.
6. The % weight age in total marks for each Part is more or less the same, except for Companies Act 2013 Part, where 2% is reduced, in the Indian Contract Act, Sale of Goods Act Part 1% increased and in Finance and Accounts Part 1% increased.

The Format, Frequency of Examination and Examination Fees remaining the same.

Blocked Credit under GST

CA Sushil Goyal

Input tax Credit is the backbone of the GST and it is also a mechanism to avoid Cascading effect of taxes. One of the fundamental features of GST is the seamless flow of input credit across the chain (from the manufacture of goods till it is consumed) and across the country. It was expected that in GST regime, seamless credit would be allowed to business houses. However, surprisingly, the credit restrictions mentioned under section 17(5) of the CGST Act, 2017 continue to remain (in respect of both goods and services) in the GST regime. This continuation of denial will lead to substantial tax cascading. Also, another round of litigation will result as interpretation issues would crop up while determining eligibility or otherwise of GST paid on personal consumptions without any denial or any restriction except say goods / services which are availed for personal use and not for official use.

As per section 16(1) of the CGST Act,2017 , any registered person can avail credit of tax paid on the inward supply of goods or services or both which is used or intended to be used in the course or furtherance of business and the said amount shall be credited to electronic credit ledger. However as per Section 17(5) of the CGST Act, 2017, there are certain supplies on which input tax credit under GST is not available.

Credit of following Inward supply of goods or services or both not eligible as Input tax Credit:

1. Motor Vehicle and other conveyances except used for :
    a. Taxable supply of such Vehicle or Conveyance
    b. Taxable Supply of Transportation of Passengers
    c. Taxable supply by way of Imparting, training, on driving, flying, navigating such vehicle or conveyance
    d. For Transportation of Goods

    It is pertinent to note that the law is silent as to ITC related to repairs and maintenance, insurance and servicing. However, the CGST (Amendment) Bill, 2018 passed in Lok Sabha on 9th August clearly restricts ITC of the following input services:
    a) general insurance,
    b) servicing,
    c) repairs and maintenance
    in so far as they relate to Motor vehicles, Vessels and Aircraft. However ITC of the following input services will be available to a taxable person if the said taxable person is engaged in the manufacture of such Motor Vehicle, Vessels or Aircraft or in the supply of general insurance services in respect of such Motor vehicle, Vessel or Aircraft insured by him.
    The Amendment bill also restricts credit of the Motor Vehicles for transportation of persons having seating capacity of not more than thirteen (including driver), vessels and aircraft except when they are used for making specified taxable supplies. Further, the words 'other conveyances' have been removed, the amendment is sought to make it clear that input tax credit would now be available in respect of dumpers, work-trucks, fork-lift trucks and other special purpose motor vehicles.
2. Food, beverages, club memberships and others

    ITC is not available for the supply of following goods or services or both:

    Food and beverages
    Outdoor catering
    Beauty treatment
    Health services
    Cosmetic and plastic surgery

    However, ITC will be available if the category of inward and outward supply is same or the component belongs to a mixed or composite supply under GST.

For Example:

I. XYZ Firm arranges for an office party for its employees. It will not be able to claim ITC on the food & beverages served.
II. 2. XYZ Firm provides lunch to its employees free of cost, then no ITC available. However if the same firm charges for the lunch from the employees then ITC available as definition of Business includes any activity or transaction in connection with or incidental or ancillary to.

3. **Sale of membership in a club, health, fitness centre**

    No ITC will be allowed on any membership fees for gyms, clubs etc.

    For Example: X, a Managing Director has taken

membership of a club and the company pays the membership fees. ITC will not be available to the company or Mr. X.

4. Rent-a-cab, life insurance, health insurance

ITC is not available for rent-a-cab, health insurance and life insurance.

However, the following are exceptions, i.e., ITC is available for-

a) Any services which are made obligatory for an employer to provide its employee under current law in force.

b) If the category is same for the inward supply and outward supply or it is a part of the mixed or composite supply

For example, ABC Travels lends out a car to XYZ Travels. Then XYZ Travels can claim ITC on the same.

5. Travel

ITC is not available in the case of travel, benefits extended to employees on vacation such as leave or home travel concession. ITC will be allowed for travel for business purposes.

For example, ABC Ltd. offers a travel package to its employees for personal holidays. ITC on GST paid by ABC Ltd. for the holiday package will not be allowed.

As per the CGST (Amendment) Bill, 2018 irrespective of the prohibitions placed u/s 17(5), ITC shall be available for provision of goods or services (i.e. food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels and aircraft (except when used for specified purpose), life insurance and health insurance, membership of club, health and fitness centre, travel benefits extended to employees on vacation such as leave or home travel concession, where it is obligatory for employer to provide to its employees goods or services under any law for the time being in force. As per CGST Act, 2017 this clause is only applicable for rent -a –cab, Life Insurance and Health Insurance but as per Amendment bill it has been extended to all the above services if it is obligatory under any law for time being in force. So, ITC pool has been widened.

6. Works contract

ITC shall not be available for any works contract services. ITC for the construction of an immovable property cannot be availed, except where the input service is used for further works contract services.

For example, XYZ Contractors are constructing an immovable property. They cannot claim any ITC on the works contract. However, XYZ hires ABC Contractors for a portion of the works contract. XYZ can claim ITC on the GST charged by ABC Contractors.

7. Constructing an immovable property on own account.

No ITC is available for goods/services for construction of an immovable property on his own account. Even if such goods/services are used in the course or furtherance of business, ITC will not be available. Inward supply of services from real estate agent, architect, interior decorator and contractor all are blocked but inward supplies such as security, house-keeping and property maintenance are not excluded as these are received after establishment of immovable property.

But this rule does not apply to plant or machinery both for works contract and construction of immovable property. ITC is available on inputs used to manufacture plant and machinery for own use. It is pertinent to note that ITC is restricted only to the extent of capitalization in the books of accounts. Therefore any expenses which have been taken to profit and loss accounts as revenue expenditure, ITC is available.

As per the explanation provided the word construction includes re-construction, renovation, additions or alterations or repairs, to the extent capitalized to the said movable property.

Example-

I. PQR Steel Industries repairs an office building for its headquarters. ITC will not be available if capitalized. However if booked as a revenue expenditure ,then ITC will be available.

II. PQR Steel Industries also constructs a blast furnace to manufacture steel. ITC is available, since it is a plant.

8. Composition Scheme

No ITC would be available to the person who has made the payment of tax under composition scheme in GST law.

9. No ITC for Non-residents

ITC cannot be availed on goods/services received by a non-resident taxable person. ITC is only available on any goods imported by him.

10. No ITC for personal use.

No ITC will be available for the goods/ services used for personal purposes and not for business purposes.

11. Free samples and destroyed goods.

No ITC is available for goods lost, stolen, destroyed, written off or given off as gift or free samples. ITC is only blocked for inputs/goods lost and not loss of inputs while manufacturing, so one needs to be extra careful.

12. No ITC in fraud cases.

ITC will not be available for any tax paid due to fraud cases which has resulted into –

a) Non or short tax payment or
b) Excessive refund or
c) ITC utilised or

Fraud cases include fraud or willful misstatements or suppression of facts or confiscation and seizure of goods.

FROM THE DESK OF CA P.D. RUNGTA GENERAL SECRETARY - ACTIVITIES SINCE 30.04.2018

SL. No.	Date	Name of Programme	Speaker
31	11.05.2018	S. C. Meeting on ""Penalty U/S 271AAB of the Income Tax Act, 1961 & Re-Assessment U/S 147/148 of Income Tax Act,1961" " at DTPA Conference Hall	CA. A. K. Tibrewal & CA. S. S. Gupta
32	19.05.2018	Seminar on "Real Estate Conclave" at BCCI,WM Hall,Kolkata	CA.Bhupendra Shah, Adv. V. Raghuraman, Mr.Khalid Aizaz Anwar & others
33	07.06.2018	S. C. Meeting 0n Filing of Returns of Income And Charitable & Religious Organisations Changes In IT Provisions at DTPA Conference Hall	CA. Sanjay Bhattacharya
34	14.06.2018	S. C. Meeting on How to Deal with Notice u/s 147 at DTPA Conference Hall	Adv. S. M. Surana
35	04.07.2018	S. C. Meeting on "Declaration of Beneficial Interest & SBO Rules Under Companies Act 2013" at DTPA Conference Hall	CA. Sumit Binani
36	06.07.2018	S. C. Meeting on "Reconciliation of Accounts with GST Returns some practical issues" at DTPA Conference Hall	CA. Anshuma Rustagi
37	26.07.2018	Workshop on "Insolvency & Bankruptcy Code(IBC Exam Oriented) at DTPA Conferene Hall	CA. Subodh Kr. Agrawal
38	27.07.2018	Workshop on "Insolvency & Bankruptcy Code(IBC Exam Oriented) at DTPA Conferene Hall	CA. Sumit Binani
39	02.08.2018	Workshop on "Insolvency & Bankruptcy Code(IBC Exam Oriented) at DTPA Conferene Hall	CA. Sumit Binani
40	03.08.2018	Workshop on "Insolvency & Bankruptcy Code(IBC Exam Oriented) at DTPA Conferene Hall	CA. R. R. Modi
	21.08.2018	New Changes in Tax Audit Report (Revised)	CA. S. S. Gupta & CA. Ranjeet Agarwal
	24.08.2018	Recording & Retractionof Statement with reference to disclosure of undisclosed income-Practical Guidelines	Adv. Paras Kochar
	Residencial Seminar		
45	03.08.2018 to 11.08.2018	Residential Seminar at Mauritius & Dubai	CA. Anand Tibrewal
	Anniversary		
51	21.05.2018	36th. Foundation Day of DTPA and 26th.Library Anniversary at DTPA Conference Hall	SMT. Seema Khorana Patra, PR. CCIT-1,W.B. & Sikkim & others
	Interaction Season & Felicitation		
56	15.05.2018	Felicitatio of new ITAT member Mr. Godara & Farewell of Mr.Waseem Ahmed, Accountant Member ITAT,Novotel,Kolkata	Team DTPA
57	30.05.2018	Inrective Session on "Observance of dedicated fortnight for Appeal and Rectification effects by the Department.	Shri Rajib Kr. Hota, Ms T.T.Prasad, Mr Arvind Kumar & Addl./Joint CITs

LIST OF NEW LIFE MEMBERS ADMITTED SINCE 25.06.2018

Sl. No.	NAME	PROPOSED BY	QUALIFICATION	E. MAIL ID
1	Mr. Amit Kr. Jain	Mr. D. S. Agarwala	FCA	amit@caamitjain.in
2	Mr. Vivek Kr. Agarwal	Mr. Krishna Kr. Agarwal	B.Com(H), C.A.	vka@outlook.in
3	Mr. Ravi Kr. Patwa	Mr. Ramesh Kr. Chokhani	B.Com(H), FCA, DISA, (ICAI)	ravipatwa@hotmail.com
4	Mr. Subhabrata Dutta	Ms. Manju Lata Shukla	CA.	sb_ca@duttalahiri.net
5	Mr. Ashis Kr. Banerjee	Mr. Ashok Kr. Maheswari	B.Com	
6	Mr. Shirish Bajaj	Ms. Manju Lata Shukla	CA.	shirishbajaj@@gmail.com

DTPA STUDY CIRCLE MEETING

DTPA STUDY CIRCLE MEETING

International Residential Seminar at Mauritius & Dubai

Residential Seminar at Shillong

36th Foundation Day of DTPA






Inauguration of Renovated DTPA Library at Ground Floor




Direct Taxes Professionals' Association

(Registered under Societies Registration Act, 1961. Registration No. S/60583 of 1988-89)

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