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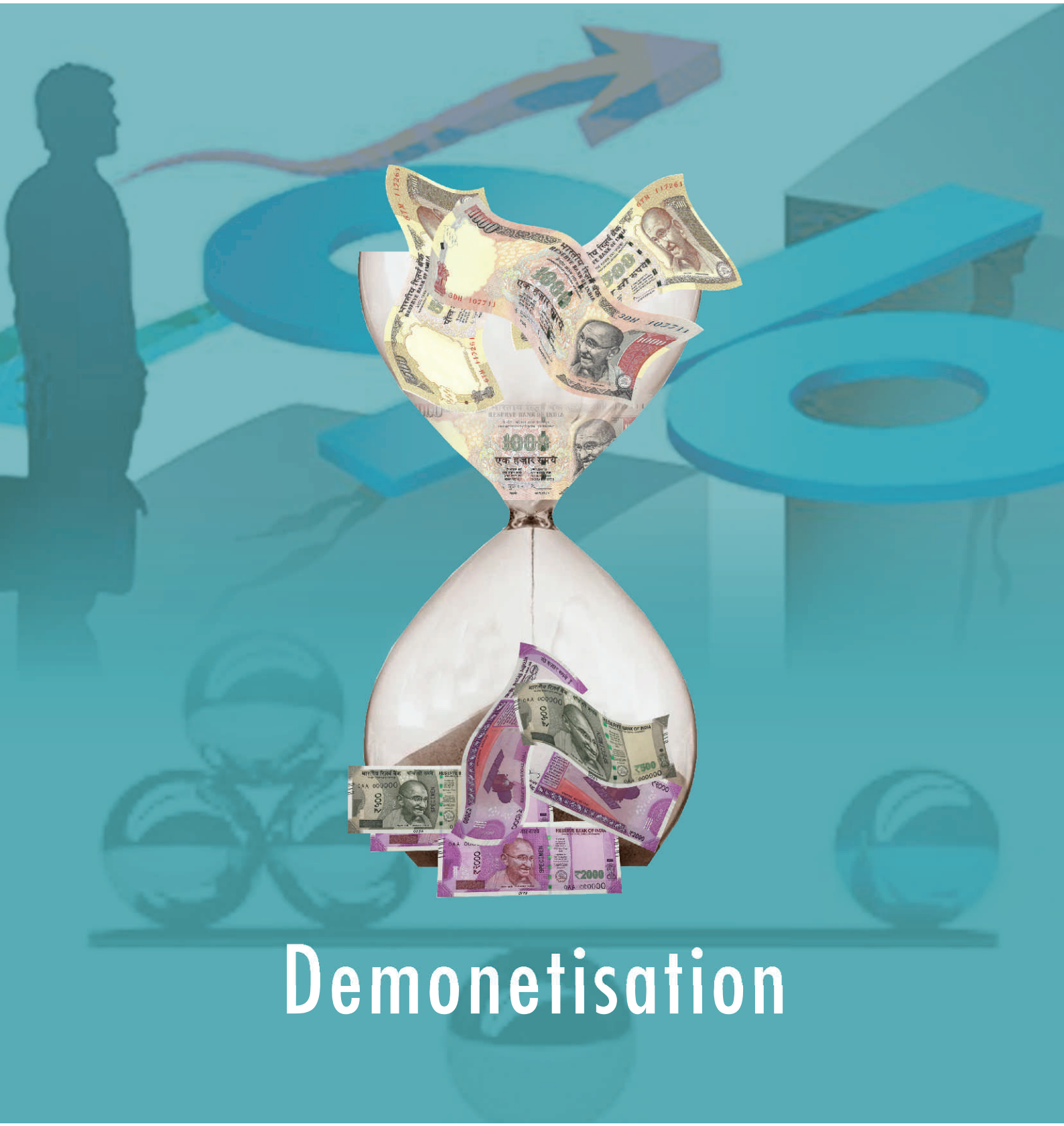

Demonetisation

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INDEX

EDITORIAL

Dear Members

May I first thank our President Sri Kamal Bagrodia, All Past President and Executive committee Members for selecting me as the Chairman of the DTPA Journal Committee. I'm incredibly conscious of the duties and tasks ahead and the honour you've bestowed upon me. It's with trepidation mingled with excitement that I look ahead to my coming tenure.

Looking ahead to my own year of Office as Chairman I would like to ensure that the publication do contribute to building a better professionalism through probing & enriching articles on the contemporary issues through contribution from eminent professional in the relevant fields. I have the vision that through quality articles I would be able to attract more readerships to our publication & make it one of the most sought after publication of the genre.

I look forward to working with my team. Together we will be a team, each reflecting our own strengths and covering each other for any individual faux pas that may arise! We will approach what we do with at all times a sense of humour, which offers that essential sense of proportion to what at times may be seen as over ceremonious or even pompous. We know we'll have a busy engagement diary, and we hope you will join with us on those occasions to which Members are regularly invited.

On your behalf, and with you, I hope to show ours is an organization in which nobody is ever seen as being an 'Untouchable', or an Outsider. Yes - that challenges all of us, but offers a mutuality, making both the organization and the publication together a vibrant and truly joyful.

In conclusion I reiterate my gratitude to you all for selecting me to the revered post. My team & me look forward to an exciting journey ahead with active support from you all, the members & the fraternity.

Thank you,

CA Mahendra K. Agarwal
Chairman - DTPA - Journal Committee

15th December, 2016

FROM THE DESK OF THE PRESIDENT - DTPA

Dear Members,

Demonetisation:

After Income Disclosure Scheme 2016, Prime Minister Shri Narendra Modi addressed the nation suddenly at 8:00pm on 8th November 2016 and attacked the hoarders of black money with a deadly weapon of "**Demonetization of Bigger currency notes of Rs.1000 and Rs.500**", further he also launched a warning to the neighboring states and/or terrorist groups. He thundered "The 500 and 1000 rupee note will become just worthless and are just a piece of paper from the midnight of 8th November itself." Thus suddenly, the word 'Demonetisation' became a buzzword amongst the Indian citizens as well as around the world. Since then, social media has become so popular and so responsive that every now and then people open the WhatsApp to check the new messages, new announcements made by the Government.

Yes, demonetization is a big word after 1947 or may be 1978 and it spread across length and breadth of India. The most surprising part is that many school students including my daughter and son, students of standard 11th and 8th respectively, have also started enquiring as to what Demonetization is ? What will happen to their small savings which they have accumulated since last several years? Why should their money in the form of 500 and 1000 rupee notes suddenly become invalid from midnight? Why Government has taken such steps that the entire 500 and 1000 will be eradicated? How they are going to buy the Pizza for them? What will happen to the poor people? .....So on and so forth.

Mr. Modi's has echoed the spirit of the statement of Bhagwad Gita Chapter 2, Verse 47-

"**Karmanye Vadhikaraste**, Ma phaleshou kada chana,
Ma Karma Phala Hetur Bhurmatey Sangostva Akarmani.

Meaning: You have the right to perform your actions but do not let the fruit be the purpose of your actions and therefore you won't be attached to not doing your duty."

Let's see the effects of demonetization. Since 8th of November, lot of policies have changed and even few sections of the Income tax Act has been drastically changed making them effective since 1st April 2016. A new scheme in the form and guise of Second Amendment Bill to income Tax Act has been passed in Lok Sabha , which is similar to the Scheme of IDS-2016 and still waiting to get it passed from Rajya Sabha and getting ascent from President of India. Now many are even saying - Was the hidden objective of Demonetization?

Now that all this the hard reality and law of the land ,we as Professionals have the challenges in front and I appeal to my professional fraternity to be a part of this bold move and guide the people concerned through this tough journey. As a part of nation building it is our duty to see that demonetization is implemented with honest spirit and simultaneously ensure that the honest tax payers are not harassed by the complicated rigors of amended provisions in the amendment bill.

Insolvency Professional Agency :

All the three leading professional bodies of India have registered them as the Insolvency Professionals Agency (IPA) under Insolvency and Bankruptcy Board of India (IBBI). One can now become the insolvency professional and a new area of opportunity for members as well. I am sure members would avail themselves of it fully by registering themselves as Insolvency Professionals. Senior Professionals have professional experience of 15 years also been given a chance to register as Insolvency professional without passing the Examination for a limited period of 6 months and then pass the examination. On 30th November, IBBI has announced the syllabus, procedure and passing criteria for conducting the exam. You can visit the link http://ibbi.gov.in/limited.html to read more details.

Pre-Budget Memorandum, 2017 :

Our Association has submitted the Pre-Budget Memorandum on both Direct Taxes and Indirect Taxes to the Government for their consideration.

December being last month of the year brings joy in our life by taking stock of activities of past one year and celebrating Christmas and welcoming the New Year as well. We will very soon enter the year 2017 and I pray the almighty to fill our life with growth, happiness and achievements in the coming year.

With warm regards,

CA Kamal Bagrodia

President - DTPA

15th December, 2016

SALIENT FEATURES OF THE TAXATION LAWS (SECOND AMENDMENT) ACT, 2016

CA P.R. Kothari

Introduction :

The Taxation Laws (Second Amendment) Act, 2016 (called 'Act') has already come into effect after getting assented to by President of India on 15.12.2016. The scheme of Pradhan Mantri Garib Kalyan Yojana 2016 has also been notified on 16.12.2016.

Effective date :

The provision of the Act have become effective since 15.12.2016 and sought to be applicable w.e.f. asst. yr. 2017-18. It extends to whole of India including the State of Jammu & Kashmir. As the amendments relating to section 115BBE of Income Tax Act, 1961 ('1961 Act') are sought to be applicable even for income between 01.04.2016 to the date of introduction of the subject amendment Bill, these amendments are retrospective in nature to that extent and thus contrary to present Government's declared policy of no retrospective taxation. In any case, courts shall have to decide about this aspect of limited retrospectivity of the Act.

Amendment relating to Section 115BBE :

a) Tax :

The Act amended the section 115BBE of 1961 Act with effect from 01.04.2017 i.e. asst. yr. 2017-18 to provide that any deemed income as referred in section 68 (unexplained cash credit), section 69 (unexplained investments), section 69A(unexplained money, bullion, jewellery, other valuable articles), section 69B (partly disclosed investments, money, bullion, jewellery or other valuable articles etc.) section 69D(Hundi loans or payments), whether reflected in the return of income furnished u/s 139 of 1961 Act or otherwise included in total income determined by A/O will entail an income tax @ 60% of such deemed income. As provided earlier also, the initial exemption of threshold limit in case of individual, h.u.f., AOP etc. shall not be available in respect of such income. As provided earlier, no deduction of any expense set off of loss or depn. will be allowed from such deemed income.

The aforesaid income tax @ 60% of deemed income shall be increased further by a surcharge for union purposes @ 25% of such 60% income tax while paying 'advance tax' for asst. yr. 2017-18 thus effectively raising the tax rate to 77.25% after including both education cesses also.

b) Penalty :

i) In Non Search Cases

Section 271AAC has been inserted w.e.f. 01.04.2017 (asst. yr. 2017-18) to 1961 Act to provide that except in search cases, the penalty @ 10% of 77.25% tax payable u/s 115BBE may be levied by A/O in addition to tax payable u/s 115BBE if income determined by A/O includes the deemed income as referred above.

However, no such penalty would be leviable, if the subject deemed income would have been disclosed suo motu by the assessee in his return of income furnished u/s 139 and applicable tax (i.e. 77.25%) has been paid on or before the end of the concerned year itself for which deemed income is so declared.

Here, one thing to be kept in mind that the suo motu declaration should be in the return furnished u/s 139 [be it u/s 139(1) or u/s 139(4) or 139(5)] and declaration in the return under section 148 or section 142(1) of 1961 Act would not be automatically free from levy of penalty u/s 271AAC.

The Act clearly provides that penalty u/s 270A for under reporting or misreporting of income shall not be imposable in respect of deemed income referred above. It has ended the unnecessary controversy hitherto going on regarding applicability of section 270A in respect of income covered by 115BBE.

The section 271AAC further provides that provision of section 274 and section 275 shall apply to penalty under this section also. Section 274 provides for reasonable opportunity of being heard to the assesse before imposition of any penalty and necessity of approval by Addl. Commisioner for penalty amount exceeding the limits prescribed in Section 274(2). It is also to be noted that though section 273B of the Act, providing for non imposition of penalties where assesse proves reasonable cause for his lapse, is not applicable to penalty u/s 271AAC but provision of reasonable opportunity envisaged u/s 274 indirectly provides an opportunity of proving reasonable cause for one's lapses. Section 275 provides for limitation period for imposition of penalties. Section 273A regarding waiver or reduction of penalty by Pr. Commissioner/ Commissioner will also be applicable to penalty u/s 271AAC.

ii) In Search Cases

Provision relating to penalty u/s 271 AAB of 1961 Act in search cases have also been amended by the 'Act' to substitute the slabs of penalty @ 10% and 20% of undisclosed income to 30% of undisclosed income subject to fulfilment of certain conditions including admission of undisclosed income in a statement u/s 132(4) of 1961 Act as well as specification and substantiation of manner of deriving such income. The earlier penalty slab of 60% has been kept intact.

No Big Relief for Suo Motu Declaration

No difference has been made in the tax rates of suo motu declared deemed income (which may include bonafide inability to substantiate the nature and source of deposits etc.) and the undeclared deemed income caught by revenue as in both cases, rate of tax is 77.25%. Here, it would have been more rational if there would have been some difference in tax rates in both cases as nature of both cases are quite different. There is an indirect difference between the tax on declared and caught income by way of penalty provisions u/s 271AAC which provides for discretionary penalty @ 10% of tax payable on caught income (other than search cases).

Pradhan Mantri Garib Kalyan Yojana, 2016:

The 'Act' has inserted a new chapter IXA to Finance Act, 2016 to provide for Taxation and Investment regime for Pradhan Mantri Garib Kalyan Yojana, 2016. The main features of yojana are as follows:

i) A declaration, of Income in the form of cash or deposit in a bank account maintained with specified entities including Post Offices (such cash or deposit being income chargeable to tax under 1961 Act for asst. yr. 2017-18 or any earlier year) in Form 1, can be made by any person between 17.12.2016 to 31.03.2017 before the Principal Commissioner of Income Tax or Commissioner of Income Tax, as the case may be.

ii) The declaration can be submitted electronically under digital signature or through transmission of data electronically under electronic verification code without digital signature or manually in printed form.

iii) The aforesaid declaration can be revised if any omission or wrong statement is discovered in the said declaration. It seems that revision can be both for lower income or higher income unlike IDS,2016 which provided for higher revision only.

iv) The declaration shall have to be accompanied by the proof of following :

a) Payments:

Tax	@ 30% of declared income	=	30% of declared income
Surcharge	@ 33% of tax	=	9.9% of declared income
Penalty	@ 10% of declared income	=	10% of declared income
			49.9% of declared income

b) Deposits:

Minimum deposit @ 25% of declared income in accordance with Pradhan Mantri Garib Kalyan Deposit Scheme, 2016 for a period of 4 years have to made with Reserve Bank of India which shall be accepted by authorized banks also. The deposit shall be made in multiples of Rupee One Hundred. The said deposit will be interest free, non transferable (other than to nominee or to legal heir in the event of death of the deposit holder) and non tradeable. No premature redemption of deposit is allowable.

v) A certificate in Form 2 shall be issued to the declarant by the concerned Pr. Commissioner or Commissioner within 30 days from the end of month in which a valid declaration is made.

vi) Any declaration made by misrepresentation or suppression of facts or without payment of tax, surcharge and penalty or without deposit as stated above shall be void and shall be deemed to never have been made.

vii) Any tax, surcharge, penalty paid under this Yojana shall not be refundable. The declared income or paid tax would not be set off or adjusted in any appeal, reference or other proceedings in relation to any Income Tax or Wealth Tax assessment or reassessment.

viii) The declaration as above shall not be admissible as evidence against the declarant under any Act including Income Tax Act, Wealth Tax Act, Companies Act, Customs Act, Service Tax proceedings, VAT Act. However, no such immunity is there from criminal Acts such as COFEPOSA, IPC, PMLA, Prevention of Corruption Act, Prohibition of Benami Property Transaction Act, Black Money Act etc. Here, there is some advantage under this scheme vis a vis IDS, 2016.

ix) The cash deposit in bank accounts etc. whether in the form of old demonetised notes or new notes both can be declared under the new scheme.

Conclusion

Considering the harsh provisions of amended section 115BBE and hard attitude of Government against evasion of taxes, it may be a second opportunity to the persons who wants to come clean after missing IDS, 2016.

PRACTICAL ASPECTS IN THE INCOME TAX SCRUTINY PROCEEDINGS

CA. Bikash Bogi

We are in month of November and the due date of completion of assessment i.e. 31st December is fast approaching. There are many issues which my professional colleagues ignores while appearing for assessment proceedings before Assessing Officer [AO]. In this article, I tried to highlight some of those issues.

Scrutiny assessment refers to the examination of a return of income by giving an opportunity to the assessee to substantiate the income declared and the expenses, deductions, losses, exemptions, etc. claimed in the return with the help of evidence.

Selection of Cases for Scrutiny Assessment :

Presently the returns of income filed by the tax payers are accepted by the Income Tax Department without any questions. Only a small percentage of cases are getting selected for scrutiny. The cases are mostly selected through the process of computer assisted scrutiny selection (CASS) and there is no element of subjectivity in this process.

In addition to the above CASS system, the cases where there is information about concealment of income, which may be based on an enquiry report, survey report or any other source, can also be selected for scrutiny. Only deserving cases are identified for scrutiny assessment in this manner. The selection in this manner is made by the AO only with the approval of higher authorities so that the selection is fair and proper.

There is yet another category of cases in which scrutiny assessment is framed under section 143(3) of the Act. There is a provision in the Income Tax Act which enables the reopening of cases where there is reason to believe that any income has escaped assessment. This reopening can be resorted to even in cases which had been subjected to scrutiny assessment earlier. A case can be reopened within a period of six years from the end of the relevant assessment year.

Further if any person has undisclosed Income / assets and he has not disclosed the same in the recently concluded Income Declaration Scheme, in that case the case of the assessee can be reopened beyond six years. Section 197 of the Income Tax Act deals with the same, which says that

"Where any income has accrued, arisen or received or any asset has been acquired out of such income prior to commencement of this Scheme, and no declaration in respect of such income is made under this Scheme,—

1. such income shall be deemed to have accrued, arisen or received, as the case may be; or
2. the value of the asset acquired out of such income shall be deemed to have been acquired or made,

in the year in which a notice under section 142, sub-section (2) of section 143 or section 148 or section 153A or section 153C of the Income-tax Act is issued by the Assessing Officer, and the provisions of the Income-tax Act shall apply accordingly."

Category of Assessment :

CBDT has classified the assessments in two categories namely:

(A) Limited Scrutiny (B) Detailed Scrutiny

(A) Limited Scrutiny

Central Board of Direr Taxes vide instruction no. 7/2014 dated 26.09.2014 (applicable for cases selected for scrutiny during FY 2014-15 via CASS), has provided instructions regarding method of scrutiny in specific cases:

"2. Therefore, for proper administration of the Income-tax Act, 1961 ('Act'), Central Board of Direct Taxes, by virtue of its powers under section 119 of the Act, in supersession of earlier instructions/ guidelines on this subject, here by directs that the cases selected for scrutiny during the Financial Year 2014-2015 under

CASS, on the basis of either AIR data or CIB information or for non re-conciliation with 26AS data, the scope of enquiry should be limited to verification these particular aspects only. Therefore, in such cases, an Assessing Officer shall confine the questionnaire and subsequent enquiry or verification only to the specific point(s) on the basis of which the particular return has been selected for scrutiny."

This circular is mainly speaking about cases where scrutiny is called for on the basis of either AIR data or CIB information & non reconciliation with 26 AS or directed the AO to confine in those issues only. But further the circular says that

"4. In case, during the course of assessment proceedings it is found that there is potential escapement of income exceeding Rs. 10 lakhs (for non-metro charges, the monetary limit shall be Rs. 5 lakhs) on any other issue(s) apart from the AIR/CIB/26AS information based on which the case was selected under CASS requiring substantial verification, the case may be taken up for comprehensive scrutiny with the approval of the Pr. CIT/DIT concerned. However, such an approval shall be accorded by the Pr. CIT/DIT in writing after being satisfied about merits of the issue(s) necessitating wider and detailed scrutiny in the case. Cases so taken up for detailed scrutiny shall be monitored by the Jt. CIT/Addl. CIT concerned."

It means subject to incriminating evidences & approval of higher Authority, Limited scrutiny can be converted in to details scrutiny. A sample of notice u/s 143(2) of Limited Scrutiny is given below for understanding:

"Notice under section 143(2) of the Income Tax Act, 1961

Limited Scrutiny

This is for your information that return of income for assessment year 2015-16 filed on 24/01/2016 has been selected for scrutiny. Following issues have been identified for examination

(i) Derivative (Future) transactions

(ii) Salary Income Mismatch.

I view of the above, we would like to give you an opportunity to produce or cause to be produced, any evidence which you feel is necessary in support of the said return."

(B) Detailed Scrutiny Assessment:

In this proceeding, AO makes a detailed inquiry on each and every aspect of the Return of Income.

- The procedure begins with a Notice u/s 143(2) which is the key to open the door of scrutiny proceedings. It needs to be "Served" on an assessee prior to expiry of six months from the end of the financial year in which the return is furnished. Assessment framed u/s 143(3) without serving notice u/s 143(2) shall be void-abinitio. It was held by the Supreme Court in case of Hotel Blue Moon that "Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and is not curable.
- It is followed by a notice u/s 142(1) calling for various information by AO for carrying out the assessment.
- AO shall consider all the information furnished by an assessee at the assessment stage in response to his notices or queries raised vide order sheet entries.
- AO shall issue a Show Cause Notice (SCN) intimating the assessee about the additions which he proposes to make in the assessee's case.
- Assessee shall furnish a reply in response to such SCN which shall be considered by AO prior to making the additions.
- AO can use some special powers in assessment proceedings like:
  - As per section 131(1), AO may issue "Summons" to any person for discovery and inspection, enforcing attendance and for compelling production of books of accounts.
  - As per section 131(3), AO may impound and retain books of accounts or any other document produced before him during the assessment proceedings.
  - As per section 133(6), AO may call for information from third parties.
- Finally, an Asst Order shall be passed u/s 143(3).

Precaution to be taken in assessment proceedings:

- Assessment proceedings commences with the issue of notice under Section 143(2). The

assessee takes it lightly that it is a formal notice. This is not a correct approach since when the question whether adequate opportunity is given or not, the formal notice is also considered. In reply to the first notice, there should be some written communication with the AO.

- Preparation of details in response to Notice of AO
  - ✓ On receipt of Notice a detailed list of documents required from the assessee should be prepared and should be immediately inform to the assessee with date of hearing so as to enable its timely compliance.
  - ✓ The reply should be prepared point wise as per notice / questionnaire received from AO.
  - ✓ A proper index of papers should be prepared and all the papers in the file should be numbered so as to help the assessing officer to locate the papers easily. All supporting documents regarding the explanations given in the submission should be duly attached with reference page no. This helps in completion of security assessment in smooth manner.
  - ✓ Any document which are not being submitted at the time of hearing should be specifically noted and informed that those will be submitted in due time or those cannot be submitted.
  - ✓ A proper covering letter should always accompany the submission.
  - ✓ Even if no documents are ready or able to be produced on the date of hearing, at-least a letter stating that it should be submitted to the department informing the inability.
- Whenever difficult query is raised, the assessee at times either gives vague reply or avoids to give reply. This is very risky. In fact, the assessee should try to find out the proper reply and should give the reply with adequate evidences. This is because it is difficult to produce additional evidence before the appellate stage. Non-compliance of notices under Sections 142(2) and 143(2) attracts penalties as per law.
- Before making any addition in the assessment, the AO normally issues final show cause notice or makes entry in the order sheet and inform the Authorised Representative about the same. Assessee should make sure about timely compliance of this notice because the AO will not wait for the reply after the specified date of the compliance and will make the addition. It will be more difficult to defend these types of additions in appellate proceedings.

Other Important Points to remember in assessment proceedings:

1. **Ad-hoc additions / suspicion is not permissible in Assessment proceedings**

   Many a times we found that certain % of the Expenditure has been disallowed on ad-hoc basis by the AO(like ad-hoc disallowance of 20% of travelling expenditure being personal in nature). Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills has held that Ad-hoc disallowance is not permissible in Assessment proceedings. As per the Apex court there must be something more than bare suspicion to support the assessment u/s 143(3).

2. **Notice deemed to valid in certain circumstances :**

   Section 292BB provides that where an assessee has appeared in assessment proceedings or co-operated in any proceedings or co-operated in any inquiry related to an assessment or reassessment, it shall be deemed that any notice under the provisions of the act has been duly served upon him in time in accordance with the provisions of the Act. Further, such an assessee shall be precluded from taking any objection in any proceedings or inquiry under the act that notice was not served upon him or served in an improper manner. However the provisions of section 292BB shall not be applicable where the assessee raised the aforesaid objection before the completion of the assessment.

3. **Presumption and burden of proof in assessment:**

   This presumption applies to the bona fides of the assessee's transactions as well as his accounts. It

cannot be presumed that an assessee is a notorious black marketer or smuggler or Hawala Dealer or that, in the circumstances prevalent in the accounting year, he must have entered into transactions not lawful, above board or dishonest. The presumption is similarly regarding his books of account, that the entries in the account books are made in the ordinary course of business and there is no concealment of income. The books of account maintained in the regular course of business are relevant and afford prima facie proof of the entries and the correctness thereof. It is for the department to prove to the contrary and there should be adequate grounds for disbelieving the accounts. It is for A.O. to prove that there is income from that source. The assessee cannot prove the negative.

Where an assessee produced unsatisfactory and unbelievable evidence the department can reject the same and need not produce contrary evidence before drawing an adverse inference against the assessee. Again, if the income was shown as having suddenly diminished from the previous year, the onus will be on the assessee to explain. The onus is on the assessee to show that his return is correct, as all the facts are exclusively in his knowledge and that he has incurred a loss.

4. **Principle of Natural Justice should be followed**

The principle of Natural justice is applicable to assessment proceedings and the assessee should have knowledge of the material that is proposed to be used against him, in order to enable him to rebut it. If the A.O. proposes to act on such material as he might have gathered as a result of his private inquiries behind the back of the assessee, he must disclose the substance of all such material, though not the sources thereof to the assessee and if this is not done, the principle of natural justice stands violated. An order passed in violation of principle of natural justice may not, however, render the act one totally outside the Act. It may still be an order under the Act liable to be corrected or set-aside to be redone after complying with such principle.

5. **Value of Audit Report when books were destroyed**

Where the books of account of an assessee are examined and audited under statutory provisions and audit report is submitted thereabout, reliance could be placed by the income tax authorities on such a report treating the same as "a material" in case the books of account of the assessee were destroyed by fire etc. This is so because an auditor is required by the statute to find out if the deductions claimed by the assessee in its balance sheet and profit and loss account are supported by the relevant entries in assessee's books of account. Therefore, it may be presumed that the auditor has done so and has found that the books of account supported the claim for deductions made by the assessee.

6. **Additional Claim before AO in assessment proceedings :**

Hon'ble Supreme Court in case of Goetze (India) Ltd held that AO cannot entertain any new claim made by the assessee otherwise than by way of revised return. However, there is no such barrier to make additional claim in appellate proceedings. It is always wise for the assessee to make new claim, if any, along with all supporting documents before the AO only, so that they have a strong case in appellate proceedings and that shall not be treated as additional evidence in appellate proceedings.

7. **Cross Examination of Witness:**

If an assessing authority is relying on the testimony of a witness, the assessee is to be afforded an opportunity to cross-examine him. It is not open to the assessing authority to get over this hurdle on the plea that the witness had not been produced by the assessee. Gujarat High Court in case of D.M. Joshi held that, in the absence of any opportunity for cross- examination, the assessment is invalid. The cross-examination depends upon the facts of each case.

Hon'ble Supreme Court in case of Kishinchand Chellaram held that though the proceedings under the Income-tax Act are not governed by the strict rules of evidence, the department is bound to afford an opportunity to controvert and cross examine the evidence on which the department places its reliance. Opportunity of cross examination must be given. The consequence of breach of natural justice is that either the addition is void or matter may have to be to be remanded to lower authorities.

8. **Method of accounting section 145**

Section 145 lays down the Method of Accounting. The section states, briefly, that the assessee's

income will be computed in accordance with the cash or mercantile system of accounting regularly employed by the assessee. Section 145(3) also lays down that where the AO is not satisfied about the correctness or completeness of the accounts, or if the accounting standards have not been regularly followed, the AO may make a best judgment assessment as in sec. 144. The principle, that there should be a loss to revenue for invoking sec. 145, was reinforced in case of Realest Builders and Services (SC) where the assessee chose to adopt a different method of accounting. The SC held that a vital aspect to be seen is whether the method adopted by the assessee results in underestimation of profits, for which the facts and figures to demonstrate this have to be given by the AO. This case also serves to highlight the importance of burden of proof, viz. The AO has to show by evidence that the assessee's claim was untenable.

9. **Past History :**

An assessment cannot be based on a presumption relating to some issues in the earlier years. Past history may be legitimate material but that is not sufficient by itself without more, to justify assessment in a particular year. There must be some material relatable to the accounting, which taken with the past history may reasonably entitle the AO to hold that there must in fact have been concealed income during the accounting year which is liable to assessment.

10. **Principle of 'Res Judicata' and it's Exceptions:**

Though the principle of "res judicata" has no application to proceedings under the Income Tax Act and the finding reached for one particular assessment year cannot be held to be binding in the assessment proceedings for subsequent years, yet this general rule is subject to the qualification that a finding reached in the assessment proceedings for an earlier year, after due enquiry, would not be reopened in a subsequent year if it is not arbitrary or peverse, and if no fresh facts are found in the subsequent assessment year. Hon'ble SC in case of Radhasoami Satsang held that in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, it is not permissible to take different and contradictory stand in a subsequent year with regard to the exemption earlier granted. The fact that the departmental officers took a particular view of the statutory provisions at an early stage will not stop them from taking a corrective view of the statutory provisions at a later point of time.

11. **Non service of Notice u/s 133(6):**

During the course of assessment proceedings, AO generally sends notice u/s 133(6) to get confirmation from third party to verify the claim of the assessee. In case the notice u/s 133(6) gets un-served, AO generally makes addition by giving reason of non service of notice. Mumbai ITAT in case of Eagle Impex held that only non service of notice u/s 133(6) should not be made basis for making addition in the hands of the assessee and if any addition made by the AO solely on that basis, that is liable to be deleted. While filing the details with the AO, the assessee should ensure that they are submitting the latest addresses of different parties as asked by the AO to avoid above circumstances.

Conclusion:

Majority of the additions made in the assessment proceedings is due to non – compliance of the notices issued by the AO. A proper care should be taken while responding the queries / notices of the AO. As a professional our responsibility should be like due to our negligence, the assessee should not suffer and at the same time it is the responsibility of the assessee to provide the details on time for timely compliance of notices of AO.

DISCLAIMER:

The information contained in this write up has been carefully prepared, but it has been written in general terms and should be seen as broad guidance only. It cannot be relied upon to cover specific situations and you should not act, or refrain from acting, upon the information contained therein without obtaining specific professional advice. The Author, it's Firm, its partners and employees do not accept or assume any liability or duty of care for any loss arising from any action taken or not taken by anyone in reliance on the information in this article or for any decision based on it. In case of any query / suggestions regarding the same, please mail at bikashbogi@sbrca.in.

BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 AS AMENDED BY THE AMENDMENT ACT, 2016 - FAQS

Advocate Subash Agarwal

Q. No. 1. What are the salient features of the Benami Transactions (Prohibition) Amendment Act, 2016?

Ans : Salient features of the aforesaid Act are-

- It comes into force w.e.f 1.11.2016.
- Its objective is to curb black money in the economy.
- It effects widespread amendment in the old Benami transaction (Prohibition) Act, 1988.
- The old Act was one of the smallest Acts in the country (only 9 sections).
- Now, as many as 71 amendments have been effected.
- It shall be implemented by the income tax authorities.

Q. No. 2. Please explain the meaning of "Benami Transaction" giving examples.

Ans : As per Sec 2(9) of the amending Act, Benami Transaction means-

A. A transaction/arrangement -

a) Where a property is transferred to/held by 'A' but consideration is provided by 'B'; and

b) The property is held for the immediate or future benefit of 'B'.

B. Transaction is carried out in a fictitious name.

C. Where person providing the consideration is not traceable or is fictitious.

D. Where owner is not aware of or denies knowledge of such ownership.

Relevant examples –

A. Suppose Mr. X holds a property in his name (registered in his name) but the consideration has been provided by Mr. Y with an understanding that Mr. Y will stay in the said property. Any such arrangement/ transaction is prohibited by law and will be construed as "benami transaction".

B. Suppose Mr. X brings in his book of accounts, a loan of Rs. 10 lacs and shows it as received from Mr. Y, who is a non-existent person. The same will be construed as a "benami transaction".

C. Suppose Mr. X purchases a property worth Rs. 1cr. The purchase of the property is funded by a loan taken From Mr. Y. Mr. Y could not be traced. The entire arrangement would be considered as "benami transaction".

D. Mr. X is a person under BPL category and has opened a savings account with a bank as per the govt's Jan Dhan Scheme. During the demonetisation window period, a deposit of Rs. 2.25 lacs is made in his bank a/c. During enquiry by the initiating officer (I.O), he denies the ownership of the said deposit. The deposit of Rs. 2.25 lacs in his Jan Dhan a/c would be construed to be a "benami transaction".

Q. No. 3. Are there any exceptions to the four categories of "benami transactions" specified in Sec. 2(9)?

If yes, please specify.

Ans : Exceptions to a "Benami transaction"-

1. Property held in the name of Karta or a member of HUF for the benefit of member of HUF (consideration provided by the known sources of HUF)
2. Property held by a person standing in a fiduciary capacity eg director, trustee, executer etc
3. Property held in the name of spouse or child but consideration has been provided out of known source of individual.

4. Property held in the joint name of brother (sister), lineal ascendant or descendant but the consideration has been provided out of known sources of individual.

5. Any transaction involving the allowing of possession of any property to be taken in part performance of a contract as per Sec. 53A of the Transfer of Property Act, 1882 where –

   I. consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

   II. stamp duty on such transaction or arrangement has been paid ; and

   III. the contract has been registered.

Q. No. 4. Please explain whether development agreements or a property "purchased" through Power of attorney/ agreement will be covered under "benami transaction".

Ans : Where under a development agreement, owner of a property has given possession of the property to the developer and has received part consideration, the said arrangement shall be construed to be benami unless the agreement has been registered and stamp duty has been paid.

Similarly, where the owner of a property has entered into an agreement for sale of his property and the buyer has provided a part or whole consideration and has also taken possession thereof, the same shall be considered as benami transaction unless the agreement for sale is registered and stamp duty has been paid.

Q. No. 5. What is the meaning of "Property" under the Benami Act?

Ans: Under the Benami Act , "property" means asset of any kind –

- Movable or immovable property.
- Tangible or intangible.
- Corporeal or incorporeal.
- Right or interest.
- Documents evidencing title or interest in property.
- Where a property is capable of conversion into some other form , then the converted form.
- Proceeds from the property.

Q. No. 6. Suppose Mr. X purchases a property worth Rs. 50 lacs and the same is registered jointly in the name of Mr. X and his uncle (Mr. Y) but the entire consideration has been provided by Mr. X. What is the status of the transaction under the Benami Act?

Ans : The transaction would be construed as benami since the relationship between Mr. X and Mr. Y is not covered within the exception clauses.

Q. No. 7. When a person can be said to be guilty of the offence of benami transaction?

Ans : As per Sec 53(1) of the Act, a person shall be guilty of the offence **of benami transaction** where he enters into a benami transaction in order to –

a) Defeat the provision of any law or

b) Avoid payment of statutory dues or

c) Avoid payment to creditors

Q. No. 8. Who can be held to guilty of a benami transaction?

Ans : Following persons shall be held to be guilty of a benami transaction –

- The beneficial owner .
- Benamidar.
- Any person who abets or introduces any person to enter into the benami transaction.

Q.No. 9. What are the consequences of "Benami Transaction"?

Ans : Consequences of "Benami' transaction are -

A. Benami property is liable to be confiscated by the central government.

B. <u>Punishment</u>

   I. <u>Transaction prior to 1.11.2016</u>

      - Imprisonment upto 3 years.
      - Fine
      - Both

   II. <u>Transaction on or after 1.11.2016</u>

      - Rigorous imprisonment – 1 year to 7 years

        Plus

      - Fine upto 25% of FMV of property.

RECENT DECISIONS ON DIRECT TAXES

Advocate Subash Agarwal

A. Various Decisions other than Kolkata

(Source : www.itatonline.org)

1. ACIT vs. Jindal Power Limited (ITAT Raipur)

I.T.A. No.: 99/BLPR/2012

DATE: June 23, 2016 (Date of pronouncement)

DATE: July 4, 2016 (Date of publication)

S. 37(1): Expenditure on Corporate Social Responsibility (CSR), though voluntary, is allowable as business expenditure. Explanation 2 to s. 37(1) inserted w.e.f. 01.04.2015 is not retrospective. It applies only to CSR expenditure referred to in s. 135 of the Companies Act and not to voluntary CSR expenditure

The amendment in the scheme of Section 37(1), which has been introduced with effect from 1st April 2015, cannot be construed as to disadvantage to the assessee in the period prior to this amendment. This disabling provision, as set out in Explanation 2 to Section 37(1), refers only to such corporate social responsibility expenses as under Section 135 of the Companies Act, 2013, and, as such, it cannot have any application for the period not covered by this statutory provision which itself came into existence in 2013. Explanation 2 to Section 37(1) is, therefore, inherently incapable of retrospective application any further. In any event, as held by Hon'ble Supreme Court's five judge constitutional bench's landmark judgment, in the case of CIT Vs Vatika Townships Pvt Ltd [(2014) 367 ITR 466 (SC)], the legal position in this regard has been very succinctly summed up by observing that "Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward.

It may appear to be some kind of a dichotomy in the tax legislation but the well settled legal position is that when a legislation confers a benefit on the taxpayer by relaxing the rigour of pre-amendment law, and when such a benefit appears to have been the objective pursued by the legislature, it would a purposive interpretation giving it a retrospective effect but when a tax legislation imposes a liability or a burden, the effect of such a legislative provision can only be prospective. We have also noted that the amendment in the scheme of Section 37(1) is not specifically stated to be retrospective and the said Explanation is inserted only with effect from 1st April 2015. In this view of the matter also, there is no reason to hold this provision to be retrospective in application. As a matter of fact, the amendment in law, which was accompanied by the statutory requirement with regard to discharging the corporate social responsibility, is a disabling provision which puts an additional tax burden on the assessee in the sense that the expenses that the assessee is required to incur, under a statutory obligation, in the course of his business are not allowed deduction in the computation of income. This disallowance is restricted to the expenses incurred by the assessee under a statutory obligation under section 135 of Companies Act 2013, and there is thus now a line of demarcation between the expenses incurred by the assessee on discharging corporate social responsibility under such a statutory obligation and under a voluntary assumption of responsibility. As for the former, the disallowance under Explanation 2 to Section 37(1) comes into play, but, as for latter, there is no such disabling provision as long as the expenses, even in discharge of corporate social responsibility on voluntary basis, can be said to be "wholly and exclusively for the purposes of business". There is no dispute that the expenses in question are not incurred under the aforesaid statutory obligation. For this reason also, as also for the basic reason that the Explanation 2 to Section 37(1) comes into play with effect from 1st April 2015, we hold that the disabling provision of Explanation 2 to Section 37(1) does not apply on the facts of this case.

2. R K P Company vs. ITO (ITAT Raipur)

I.T.A. No.: 106/RPR/2016

DATE: June 24, 2016 (Date of pronouncement)

DATE: July 4, 2016 (Date of publication)

S. 40(a)(ia): When there are conflicting judgements of

non-jurisdiction High Courts, the Tribunal is not permitted to choose based on its perception of what the correct law is because it will amount to sitting in judgement over the High Courts' views. Instead, it has to follow the view which is in favour of the assessee even if it believes that this view is not the correct law. Second proviso to s. 40(a)(ia) inserted by FA 2013 should be treated as retrospectively applicable from 1st April 2005

The Tribunal had to consider whether the second proviso to section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004 in view of the conflict of opinion between the Delhi High Court in CIT Vs Ansal Landmark Townships Pvt Ltd [(2015) 377 ITR 635 (Del)] and the Kerala High Court in Thomas George Muthoot Vs CIT [(2015) 63 taxmann.com 99 (Kerala)]. HELD by the Tribunal:

(i) Undoubtedly, there are conflicting decisions by the Delhi High Court in CIT Vs Ansal Landmark Townships Pvt Ltd [(2015) 377 ITR 635 (Del)] and the Kerala High Court in Thomas George Muthoot Vs CIT [(2015) 63 taxmann.com 99 (Kerala)] on the issue of restrospectivity of second proviso to Section 40(a)(ia). It is thus evident that views of these two High Courts are in direct conflict with each other. Clearly, therefore, there is no meeting ground between these two judgments. The difficulty arises as to which of the Hon'ble non jurisdictional High Court is to be followed by us in the present situation. It will be wholly inappropriate for us to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints, as such an exercise will de facto amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us. We find guidance from the judgment of Hon'ble Supreme Court in the matter of CIT vs. Vegetable Products Ltd. [(1972) 88 ITR 192 (SC)]. Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted". This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. In another Supreme Court judgment, Petron Engg. Construction (P) Ltd. & Anr. vs. CBDT & Ors. (1988) 75 CTR (SC) 20: (1989) 175 ITR 523 (SC), it has been reiterated that the above principle of law is well established and there is no doubt about that. Hon'ble Supreme Court had, however, some occasions to deviate from this general principle of interpretation of taxing statute which can be construed as exceptions to this general rule. It has been held that the rule of resolving ambiguities in favour of taxpayer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in Littman vs. Barron 1952(2) AIR 393 and followed by apex Court in Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commr. of CT (1992) Suppl. (1) SCC 21 and Novopan India Ltd. vs. CCE & C 1994 (73) ELT 769 (SC), has been summed up in the words of Lord Lohen, "in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving tax-payer relief in certain cases from a section clearly imposing liability". This exception, in the present case, has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of State of M.P. vs. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 (SC) 614. Therefore, what follows is that in the peculiar circumstances of the case and looking to the nature of the provisions with which we are presently concerned, the view expressed by the Hon'ble Delhi High Court in the case of Ansal Landmark (supra), which is in favour of assessee, is required to be followed by us. Revenue does not, therefore, derive any advantage from Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot (supra).

(ii) The second issue is with respect to the second proviso to Section 40(a)(ia) being held to be retrospective, without corresponding enabling provision in the rules being held to be retrospective. That is a hyper technical argument and too pedantic an approach. The second proviso to Section 40(a)(ia) was held to be retrospective in the context of finding solution to the problem to the taxpayer, and the matter was set aside to the file of the Assessing Officer with certain directions about factual verifications on the recipient having included the same in the receipts based on which taxable income is computed, and the income having been offered to tax. It is this action of the coordinate bench that was upheld by the Tribunal and the course of action so adopted by the coordinate bench approved by Their Lordships. It is impermissible to pick up one of the aspects of the decision of the judicial authority and read the same in isolation with other aspects. The decision is not on the retrospectivity of the proviso alone, its also on deletion of disallowance in the event of the recipient having taken into account these receipts in the computation of income. The judge made law is as binding on the authorities below as is the legislated statue. The hyper technical stand of the Departmental Representatives, therefore, does not merit our approval.

(iii) As regards lack of guidance from Hon'ble jurisdictional High Court, that cannot be reason enough to disregard the decisions from non-jurisdictional High Courts. Hon'ble Courts above, being a higher tier of the judicial hierarchy, bind the lower forums not only in the jurisdiction of respective High Courts, but unless, there is anything contrary thereto by the jurisdictional High

Courts, other jurisdictions as well. There cannot be any dispute on the fundamental proposition that in the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above, and therefore we have to humbly bow before the views expressed by Hon'ble Courts above. Such a High Court being a non-jurisdictional High Court does not alter the position as laid down by Hon'ble Bombay High Court in the matter of CIT vs. Godavari Devi Saraf ([1978) 113 ITR 589 (Bom)] and as analysed by a coordinate bench of this Tribunal in the case of ACIT Vs Aurangabad Holiday Resorts Pvt Ltd [(2009) 118 ITD 1 (Pune)].

3. Urvi Chirag Sheth vs. ITO (ITAT Ahmedabad)

I.T.A. No.: 630/Ahd/16

DATE: May 31, 2016 (Date of pronouncement)

DATE: July 4, 2016 (Date of publication)

S. 56(2)(vii)/ 145A: Interest awarded on compensation for personal disability does not have the character of "income" and cannot be taxed. CBDT requested to issue instructions to mitigate hardship of accident victims

As we part with the matter, we must say that, as fellow citizens, we are deeply anguished to take note of the long journey that the assessee had to undertake to get her dues and then to fight this unjust income tax demand on her. In order to ensure that others do not have to tread the same arduous path- at least with respect to the tax demand, and to bring an element of certainty, we would suggest that the Central Board of Direct Taxes may as well take a conscious call on issuing appropriate administrative instructions in this regard and ensuring that what was brought as a measure of relief to the taxpayers is not used, by the field officers, as a source of taxation. Such a step certainly cannot mitigate the pain of an accident victim but it can probably help in ensuring that hardships of the accident victim are not further compounded, and that's the least that a responsive tax administration, like the one we fortunately have at present, can do.

See Also Tamil Nadu State Transport Corporation (Salem) Ltd vs. Chinnadurai(Madras High Court)

4. Jitendra Chandralal Navlani vs. UOI (Bombay High Court)

WRIT PETITION NO. 1069 OF 2016

DATE: June 8, 2016 (Date of pronouncement)

DATE: July 28, 2016 (Date of publication)

S. 148 notice issued to, and reassessment order passed on, a non-existing entity is without jurisdiction. A writ petition can be entertained despite the presence of alternate remedy

Normally we would not have entertained a petition as an alternative remedy to file an appeal is available to the petitioners. However, prima facie, the impugned notice has been issued in respect of a non existing entity as M/s. Addler Security Systems Pvt. Ltd., which stands dissolved, having been struck off the Rolls of the Registrar of Companies much before its issue. Consequently, the assessment has been framed also in respect of the non-existing entity. This defect in issuing a reopening notice to a non-existing company and framing an assessment consequent thereto is a issue which goes to the root of the jurisdiction of the Assessing Officer to assess the non-existing company. Thus, prima facie, both the impugned notice dated 24th March, 2015 and the Assessment Order dated 28th March, 2016, are without jurisdiction.

5. Westlife Development Ltd vs. Pr. CIT (ITAT Mumbai)

I.T.A. No. 688 /Mum/2016

DATE: June 10, 2016 (Date of pronouncement)

DATE: June 28, 2016 (Date of publication)

S. 263: In challenging the validity of a s. 263 revision order, the validity of the underlying s. 143(3) assessment order which is sought to be revised can be examined even if the said assessment order has not been challenged and has become final. If the assessment order is passed on a non-existent entity, the revision order is void

(i) There is no doubt that after passing of the original assessment order, the primary (i.e. original proceedings) had come to an end and attained finality and, therefore, outcome of the same cannot be disturbed, and therefore, the original assessment order framed to conclude the primary proceedings had also attained finality and it also cannot be disturbed at the instance of the assessee, except as permitted under the law and by following the due process of law. Under these circumstances, it can be said that effect of the original assessment order cannot be erased or modified subsequently. In other words, whatever tax liability had been determined in the original assessment order that had already become final and that cannot be sought to be disturbed by the assessee. But, the issue that arises here is that if the original assessment order is illegal in terms of its jurisdiction or if the same is null & void in the eyes of law on any jurisdictional grounds, then, whether it can give rise to initiation of further proceedings and whether such subsequent proceedings would be valid under the law as contained in Income Tax Act? It has been vehemently argued before us that the subsequent proceedings (i.e. collateral proceedings) derive strength only from the order passed in the original proceedings (i.e. primary proceedings). Thus, if order passed in the original proceedings is itself illegal, then that cannot give rise to valid revision proceedings. Therefore, as per law, the validity of the order passed in the primary (original) proceedings should be allowed to be examined even at the subsequent stages, only for the limited purpose of examining whether the collateral (subsequent) proceedings have been initiated on a valid

legal platform or not and for examining the validity of assumption of jurisdiction to initiate the collateral proceedings. If it is not so allowed, then, it may so happen that though order passed in the original proceedings was illegal and thus order passed in the subsequent proceedings in turn would also be illegal, but in absence of a remedy to contest the same, it may give rise to an 'enforceable' tax liability without authority of law. Therefore, the Courts have taken this view that jurisdictional aspects of the order passed in the primary proceedings can be examined in the collateral proceedings also.

(ii) Whether the impugned assessment order passed u/s 143(3) dated 24-10- 2013 was valid in the eyes of law or a nullity as has been claimed by the assessee on the ground that it was framed in the hands of a non-existing company. Framing of assessment against non-existing entity/person would go to root of matter and was not mere procedural irregularity, but a jurisdictional defect and there could not be any assessment against a dead person.

Thus, apparently, assessment proceedings having been initiated against non-existing company even after amalgamation of Assessee Company with another company were illegal, and thus order passed under such proceedings without jurisdiction and null & void.

(iii) If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the non est assessment order:

The original assessment order passed u/s 143(3) dt 24-10-2013 was null & void in the eyes of law as the same was passed upon a non-existing entity and, therefore, the CIT could not have assumed jurisdiction under the law to make revision of a non est order and, therefore, the impugned order passed u/s 263 by the CIT is also nullity in the eyes of law and therefore the same is hereby quashed.

6. Pr. CIT vs. Atotech India Ltd (P&H High Court)

ITA-347-2015 (O&M)

DATE: November 30, 2016 (Date of pronouncement)

DATE: December 12, 2016 (Date of publication)

S. 271(1)(c) penalty cannot be levied in a case where the assessee has relied on legal opinion of a professional and there is no tax impact i.e. the loss disallowed in year one is allowed set-off in a later year

For the assessment year 2004-2005, the assessee in its return of income sought to set off its income against the brought forward business losses of the earlier years. Proceedings under Section 143 of the Income Tax Act, 1961 were initiated in the course of which the assessee by a letter dated 13.12.2006 claimed the above set off against another head, namely, of unabsorbed depreciation. Admittedly, the tax effect in either case is nil. Further, it is admitted that even if the respondent was permitted to claim the set off against the unabsorbed depreciation, it would have no financial implication for the future. On appeal by the department to the High Court HELD dismissing the appeal:

(i) The decision of the Tribunal that the respondent ought not to be made liable for penalty cannot be said to be perverse or absurd. The Tribunal noted that the respondent had claimed the set off of its business income of Rs. 1.85 crores against the brought forward business losses of the earlier years on the basis of a legal opinion received from a leading firm of Chartered Accountants. The Tribunal found nothing clandestine in the manner in which the opinion was sought. In any event, even our attention was not invited to anything which suggests any malafides either in the obtaining of the opinion or otherwise. Further, the loss was allowed to be carried forward in the assessment year, namely, assessment year 2002-2003. Inter alia, in these circumstances, the Tribunal found as a matter of fact that the letter dated 13.12.2006 was voluntary and not merely because a notice had been issued under Section 143(2) of the Act. This is a perception on the basis of the facts of the case and warrants no interference.

(ii) In these circumstances including in view of the fact that there is no financial implication on account of the change in the basis of the claim, no substantial question of law arises in this case.

7. Torm Shipping India Pvt Ltd vs. ITO (ITAT Mumbai)

I.T.A. No.1272 & 1273/Mum/2013

DATE: October 14, 2016 (Date of pronouncement)

DATE: December 12, 2016 (Date of publication)

S. 147 reopening opens a "Pandora's box" and cannot be done in a casual manner. The reasons cannot be based on mere doubts or with a view to verify basic facts. If the AO takes the view that the income referred to in the reasons has not escaped assessment, he loses jurisdiction to assess other escaped income that comes to his notice during reassessment

(i) The Reasons have been recorded on the basis of mere doubts. There were no bases with the AO to allege that too with the support of any cogent material that impugned income was not included by the assessee in its income offered to tax. Reopening of an assessment is not permitted merely on the basis of some notions or presumptions. Nor it is allowed merely for making verification of some basic facts. There must be existence of some tangible material indicating escapement of income. Then only, an AO is permitted to resort to provisions of reopening contained in sections 147 to 151 of the Act. Because, once an assessment is reopened on valid basis, entire pandara's box is open before the AO. Therefore the AO may then bring to tax not only income escaped from tax which was mentioned in the Reasons

recorded, but also any other escaped income that may come to his notice during the course of reassessment proceedings. Reopening of an assessment attacks and pierces the concept of finality of litigation. Therefore, an invalid reopening done in the casual manner and without following parameters of law may cause undue hardship to the taxpayers. Thus, in view of the aforesaid legal discussion and facts of the case before us, we find that AO's action of continuing with the reassessment proceedings and framing of the impugned reassessment order is contrary to law and facts and, therefore, the same is hereby quashed;

(ii) If in the course of proceedings under section 147 of the Income tax Act, 1961, the Assessing Officer comes to the conclusion that any income chargeable to tax which, according to his "reason to believe" had escaped assessment for any assessment year, did not escape assessment, then the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction to subject to tax any other income chargeable to tax which the Assessing Officer may find to have escaped assessment and which may come to his notice subsequently in the course of proceedings under section 147 (CIT vs. Jet Airways 331 ITR 236 (Bom), ACIT vs. Major Deepak Mehta 344 ITR 641, CIT vs. Shri Ram Singh 306 ITR 340, DCIT vs. Takshila Education Society 378 ITR 520 (Pat), CIT vs. Mohmed Juned Dadani 30 taxmann.com 1(Gujarat), Oriental Bank of Commerce vs. Addl. CIT 49 taxmann.com 485 (Delhi) and Ranbaxy Laboratories Ltd vs. CIT 12 taxmann.com 74 (Delhi) followed)

8. Triune Projects Pvt. Ltd vs. DCIT (Delhi High Court)

ITA 448/2016, CM APPL.26426/2016

DATE: November 22, 2016 (Date of pronouncement)

DATE: December 8, 2016 (Date of publication)

S. 2(42C)/ 50B: The fact that certain assets of the "undertaking" are left out of the sale transaction because it would cause inconvenience for the purchaser does not mean that the transaction is not a "slump sale". To expect a purchaser to buy and pay value for defunct or superfluous assets flies in the face of commercial sense

(i) The sale transaction was reported for a total consideration of Rs.45.83 crores. The sale was for a going concern, which included ongoing service contracts, employment contracts and other tangible assets, and intangible assets such as technical know-how etc. To expect a purchaser to buy and pay value for defunct or superfluous assets flies in the face of commercial sense. Unfortunately, the Revenue's understanding is that in a going concern the buyer is bound to pay good money, transact and purchase bad and irrecoverable debts. Not only does it fly in the face of common and commercial understanding, but it is not even a pre-condition , as is evident from the definition of "undertaking", cited in Explanation (1) to Section 2 (19) (A) of the Act.

(ii) This definition of "undertaking" is what has been engrafted into by reference, under Section 2(42C) of the Act. Therefore, if certain assets or properties are left out because they would cause inconvenience or lead to some kind of a trouble for the purchasing party, it is well within its right to exclude it from the list of assets.

9. Elecon Engineering Co Ltd vs. ACIT (Gujarat High Court)

SPECIAL CIVIL APPLICATION NO. 1641 of 2015

DATE: August 31, 2016 (Date of pronouncement)

DATE: December 8, 2016 (Date of publication)

S. 147: If the AO reopens the assessment on information supplied by the audit party without application of mind, the reopening is invalid. Likewise, if the AO disputes the findings of the audit party, he is not entitled to reopen the assessment. The reasons must show independent application of mind of the AO

(i) Even if one ground succeeds, as in the present case, reopening would have to be permitted. It is in this context, the question of notice of reopening having been issued by the Assessing Officer at the behest of the audit party assumes significance. The law on the point laid down by the Supreme Court in judgement in case of Commissioner of Income-tax v. P.V.S. Beedies Pvt. Ltd. reported in (1999) 237 ITR 13 and in case of Indian and Eastern Newspaper Society v. Commissioner of Income-tax reported in (1979) 119 ITR 996 is well settled. We also have the decision of this Court in case of Adani Exports v. Deputy Commissioner of Income Tax reported in (1999) 240 ITR 224(Guj) on this issue. In case of Indian and Eastern Newspaper Society (supra), the Supreme observed that the opinion of the audit party on a point of law could not be regarded as information enabling the Assessing Officer to initiate reassessment proceedings. This aspect was elaborated by Division Bench judgement of this Court in case of Adani Exports (supra) observing that it is the satisfaction of the Assessing Officer for the purpose of reopening which is subjective in nature but when the reasons recorded show a nexus between the formation of belief and the escapement of income, a further enquiry about the adequacy or sufficient of the material to such a belief is not open to be scrutinised. However, the decision of the Supreme Court would indicate that though audit objection may serve as an information, the basis on which the ITO can act, ultimate action must depend directly and solely on the formation of belief by ITO on his own, where such information passed on to him by the audit party that income has escaped assessment. In the said case, it was held that Assessing Officer had acted at the behest of audit party and that notice for reopening was therefore, bad in law.

(ii) Thus there is clear distinction between a situation where the Assessing Officer acts on information supplied by the audit party and issues a notice for reopening the assessment. In some cases, we have also noticed that the Assessing Officer is himself convinced that the audit objection do not form valid reasons to form a belief that income chargeable to tax has escaped assessment. He nevertheless, issues a notice for reopening clearly indicating compulsion to do so. In such cases, decision in case of Indian and Eastern Newspaper Society (supra) and Adani Exports (supra) would squarely apply. However, situations may also arise where the audit party merely brings to the notice of Assessing Officer, a certain element having relation to the income of the assessee. If the Assessing Officer on the basis of such information forms an independent belief that income chargeable to tax has escaped assessment, there is nothing preventing him from exercising power of reassessment, as was held by the Supreme Court in case of P.V.S. Beedies Pvt. Ltd. (supra) and also noted in judgement in case of Adani Exports (supra).

(iii) It would therefore, be necessary for us to ascertain in which category the present case would fall. The petitioner has been contending from the outset that the entire exercise was undertaken by the Assessing Officer at the instance of audit party. The denials on these aspects by the Assessing Officer while rejecting the objections and in the reply to this petition were rather muted. Instead of therefore, relying on the pleadings, we had called for the original files to satisfy ourselves. We notice that the audit party had raised several objections to the assessment carried out in case of the assessee and these objections were brought to the notice of the Assessing Officer. The file shows that this was followed by the reasons recorded by the Assessing Officer for issuing the notice. If we compare the audit objections and the reasons recorded, we find that the Assessing Officer has included all objections pointed out by the audit party but has also included one more ground namely, of the escaped capital gain on sale of land by the petitioner to Shri Ashwin Kumar B. Patel. This ground was not part of the audit objection. In our opinion, this would indicate that the Assessing Officer had independently applied his mind and formed a belief that on the grounds mentioned by the audit party in its objection letter and additional ground which is recorded in the reasons, the income chargeable to tax in case of assessee had escaped assessment.

10. <u>IndiaBulls Financial Services Ltd vs. DCIT (Delhi High Court)</u>

<u>ITA 470/2016</u>

DATE: November 21, 2016 (Date of pronouncement)

DATE: December 6, 2016 (Date of publication)

S. 14A Rule 8D: The fact that the AO did not expressly record his dissatisfaction with the assessee's working does not mean that he cannot make the disallowance. The AO need not pay lip service and formally record dissatisfaction. It is sufficient if the order shows due application of mind to all aspects

Undoubtedly, the language of Section 14A presupposes that the AO has to adduce some reasons if he is not satisfied with the amount offered by way of disallowance by the assessee. At the same time Section 14A (2) as indeed Rule 8D(i) leave the AO equally with no choice in the matter inasmuch as the statute in both these provisions mandates that the particular methodology enacted should be followed. In other words, the AO is under a mandate to apply the formulae as it were under Rule 8D because of Section 14A(2). If in a given case, therefore, the AO is confronted with a figure which, prima facie, is not in accord with what should approximately be the figure on a fair working out of the provisions, he is but bound to reject it. In such circumstances the AO ordinarily would express his opinion by rejecting the disallowance offered and then proceed to work out the methodology enacted.

In this instance the elaborate analysis carried out by the AO – as indeed the three important steps indicated by him in the order, shows that all these elements were present in his mind, that he did not expressly record his dissatisfaction in these circumstances, would not per se justify this Court in concluding that he was not satisfied or did not record cogent reasons for his dissatisfaction to reject the AO's conclusion. To insist that the AO should pay such lip service regardless of the substantial compliance with the provisions would, in fact, destroy the mandate of Section 14A.

Having regard to these facts, this Court is satisfied that the disallowance which is otherwise in accord with Rule 8D(c) was justified. No substantial question of law arises. The appeal is dismissed.

11. <u>Ashok Prapann Sharma vs. CIT (Supreme Court)</u>

<u>CIVIL APPEAL NO. 2314/2007</u>

DATE: November 24, 2016 (Date of pronouncement)

DATE: November 30, 2016 (Date of publication)

S. 55(2): In determining the cost of acquisition as on 01.04.1974 (or 01.04.1981), the value declared in the wealth-tax return as well as the comparable sales, even if later in point of time, have to be considered. The High Court should not interfere with findings of fact, unless palpably incorrect

The Assessee was subjected to payment of income-tax on capital gains accruing from land acquisition compensation and sale of land. The dispute arose as to how the cost of acquisition is to be worked out for the purposes of deduction of such cost from the receipts so as to arrive at the correct quantum of capital gains exigible to tax under the Income-Tax Act, 1961 (for short "the Act"). The Assessing Officer as well as the First Appellate Authority took into account the declaration made in the return filed by the Assessee under the Wealth Tax Act (Rs.2 per square yard) in respect of the very plot

of land as the cost of acquisition. Some instances of comparable sales showing higher value at which such transactions were made (Rs.70/- per square yard) were also laid by the Assessee before the Assessing Officer. The same were not accepted on the ground that such sales were subsequent in point of time i.e. 1978-1979 whereas under Section 55(2) of the Act the crucial date for determination of the cost of acquisition is 1st April, 1974. The Tribunal took the view that the comparable sales cannot altogether be ignored. Therefore, though the comparable sales were at a higher value of Rs.70/- per square yard, the learned Tribunal thought it proper to determine the cost of acquisition at Rs.50/- per square yard. In Second Appeal, the High Court exercising jurisdiction under Section 260A of the Act reversed the said finding bringing the Assessee to this Court by way of present appeal. On appeal to the Supreme Court HELD reversing the High Court:

A declaration in the return filed by the Assessee under the Wealth Tax Act would certainly be a relevant fact for determination of the cost of acquisition which under Section 55(2) of the Act to be determined by a determination of fair market value. Equally relevant for the purposes of aforesaid determination would be the comparable sales though slightly subsequent in point of time for which appropriate adjustments can be made as had been made by the learned Tribunal (from Rs.70/- per square yard to Rs.50/- per square yard). Comparable sales, if otherwise genuine and proved, cannot be shunted out from the process of consideration of relevant materials. The same had been taken into account by the learned Tribunal which is the last fact finding authority under the Act. Unless such cognizance was palpably incorrect and, therefore, perverse, the High Court should not have interfered with the order of the Tribunal. The order of the High Court overlooks the aforesaid severe limitation on the exercise of jurisdiction under Section 260A of the Act.

12. Krishna Enterprises vs. ACIT (ITAT Mumbai)

ITA No.5402/Mum/2014

DATE: November 23, 2016 (Date of pronouncement)

DATE: November 26, 2016 (Date of publication)

S. 50C: If the difference between the sale consideration of the property shown by the assessee and the FMV determined by the DVO u/s 50C(2) is less than 10%, the AO is not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee. Unregistered sale agreements prior to 01.10.2009 are not subject to s. 50C as per CBDT Circular No.5/10 dated 03.06.2010

(i) The assessee sold certain flats during the year under consideration and also executed sale agreements for the same. The sale agreements were not registered, therefore, it was not possible to determine the stamp duty value as per provisions of Section 50C. However, the AO referred the matter to the DVO, who valued the four flats at Rs.2,07,51,130/- against declared sale consideration of Rs.1,96,,60,000/- by the assessee. Thus, there was a difference of Rs.10,91,130/- which amounts to approximately 5.5% of the amount actually declared as the sale consideration.

(ii) Circular No.5/10 dated 03/06/2010 reads as under:-

"*The existing provisions of section 5OC provide that where the consideration received or accruing as a result of the transfer of a capital asset, being land or building or both, is less than the value adopted or assessed by an authority of a State Government (stamp valuation authority) for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of consideration received or accruing as a result of such transfer for computing capital gain. However, the present scope of the provisions does not include transactions which are not registered with stamp duty valuation authority, and executed through agreement to sell or power of attorney*."

(iii) Thus, these amendments have been made applicable with effect from 1st October, 2009 and will accordingly apply in relation to transactions undertaken on or after such date. In the instant case, the transactions were entered during the financial year 2006-2007 i.e., 1st April 2006 to 31st March 2007 which is prior to 01/10/2009. Therefore, as per CBDT, circular provisions of Section 50C are not applicable in so far as sales deed so executed were not registered with the Stamp Duty Violation Authority.

(iii) We are also inclined to agree with learned AR Mr. Shashank Dandu that in view of the decision of Co-ordinate Bench in case of Rahul Constructions vs. DCIT (Pune) (Trib.) 38 DTR 19 (2010) ITA No.1543/Pn/2007 since the difference between the sale consideration of the property shown by the assessee and the FMV determined by the DVO under Section 50C(2) being less than 10 per cent, AO was not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee.

(iv) We are also in agreement with learned AR that decision of Madras High Court in case of Sugantha Ravindran 353 ITR 488 is squarely applicable to the facts of the instant case where it has been held that since transfer was made prior to the amendment of Section 50C w.e.f. 1/10/2009, the provisions of section 50C would not be applicable.

(v) It was also argued by learned AR that the unregistered property was sold on 07/08/2006 which means, since the unregistered property was sold before the clarification was issued under Circular No.5/2010 dated 03/06/2010 where it clearly states that the scope of the provisions do not include transactions which are not registered with stamp duty valuation authority, and executed through

agreement to sell or power of attorney and hence the provisions of Section 50C will not be attracted since the sale is before 01/10/2009, which is the date on which the circular becomes applicable.

13. Royal Rich Developers Pvt. Ltd vs. DCIT (ITAT Mumbai)

I.T.A. No. 1835& 1836 /Mum/2014

DATE: August 24, 2016 (Date of pronouncement)

DATE: November 14, 2016 (Date of publication)

Bogus share capital: Interplay between s. 56(2)(viib) and s. 68 explained. Amendment to s. 68 casting onus on assessee and requiring it to explain source of source of share subscription is clarificatory and retrospective. Law in Lovely Exports 299 ITR 268, Sophia Finance 205 ITR 98 etc does not apply as they are prior to the Money Laundering Act 2002

(i) There are companies which are widely held companies in which public are substantially interested which comes out with an initial public offers wherein shares are listed on stock exchanges and widely traded , wherein members of public make subscriptions in pursuance to the Prospectus issued by the company . Issue of shares in these cases to general public in India as well abroad are approved, regulated and monitored by various authorities who are engaged in regulating and managing securities market such as Securities and Exchange Board of India (SEBI), Stock Exchanges, Government of India etc. These members of public who make subscription are widely scattered all over the country or even outside India as any person entitle to apply as per the conditions prescribed in the prospectus can place an application subscribing to the shares of the company by depositing duly filled in application along with application money with the designated authorized recipients of the company stipulated in the prospectus such as bankers, brokers, under-writers, merchant bankers, company offices etc. These shareholders who are member of public are un-known persons to the company issuing shares and the company issuing shares have no control/mechanism to verify their creditworthiness etc. and the burden of proof in such cases is different , but there is another class of companies which are closely held companies in which public are not substantially interested who are mostly family controlled closely held companies and they raise their share capital from their family members, relatives and friends and in these companies since share capital is received from the close knit circles who are mostly known to the company/promoters, the onus as required u/s 68 of the Act is very heavy to prove identity and capacity of the shareholders and genuineness of the transaction. The onus of widely held company could be discharged on the submissions of all the information contained in the statutory share application documents and on not being satisfied the AO may proceed against the shareholders u/s 69 of the Act instead of proceeding against the company, but in the closely held companies as in the instant case the share capital are mostly raised from family, close relatives and friends and the assessee is expected to know the share subscribers and the burden is very heavy on the assessee to satisfy cumulatively the ingredients of Section 68 of the Act as to identity and establish the credit worthiness of the creditors and genuineness of the transaction to the satisfaction of the AO , otherwise the AO shall be free to proceed against the assessee company and make additions u/s 68 of the Act as unexplained cash credit. The use of the word 'any sum found credited in the books ' in Section 68 indicates that it is widely worded and the AO can make enquiries as to the nature and source thereof. The AO can go to enquire/investigate into truthfulness of the assertion of the assessee regarding the nature and the source of the credit in its books of accounts and in case the AO is not satisfied with the explanation of the assessee with respect to establishing identity and credit worthiness of the creditor and the genuineness of the transactions, the AO is empowered to make additions to the income of the assessee u/s 68 of the Act as an unexplained credit in the hands of the assessee company raising the share capital because the AO is both an investigator and adjudicator. In our considered view, merely submission of the name and address of the share subscriber, income tax returns, Balance Sheet/statement of affairs of the share subscriber and bank statement of the share subscriber is not sufficient as the AO is to be satisfied as to their identity and creditworthiness as well as to the genuineness of the transaction entered into. The share holders in this instant case did not appear before the AO at the instance of the assessee as well in pursuance to the summons u/s 131 of the Act issued by the AO and thus, the onus shifts back to the assessee to produce the shareholders before the AO and if the assessee falters the additions can be made u/s 68 of the Act.. The Hon'ble Supreme Court dealt with this issue in A. Govindarajulu Mudaliar v. CIT (1958) 34 ITR 807(SC). In the instant case, we have noted that at first the assessee raised the bogey in appellate proceedings before the learned CIT(A) that the AO in assessment proceedings has not given adequate and proper opportunity to the assessee to produce the shareholder but when adequate , proper and sufficient opportunity was afforded to the assessee in remand proceedings by the AO to produce the shareholders, the assessee failed to produce them despite sufficient , proper and adequate opportunity granted by the AO. The shareholder also did not appear before the AO even on being summoned by the AO directly u/s 131 of the Act. Section 68 of the Act has been amended by Finance Act, 2012 w.e.f. 01-04-2013 whereby the onus is cast upon the assessee company to justify the sources of share subscription including share premium raised, to explain the source of the source of raising the share subscription. Thus, Section 68 of the Act has been amended by insertion of proviso casting the onus on the assessee company to

explain the source of source of raising share subscription which has been held to be clarificatory in nature and hence retrospective by the decision of the **Kolkata Tribunal in the case of Subhlakshmi Vanijya (P.) Ltd.**

(ii) We fail to find out any parallel between the amendments made to section 68 and section 56(2)(viib) except for the fact that these provisions have been added by the Finance Act, 2012. A conjoint reading of proviso to section 68 and section 56(2)(viib) divulges that where a closely held company receives, inter alia, some amount as share premium whose genuineness is not proved by the assessee company or its source etc. is not proved by the shareholder to the satisfaction of the AO, then the entire amount including the fair market value of the shares, is chargeable to tax u/s 68 of the Act. If however, the genuineness of the amount is proved and the shareholder also proves his source, then the hurdle of section 68 stands crossed and the share premium, to the extent stipulated, is chargeable to tax u/s 56(2)(viib) of the Act. It shows that only when source of such share premium in the hands of a shareholder is properly explained to the satisfaction of the AO, that the provisions of section 56(2)(viib) gets triggered. Approaching this section pre-supposes that the assessee genuinely received share premium from the share-holder having satisfactorily explained the transaction. Thus it is evident that sections 68 and 56(2)(viib) can never simultaneously operate. The later excludes the former and vice versa. Consequently, we are unable to accept the contention of the ld. AR that the proviso to section 68 attached a new obligation and hence should be declared as prospective. It is axiomatic that proving genuineness of a transaction of any credit, including share capital, was always an essential constituent of section 68. Since section 68 covers 'any sum credited' in the books without any exception, which, inter alia, includes share capital, it cannot be held that the examination of share capital with premium etc. was earlier outside the ambit of section 68 and now this amendment has brought it into its purview. We have noted it from several judgments dealing with share capital in pre-amendment period and the Memorandum explaining the provisions that proving the genuineness of share capital etc. by a company has always been considered a necessary requirement to escape the magnetization of section 68. The amendment has simply made express which was earlier implied. We, therefore, hold that though amendment to section 56(2)(viib) is prospective, but to section 68 is prospective. If that is the position, then the assessee is always obliged to prove the receipt of share capital with premium etc. to the satisfaction of the AO, failure of which calls for addition u/s 68.

(iii) Thus, it is for the assessee to explain the creditworthiness of the share subscribers and genuineness of the transaction including the source of source. The AO wanted to examine the share subscribers to go to bottom of the truth to find out the real nature of the transaction in order to verify genuineness of the transaction and to verify credit worthiness of the share subscribers that how persons with meager known sources of income and assets have invested huge amount of share money in the assessee company and that too at a huge premium. **In the instant case, the business of the assessee is non-existent nor there is any project initiated by the assessee which could warrant justification and rationale for such a huge premium and consequentially investment of such a magnitude vis-à-vis reported and known sources of income and assets of the share subscribers. No rational person with sound mind will invest such a huge amount in the share subscription of a paper/shell company having no worthwhile business/project in hand at such a huge premium and it was for the assessee to have brought on record cogent material to prove the genuineness of the transaction as well credit worthiness of the share subscribers. The assessee scuttled the investigation launched by the AO wherein no share subscriber appeared before the AO during the assessment and remand proceedings even at assessee behest when the AO called the assessee to produce the shareholders , nor the shareholder appeared in pursuance to summons issued by the AO u/s 131 of the Act directly to these shareholders. The contentions of the assessee that the AO did not gave proper and adequate opportunity to the assessee to produce share subscribers during assessment proceedings are merely hollow words and such a plea is nothing but an attempt to thwart and delay justice . In any case adequate, proper and sufficient opportunity was given to the assessee to produce share subscriber in remand proceedings. The heavy onus was on the assessee to prove the genuineness of the transaction and the reasons for collecting the premium at Rs. 30/- per share as against the face value of the shares of Rs 10 per share wherein the assessee company was merely a paper/shell company having no business/known project in hand.** The assessee is not able to demonstrate the reasons and justification for charging of Rs. 30/- premium per share as against the face value of Rs. 10 per share and during the course of search and survey action on 30-05-2008 and post enquiries, the two Directors namely Mr Vinod K Faria and Suresh V Faria of the assessee company have admitted in statement recorded on oath that these share subscription entries are accommodation entries and are bogus transactions whereby cash is paid in lieu of share subscription. It is not shown and brought on record that these statements recorded on oath were retracted by the Directors of the assessee at any stage of proceeding till now. The Director of the Company Mr. Vinod K. Faria in statement recorded u/s 132(4) of the Act on 31-05-2008 surrendered Rs. 10 crores over and above regular

income recorded in the books of accounts maintained by the assessee and one of the grounds for the surrender of Rs. 10 crores was that the assessee company will not be able to prove the genuineness of the share capital of Rs.5.5 crores (both in AY 2006-07 and 2007-08) raised by the assessee company to the satisfaction of the AO.

(iv) We are of the considered view that the onus is on the assessee company to bring on record the cogent evidences to prove the identity and creditworthiness of the share subscribers and genuineness of the transaction which in the instant case the assessee is not able to prove the same as per the facts emerging from the records and material before us as set out above and in our considered view in the instant case the transactions were nominal rather than real . The creditworthiness of the shareholders is not proved because they did not had their own money as every cheque/draft issued in 62 ITA 1835 & 1836/Mum/2014 favour of the assessee is preceded by deposit of cash/cheque in the bank account of the shareholder and these share holders are merely name lenders. The genuineness of the transactions is also not proved as to how such a huge sum of money got invested by the share subscribers and that too at a huge premium when the company was merely a paper/shell company having no business/project worth in its hand. The shareholders could not be interrogated by the AO which was essential to unearth the truth as the assessee did not produced the shareholders nor they appeared before the AO in response to summons issued u/s 131 of the Act. The Directors namely Mr. Vinod K Faria and Mr Suresh V. Faria of the assessee company have admitted in their statement recorded on oath u/s 132(4)/131 of the Act that these share subscription was bogus and were merely accommodation entries. The blank transfer forms and receipts from the shareholders were found during survey with respect to transfer of these shares from shareholders to the persons to be nominated by the promoters, all the share application forms were filled in the same handwriting, there was no serial numbers in share application form, the acknowledgment of receipt of share application forms were not given to the share subscribers by the assessee and these are not usual conduct of the carrying on of business. Under these circumstances keeping in view of cumulative reasons and summation of our discussions as set out above, we are of the considered view that the Revenue has rightly made the addition of Rs.1.60 crores received as share subscription as unexplained cash credit u/s. 68 of the Act which we sustained and we do not found any infirmity in the orders of the learned CIT(A) which we sustain/upheld.

(Subhalakshmi Vanijya Private Limited v. CIT (2015) 60 taxmann.com 60(Kol. Trib) and Rajmandir Estates Private Limited v Pr. CIT (2016) 70 taxmann.com 124(Cal.HC) followed.)

14. Woodward Governor (India) Ltd vs. ACIT (Delhi High Court)

W.P.(C) 16902/2004

DATE: October 5, 2016 (Date of pronouncement)

DATE: November 1, 2016 (Date of publication)

S. 147: Even if the claim for s. 80-IA deduction is contrary to Pandian Chemicals 262 ITR 278 (SC) and Liberty India 317 ITR 218 (SC), the assessment cannot be reopened (beyond 4 years) in the absence of tangible material. The reasons recorded for the reopening cannot be improved or supplemented later

(i) The revenue in support of the reassessment notice urges that the failure of the petitioner to indicate the break-up of income that arose on account of commission and interest on fixed deposits empowers it to proceed under Section 147. It is submitted that in any event, the materials on record originally disclosed to the revenue at the time of completion of assessment, do not give the appropriate break up; more significantly the AO did not make diligent enquiries in that regard. It is urged that the two heads of Income sought to be passed off as deductions and clubbed with the receipts that are legitimately admissible under Section 80-IA, are contrary to the declaration of law by the Supreme Court in Pandian Chemicals Ltd. Vs. CIT reported in 262 ITR 278 SC and Liberty India vs. CIT (2009) 317 ITR 218 SC.

(ii) The counsel for the petitioner urges that the so-called opinion or "reasons to believe" leading to the re-assessment, nowhere indicate any objective material much less tangible material in that impelled the AO to revisit a concluded issue. It is urged that the rationale for re-opening is utterly inaccurate because during the course of assessment proceedings, full disclosure including the break-up of income was in fact made.

(iii) It is evident from a plain reading of the reasons furnished by the revenue that there is no allusion to tangible material in the form of objective documents, information etc outside of the concluded assessment and the documents pertaining to it. According to the binding ruling of the Supreme Court in Commissioner of Income Tax vs. Kelvinator Ltd. 320 ITR 561, sans such documents, evidence or tangible material, there cannot be valid opinion leading to proper re-assessment proceedings.

(iv) The rationale furnished by the revenue in its counter affidavit and reiterated in the court during the hearing was that a component of income which was otherwise inadmissible but escaped the notice of the AO, because of the ratio in Liberty India and Pandian (supra) is unpersuasive. Besides, the lack of any reference to objective material, cannot in any way improve the case of the revenue – much less its reference to otherwise binding judgments that could have been the basis of a valid revision by the revenue under Section 264. **It goes without saying that statutory orders containing reasons are to be judged on the basis of what is apparent and not what is explained later, as the**

validity of those orders does not improve with time or on account of better explanations furnished in the course of legal proceedings (refer M.S. Gill and Anr. vs. Chief Election Commissioner AIR 1978 SC 581).

B. KOLKATA ITAT DECISIONS

(Download full text fm www.itat.nic.in)

1. ITO vs. M/s. Raj Kumar Suresh Kumar Jaiswal [I.T.A Nos.

128 to 133/kol/2013]

ITO vs. M/s. Raj Kumar Jaiswal [I.T.A Nos. 134 to 139/kol/2013]

ITAT, "C" Bench, Kolkata; Order Dated : 09.11.2016

Section 206C :

Held :

(i) Where scrap purchased by the assessee is segregated and some useful separate products are obtained and when such separate products are sold – No obligation for collecting TCS.

(ii) Proviso to S. 206C(6) – It is *pari materia* to second proviso to S. 40a(ia) – the ratio laid down by DHC in Ansal Landmark Township (about retrospectivity) will apply.

2. Shri Mukul Dutta vs. ITO

[I.T.A No. 486/Kol/2015]

ITAT, "D" Bench, Kolkata; Order Dated : 16.11.2016

Held :

Contractual receipts not disclosed in the books cannot be taxed fully – only net profit percent can be added back. Department has to prove that expenses relating to such income has been debited in the books.

3. Shri Suraj Sonar vs. ACIT [IT (SS) A. No. 132/Kol/2014]

Smt. Mina Sonar vs. ACIT [IT (SS) A.No.133/Kol/2014]

Shri Bharat Sonar, HUF vs. ACIT[IT (SS)A.No. 134/Kol/2014]

Shri Bharat Sonar vs. ACIT [IT (SS) A. No. 135/Kol/2014]

ITAT, "C" Bench, Kolkata; Order Dated: 09.11.2016

Held :

(i) Once substantive assessment is confirmed, protective addition cannot be sustained.

(ii) Assessed income can go below the returned income depending upon facts and circumstances.

4. DCIT Vs. VEDA COMMERCIAL PVT. LTD. & VICE VERSA

I.T.A. No. 1064/Kol/2010; C.O. No. 153/Kol/2010 & I.T.A No. 1064/Kol/2010

ITAT, "A" Bench, Kolkata; Order Dated : 16.11.2016

Capital Gains vs. Stock-in-Trade

Held :

Assessee dealt in 185 companies' shares but assessee held the shares as investment, received decent dividend, Board Resolution was passed, no borrowed funds were taken and revenue accepted holdings as investment in earlier years u/s. 143(1) – Surplus to be treated as Capital Gains.

5. ACIT vs. M/s. Winro Commercial (India) Ltd. [ITA No. 1468/Kol/2012]

DCIT vs. M/s. Winro Commercial (India) Ltd. [ITA No. 804/Kol/2013]

M/s. Winro Commercial (India) Ltd. vs. CIT-1 [ITA No. 1590/Kol/2013]

ITAT, "B" Bench, Kolkata; Order Dated :21.07.2016

S. 14A R.W Rule 8D :

Held :

Where the CIT(A) gave relief on the ground that borrowed funds were utilized for giving loans and not for acquiring shares and the capital of the appellant including share capital and reserves and surplus exceeded the amount of investment in shares & units and CIT(A) held that the case of Dhanuka & sons 339 ITR 319(Cal) is distinguishable on these facts and he finally deleted additions made u/s. 14A r.w. Rule 8D, there is no mistake in the order of CIT(A) and the same cannot be interfered with.

DIRECT TAX – RECENT CIRCULARS, NOTIFICATIONS AND PRESS RELEASES

CA Aditi Anand

RECENT CIRCULARS

1. **Circular No. 35 / 2016 dated 13th October, 2016**

   Applicability of TDS provisions of section 194 – I of the Income Tax Act, 1961 on lump sum lease premium paid for acquisition of long term lease

   Lump Sum lease premium or one time upfront lease charges, which are not adjustable against periodic rent, paid or payable for acquisition of long term leasehold rights over land or any other property are not payments in the nature of rent within the meaning of Section 194 I of the Income Tax Act, 1961. Therefore, such payments are not liable for TDS Deduction under Section 194 I of the Income Tax Act, 1961.

2. **Circular No. 36 / 2016 dated 25th October, 2016**

   Taxability of the compensation received by the land owners for the land acquired under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (RECTLAAR Act)

   Compensation received in respect of award or agreement which has been exempted from levy of income tax vide section 96 of the RECTLAAR Act shall also not be taxable under the provisions of the Income Tax Act, 1961 even if there is no specific provision of exemption for such compensation in the Income Tax Act, 1961. The clarification is provided in light of the fact that exemption provided under section 96 of the RFCTLARR Act is wider in scope than the tax-exemption provided under the existing provisions of Income Tax Act, 1961.

3. **Circular No. 37 / 2016 dated 2nd November, 2016**

   Chapter VI-A deduction on enhanced profits

   Disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Income Tax Act, 1961 and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance.

4. **Circular No. 38 / 2016 dated 22nd November, 2016**

   Admissibility of expenditure incurred by a firm on Keyman Insurance Policy in the case of a Partner

   In case of a firm, premium paid by the firm on the Keyman Insurance Policy of a partner, to safeguard the firm against a disruption of the business, is an admissible expenditure under section 37 of the Income Tax Act, 1961.

5. **Circular No. 39 / 2016 dated 29th November, 2016**

   Transport, Power and Interest subsidies received by an Industrial Undertaking- Eligibility for deduction under sections 80-IB, 80-IC etc., of the Income Tax Act, 1961

   Revenue subsidies received from the Government towards reimbursement of cost of production / manufacture or for sale of the manufactured goods are part of profits and gains of business derived from the Industrial Undertaking /eligible business, and are thus, admissible for applicable deduction under Chapter VI-A of the Income Tax Act, 1961.

6. **Circular No. 40 / 2016 dated 9th December, 2016**

   Directions under section 119 of the Income Tax Act, 1961

   Reopening of cases u/s 147 of the Income Tax Act, 1961 is feasible only when the Assessing Officer "has reason to believe that any income chargeable to tax has escaped assessment for any assessment year" and not merely on the basis of any reason to suspect. Mere increase in turnover, because of use of digital means of payment or otherwise, in a particular year cannot be a sole reason to believe that income has escaped assessment in earlier years. The clarification has been issued in light of increased turnover resulting from augmented digital payments after announcement of the scheme of Demonetisation.

RECENT NOTIFICATIONS

1. **Notification No. 89 / 2016 dated 4th October, 2016**

   Insertion of New Rule 6A in the Income Tax Rules, 1962 with regard to expenditure for obtaining right to use spectrum for telecommunication services.

2. **Notification No. 90 / 2016 dated 5th October, 2016**

   Insertion of Rule 129 and introduction of Form 68A as prescribed by Section 270AA(2) of the Income Tax Act, 1961. Form to be used to make application to the Assessing Officer for grant of immunity from imposition of Penalty under section 270A and initiation of proceedings U/s 276C and 276CC of the Income Tax Act, 1961.

3. **Notification No. 91 / 2016 dated 6th October, 2016**

   Rules 114D [prescribing time and manner in which persons referred to in Rule 114C of the Income Tax Rules 1962 shall furnish a statement prescribed in Form 60] and 114E [Furnishing of statement of financial transaction as prescribed by sub section (1) of section 285 BA of the Act in Form 61A] of the Income Tax Rules, 1961 amended via the Income Tax (26th Amendment) Rules, 2016.

4. **Notification No. 92 / 2016 dated 7th October, 2016**

   Rule 17CA amended via Income Tax (27th Amendment) Rules, 2016 to provide that Electoral Trusts are not to accept contributions from a Government Company and a Foreign Source.

5. **Notification No. 93 / 2016 dated 14th October, 2016**

   Conditions for demerger in case of reconstruction or splitting up of a company which has ceased to be a public sector company as a result of transfer of its shares by the Central Government, into separate companies notified under Explanation 5 to Section 2(19AA) of the Income Tax Act, 1961.

6. **Notification No. 94 / 2016 dated 17th October, 2016**

   Rule 40BB introduced via Income Tax (27th Amendment) Rules, 2016 to provide for special provisions relating to tax on distributed income of Domestic Company for Buy Back of Shares. Rule lays down the method to be adopted for determination of amount received by the Company in respect of issue of shares which are the subject of Buy Back

7. **Notification No. 95 / 2016 dated 19th October, 2016**

   Director, Vigilance and Anti – Corruption Bureau, Kerala notified for the purpose of sub clause (ii) of clause (a) of sub section (1) of Section 138 of the Income Tax Act, 1961.

8. **Notification No. 96 / 2016 dated 24th October, 2016**

   Agreement between the Government of the Republic of India and the Government of the Republic of Korea for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income notified by repealing Notification No. GSR 111(E), dated 26th September, 1986.

9. **Notification No. 97 /2016 dated 25th October, 2016**

   Notification of the Adjudicating Authority and Appellate Tribunal under the Prohibition of Benami Property Transactions Act, 1988 effective from 1st November, 2016.

10. **Notification No. 98 / 2016 dated 25th October, 2016**

    1st November, 2016 appointed as the day when provisions the Benami Transaction (Prohibition) Amendment Act, 2016 (43 of 2016) shall come into force.

11. **Notification No. 99 /2016 dated 25th October, 2016**

    Prohibition of Benami Property Transaction Rules, 2016 prescribed for the purpose of Prohibition of Benami Property Transactions Act, 1988.

12. **Notification No. 100 / 2016 dated 25thOctober, 2016**

    Notifies Income Tax authoritiesunder Prohibition of Benami Property Transactions Act, 1988.A Joint / Additional Commissioner of Income-tax, an Assistant / Deputy Commissioner of Income-tax and a Tax Recovery Officer in each Pr. CCIT Region have been notified to perform the functions and exercise the powers of the Approving Authority, Initiating Officer and Administrator, respectively under the PBPT Act.

13. **Notification No. 101 / 2016 dated 27th October, 2016**

    Notification of Bihar Electricity Regulatory Commission, a body constituted by the State Government of Bihar, in respect of exemption granted with regard to the specified income arising to the Commission for the purpose of Section 10(46) of the Income Tax Act, 1961.**Notification No. 102 / 2016 dated 28th October, 2016**

    Agreement between the Government of the Republic of India and the Government of Japan for the avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to taxes on Income by amending Notification No. GSR 101(E) dated 1st March, 1990.

14. **Notification No. 103 / 2016 dated 7th November, 2016**

    Amendment in Rule 5 and New Appendix 1 of the Income Tax Rules, 1962 vide the Income Tax (29th Amendment) Rules, 2016 restricting depreciation allowance to 40% in case of domestic companies

opting for concessional taxation under the newly inserted section 115BA of the Income Tax Act, 1961.

15. Notification No. 104 / 2016 dated 15th November, 2016

Amendment in Rule 114B and 114E of the Income tax Rules, 1962 vide the Income Tax (30th Amendment) Rules, 2016 specifying limit for deposit of Cash without PAN and issuing direction to Banks for submission of Information for deposit of cash in excess of the specified limit for the period from 9th November, 2016 to 30th December, 2016.

16. Notification No. 105 / 2016 dated 16th November, 2016

Insertion of Rule 12E vide Income Tax (31st Amendment) Rules, 2016 prescribing income tax authority not below the rank of an Income Tax Officer as the Authority empowered toissue notice under sub section (2) of section 143 of the Income Tax Act, 1961.

17. Notification No. 106 / 2016 dated 21st November, 2016

Amendment in Rule 10V [Guidelines for application of Section 9A of the Income Tax Act, 1961] of the Income Tax Rules, 1962 vide Income Tax (32nd Amendment) Rules, 2016 with respect to business connection of offshore funds. The notification offers relaxations to meet the eligibility norms vis-a-vis fund and fund manager being an unconnected person. It also excludes fixed fees from the ambit of cap of 20 percent placed on profit sharing.

18. Notification No. 107 /2016 dated 28th November, 2016

Insertion of Rule 12CC vide Income Tax (33rd Amendment) Rules, 2016 for the purpose of furnishing of statement under sub section (4) of section 115TCA of the Income Tax Act, 1961. Notification of format in Form 64E for furnishing of statement of income paid or credited by a Securitisation Trust and Form 64F for furnishing of statement of income distributed by a Securtitisation Trust to the investor for the purpose of sub rule (2) of Rule 12CC.

19. Notification No. 108 /2016 dated 29th November, 2016

Amendment in Rule 8AA of the Income Tax Rules, 1962 vide Income Tax (34th Amendment) Rules 2016 notifying method of determination of period of holding of capital assets declared under the Income Declaration Scheme, 2016.

20. Notification No. 109 / 2016 dated 1st December, 2016

Notification of Chandigarh Building and Other Construction Workers Welfare Board, a board constituted by the Administrator, Union Territory, Chandigargh, in respect of exemption granted with regard to the specified income arising to the Board for the purpose of Section 10(46) of the Income Tax Act, 1961.

21. Notification No. 110 / 2016 dated 1stDecember, 2016

Notification of Maharashtra Electricity Regulatory Commission, a commission constituted by the State Government of Maharashtra in respect of exemption granted with regard to the specified income arising to the Commission for the purpose of Section 10(46) of the Income Tax Act, 1961.

22. Notification No. 111 / 2016 dated 1st December, 2016

Notification of Bureau of Indian Standards (BIS) set up by the Bureau of Indian Standards Act, 1986 (63 of 1986) in respect of exemption granted with regard to the specified income arising to the Bureau for the purpose of Section 10(46) of the Income Tax Act, 1961.

23. Notification No. 112 / 2016 dated 7th December, 2016

Notification of Petroleum and Natural Gas Regulatory Board, a Board constituted by the Government of India in respect of exemption granted with regard to the specified income arising to the Board for the purpose of Section 10(46) of the Income Tax Act, 1961.

24. Notification No. 113 / 2016 dated 8th December, 2016

Corrigendum to Notification No. 97 / 2016 dated 25th October, 2016. Specification of the Adjudicating Authority under the Prohibition of Benami Property Transactions Act, 1988 effective from 1st November, 2016.

25. Notification No. 114 / 2016 dated 14th December, 2016

Rescinds Notification No. 86 / 2013 dated 1st November, 2013 which had notified Cyprus as notified jurisdictional area for the purpose of Section 94A of the Income Tax Act, 1961.

26. Notification No. 11 /2016 [F.No.DGIT(S)/ CPC(TDS)/Notification/2016-17] dated 2nd December, 2016

Procedure for furnishing and verification of Form 26A for removal of default of Short Deduction and / or Non Deduction of Tax at Source.

27. Notification No. 12 /2016 [F.No.DGIT(S)/CPC(TDS)/Notification/2016-17] dated 8th December, 2016

Procedure for the purpose of furnishing and verification of Form 27BA for removal of default of Short Collection and / or Non Collection of Tax at Source.

RECENT PRESS RELEASES BY THE CENTRAL BOARD OF DIRECT TAXES

1. Press Release dated 25th October, 2016 – DraftRules for Prescribing the method of valuation of fair market value in respect of the Trust or the institution-Chapter XII-EB of the Income-tax Act, 1961

The Finance Act, 2016, inter alia, inserted a new Chapter XII-EB consisting of sections 115TD, 115TE and 115TF in the Income-tax Act, 1961 (the Act). This chapter contains specific provisions relating to levy of additional income-tax where the charitable institution exempt under the Act ceases to exist as charitable organization or converts into a non-charitable organization. Sub-section (2) of newly inserted section 115TD provides that the accreted income for the purposes of sub-section (1) thereof means the amount by which the aggregate fair market value of the total assets of the trust or the institution, as on the specified date, exceeds the total liability of such trust or institution computed in accordance with the method of valuation as may be prescribed. In this regard, draft rules providing for the method of valuation of fair market valuehad been formulated and uploaded on the Department of Revenue's website for comments from stakeholders and general public till 31st October, 2016.

2. Press Release dated 26th October, 2016 – Notification of Revised Double Taxation Avoidance Agreement (DTAA) between India and Republic of Korea

Double Taxation Avoidance Convention between India and Korea was signed on 19th July, 1985 and was notified on 26th September 1986. A revised DTAA between India and Korea for the Avoidance of Double Taxation and the Prevention of Fiscal evasion with respect to taxes on income which was signed on 18th May 2015 andentered into force on 12th September 2016, on completion of procedural requirements by both countries. Provisions of new DTAA will have effect in India in respect of income derived in fiscal years beginning on or after 1st April, 2017.

3. Press Release dated 28th October, 2016 – Prohibition of Benami Property Transactions Act, 1988

Benami Property Transactions Act, 1988 has been amended by the Benami Transactions (Prohibition) Amendment Act, 2016 (BTP Amendment Act). The rules and all the provisions of the BTP Amendment Act shall come into force on 1st November, 2016.The PBPT Act defines benami transactions, prohibits them and further provides that violation of the PBPT Act is punishable with imprisonment and fine. The PBPT Act prohibits recovery of the property held benami from benamidar by the real owner. Properties held benami are liable for confiscation by the Government without payment of compensation.An appellate mechanism has been provided under the PBPT Act in the form of Adjudicating Authority and Appellate Tribunal.A Joint / Additional Commissioner of Income-tax, an Assistant / Deputy Commissioner of Income-tax and a Tax Recovery Officer in each Pr. CCIT Region have been notified to perform the functions and exercise the powers of the Approving Authority, Initiating Officer and Administrator, respectively under the PBPT Act.

4. Press Release dated 1st November, 2016 – Joining of Shri Sushil Chandra as Chairman, Central Board of Direct Taxes

Shri Sushil Chandra, IRS 1980 batch has joined as Chairman, Central Board of Direct Taxes on 1st November, 2016. He has been Member (Investigation) in CBDT since December, 2015 and has handled many prestigious assignments like the Principal Chief Commissioner & Director General of Income Tax at Ahmedabad, Commissioner of Income Tax (Central) & Director of Income Tax (Investigation) at Mumbai among others.

5. Press Release dated 9th November, 2016 – Notification of Protocol amending the Double Taxation Amending Convention (DTAC) between India and Japan

The Protocol amending the DTAC between India and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal evasion with respect to taxes on income signed on 11th December, 2015 entered into force on 29th October, 2016 on completion of procedural requirements by both countries. The Protocol provides for internationally accepted standards for effective exchange of information on tax matters including bank information and information without domestic tax interest. The Protocol provides for exemption of interest income from taxation in the source country with respect to debt-claims insured by the Government/Government owned financial institutions. The Protocol inserts a new article on

assistance in collection of taxes.

6. Press Release dated 17th November, 2016 – Transactions in relation to which quoting PAN is mandatory

In addition to the existing requirement of quoting of PAN in respect of cash deposits in excess of Rupees fifty thousand in a day specified in Rule 114B of the Income Tax Rules, 1962 quoting of PAN will now also be mandatory in respect of cash deposits aggregating to Rupees two lakh fifty thousand or more during the period 9th November, 2016 to 30th December, 2016 as per an amendment notified by CBDT on 15th November, 2016.The persons requiring a PAN for complying with the above requirement may do so by applying to the NSDL in a prescribed format with the necessary documentary proof.

7. Press Release dated 17th November, 2016 – India India–USA Bilateral Competent Authority MAP/APA Meeting – Resolution of more than 100 cases under MAP and Agreement on terms and conditions of First ever Bilateral APA involving India and USA.

The Bilateral Competent Authority Mutual Agreement Procedure (MAP) / Advance Pricing Agreement (APA) meeting between India and USA held in Washington DC, USA during the last week of October, 2016 focussed on resolving MAP cases pending for a long time and to achieve significant developments in Bilateral APA Process. 66 MAP cases relating to Transfer Pricing issues and 42 MAP cases relating to Treaty Interpretation issues were agreed to be resolved successfully. The total amount locked up in dispute in these cases was approximately Rs.5,000 Crore and the cases pertained to Assessment Years ranging from AY 1999-2000 to AY 2011-12. An agreement on the terms and conditions of the first ever Bilateral APA involving India and USA was also reached.

8. Press Release dated 18th November, 2016 – Signing of Bilateral Advance Pricing Agreements

The CBDT signed 3 bilateral APAs on 18th November, 2016 taking the total number of APAs signed [both-bilateral and unilateral] so far to 111.The agreements cover international transactions in the nature of payment of intra-group service charges and pertain to the telecom industry. They also have a roll-back provision.

9. Press Release dated 18th November, 2016 – Signing of Revised Double Taxation Avoidance Agreement between India and Cyprus

A revised Agreement between India and Cyprus for the Avoidance of Double Taxation and the Prevention of Fiscal evasion (DTAA) with respect to taxes on income, along with its Protocol, was signed on 18th November, 2016 in Nicosia, which will replace the existing DTAA that was signed by two countries on 13th June 1994.New DTAA provides for source based taxation of capital gains arising from alienation of shares, instead of residence based taxation provided under the existing DTAA. However, a grandfathering clause has been provided for investments made prior to 1st April, 2017, in respect of which capital gains would continue to be taxed in the country of which taxpayer is a resident.

10. Press Release dated 22nd November, 2016 – Signing of 'Joint Declaration' by India and Switzerland for the implementation of Automatic Exchange of Information (AEOI) between the two countries

Joint Declaration between the representatives of India and Switzerland was signed on 22nd November, 2016 for the implementation of Automatic Exchange of Information. As a result, it will now be possible for India to receive from September, 2019 onwards, the financial information of accounts held by Indian residents in Switzerland for 2018 and subsequent years, on an automatic basis.

11. Press Release dated 23rd November, 2016 – Signing of Four Unilateral Advance Pricing Agreements by CBDT

The Central Board of Direct Taxes (CBDT) has entered into four more unilateral Advance Pricing Agreements (APAs) on 22nd and 23rd November, 2016. Some of these agreements also have a "Rollback" provision in them. The four APAs signed over the last two days pertain to various sectors of the economy like pharmaceuticals, Information Technology and construction. The international transactions covered in these agreements include software development Services, IT enabled Services (BPOs), Engineering Design Services, Contract R&D Services and Marketing Support Services.

12. Press Release dated 1st December, 2016 – Clarifications with respect of Gold Jewellery under Income Tax Law

It has been clarified that there is no limit on holding of gold jewellery or ornaments by anybody provided it is acquired from explained sources of income including inheritance. Instructions have been issued in the matter of search and seizure of gold jewellery vide Circular dated 11th May 1994. Jewellery and ornaments to the extent of 500 gms.

for married lady, 250 gms. for unmarried lady and 100 gm for male member will not be seized, even if prima facie, it does not seem to be matching with the income record of the assesse.Officer conducting search has discretion not to seize even higher quantity of gold jewellery based on factors including family customs and traditions.

13. Press Release dated 1st December, 2016 – Taxation Laws (Second Amendment) Bill, 2016

It is hereby clarified that the Taxation Laws (Second Amendment) Bill, 2016 has not introduced any new provision regarding chargeability of tax on jewellery. The Bill only seeks to enhance the applicable tax rate under section 115BBE of the Income-tax Act, 1961 (the Act) from existing 30% to 60% plus surcharge of 25% and cess thereon. This section only provides rate of tax to be charged in case of unexplained investment in assets. The chargeability of these assets as income is governed by the provisions of section 69, 69A & 69B which are part of the Act since 1960s. The provisions of section 115BBE apply mainly in those cases where assets or cash etc. are sought to be declared as 'unexplained cash or asset' or where it is hidden as unsubstantiated business income, and the Assessing Officer detects it as such. It is clarified that the jewellery/gold purchased out of disclosed income or out of exempted income like agricultural income or out of reasonable household savings or legally inherited which has been acquired out of explained sources is neither chargeable to tax under the existing provisions nor under the proposed amended provisions.

14. Press Release dated 14th December, 2016 – Filing of Revised Income Tax Returns by Tax Payers post De – Monetisation of Currency

It has been clarified that the provision to file a revised return of income u/s 139(5) of the Act has been stipulated for revising any omission or wrong statement made in the original return of income and not for resorting to make changes in the income initially declared so as to drastically alter the form, substance and quantum of the earlier disclosed income. Instances of revision of Income Ta Return for manipulating the figures of income, cash-in-hand, profits etc. with an intention to show the current year's undisclosed income (including the unaccounted income held in the form of demonetized currency in current year) in the earlier return may necessitate scrutiny of such cases so as to ascertain the correct income of the year and may also attract penalty/prosecution in appropriate cases as per provisions of law.

रजिस्ट्री सं॰ डी॰ एल॰—(एन)04/0007/2003—16 REGISTERED NO. DL—(N)04/0007/2003—16

भारत का राजपत्र
The Gazette of India

असाधारण
EXTRAORDINARY
भाग II — खण्ड 1
PART II — Section 1
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PUBLISHED BY AUTHORITY

सं॰ 57] नई दिल्ली, बृहस्पतिवार, दिसम्बर 15, 2016/ अग्रहायण 24, 1938 (शक)
No. 57] NEW DELHI, THURSDAY, DECEMBER 15, 2016/AGRAHAYANA 24, 1938 (SAKA)

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, Thursday, 15*th December,* 2016*/Agrahayana* 24, 1938 *(Saka)*

The following Act of Parliament received the assent of the President on the 15th December, 2016, and is hereby published for general information:—

THE TAXATION LAWS (SECOND AMENDMENT) ACT, 2016

(No. 48 of 2016)

[15*th December*, 2016.]

An Act further to amend the Income-tax Act, 1961 and the Finance Act, 2016.

Be it enacted by Parliament in the Sixty-seventh Year of the Republic of India as follows:—

CHAPTER I
Preliminary

Short title and commencement.

1. (*1*) This Act may be called the Taxation Laws (Second Amendment) Act, 2016.

(*2*) Save as otherwise provided in this Act, it shall come into force at once.

CHAPTER II
Income-tax

Amendment of section 115BBE.

43 of 1961.

2. In the Income-tax Act, 1961 (hereinafter referred to as the Income-tax Act), in section 115BBE, for sub-section (*1*), the following sub-section shall be substituted with effect from the 1st day of April, 2017, namely:—

"(*1*) Where the total income of an assessee,—

(*a*) includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or

(*b*) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (*a*),

the income-tax payable shall be the aggregate of—

(*i*) the amount of income-tax calculated on the income referred to in clause (*a*) and clause (*b*), at the rate of sixty per cent.; and

(*ii*) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (*i*).".

Amendment of section 271AAB.

3. In the Income-tax Act, in section 271AAB,—

(*I*) in sub-section (*1*), after the words, figures and letters "the 1st day of July, 2012", the words, brackets and figures "but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President" shall be inserted;

(*II*) after sub-section (*1*), the following sub-section shall be inserted, namely:—

"(*1A*) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,—

(*a*) a sum computed at the rate of thirty per cent. of the undisclosed income of the specified previous year, if the assessee—

(*i*) in the course of the search, in a statement under sub-section (*4*) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(*ii*) substantiates the manner in which the undisclosed income was derived; and

(*iii*) on or before the specified date—

(*A*) pays the tax, together with interest, if any, in respect of the undisclosed income; and

(*B*) furnishes the return of income for the specified previous year declaring such undisclosed income therein;

(*b*) a sum computed at the rate of sixty per cent. of the undisclosed income of the specified previous year, if it is not covered under the provisions of clause (*a*).";

(*III*) in sub-section (*2*), after the words, brackets and figure "in sub-section (*1*)", the words, brackets, figure and letter "or sub-section (*1A*)" shall be inserted.

Insertion of new section 271AAC.

4. In the Income-tax Act, after section 271AAB, the following section shall be inserted with effect from the 1st day of April, 2017, namely:—

Penalty in respect of certain income.

"271AAC. (*1*) The Assessing Officer may, notwithstanding anything contained in this Act other than the provisions of section 271AAB, direct that, in a case where the income determined includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D for any previous year, the assessee shall pay by way of penalty, in addition to tax payable under section 115BBE, a sum computed at the rate of ten per cent. of the tax payable under clause (*i*) of sub-section (*1*) of section 115BBE:

Provided that no penalty shall be levied in respect of income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D to the extent such income has been included by the assessee in the return of income

furnished under section 139 and the tax in accordance with the provisions of clause (*i*) of sub-section (*1*) of section 115BBE has been paid on or before the end of the relevant previous year.

(*2*) No penalty under the provisions of section 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (*1*).

(*3*) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.".

CHAPTER III

FINANCE ACT

28 of 2016.

5. In the Finance Act, 2016,— Amendment of section 2.

(*a*) in Chapter II, in section 2, in sub-section (*9*),—

(*i*) in the third proviso, the figures and letters "115BBE," shall be omitted;

(*ii*) after the sixth proviso, the following proviso shall be inserted, namely:—

'Provided also that in respect of any income chargeable to tax under clause (*i*) of sub-section (*1*) of section 115BBE of the Income-tax Act, the "advance tax" computed under the first proviso shall be increased by a surcharge, for the purposes of the Union, calculated at the rate of twenty-five per cent. of such advance tax.';

(*b*) after Chapter IX, the following Chapter shall be inserted, namely:— Insertion of new Chapter IX A.

'CHAPTER IXA

TAXATION AND INVESTMENT REGIME FOR *PRADHAN MANTRI GARIB KALYAN YOJANA*, 2016

199A. (*1*) This Scheme may be called the Taxation and Investment Regime for *Pradhan Mantri Garib Kalyan Yojana*, 2016. Short title and commencement.

(*2*) It shall come into force on such date as the Central Government may, by notification, in the Official Gazette, appoint.

199B. In this Scheme, unless the context otherwise requires,— Definitions.

(*a*) "declarant" means a person making the declaration under sub-section (*1*) of section 199C;

43 of 1961.

(*b*) "Income-tax Act" means the Income-tax Act, 1961;

(*c*) "*Pradhan Mantri Garib Kalyan* Deposit Scheme, 2016" (hereinafter in this Chapter referred to as "the Deposit Scheme") means a scheme notified by the Central Government in consultation with the Reserve Bank of India in the Official Gazette; and

(*d*) all other words and expressions used in this Scheme but not defined and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.

199C. (*1*) Subject to the provisions of this Scheme, any person may make, on or after the date of commencement of this Scheme but on or before a date to be notified by the Central Government in the Official Gazette, a declaration in respect of any income, in the form of cash or deposit in an account maintained by the person with a specified entity, chargeable to tax under the Income-tax Act for any assessment year commencing on or before the 1st day of April, 2017. Declaration of undisclosed income.

(*2*) No deduction in respect of any expenditure or allowance or set-off of any loss shall be allowed against the income in respect of which a declaration under sub-section (*1*) is made.

Explanation.— For the purposes of this section, "specified entity" shall mean—

(*i*) the Reserve Bank of India;

(*ii*) any banking company or co-operative bank, to which the Banking Regulation Act, 1949 applies (including any bank or banking institution referred to in section 51 of that Act); 10 of 1949.

(*iii*) any Head Post Office or Sub-Post Office; and

(*iv*) any other entity as may be notified by the Central Government in the Official Gazette in this behalf.

Charge of tax and surcharge.

199D. (*1*) Notwithstanding anything contained in the Income-tax Act or in any Finance Act, the undisclosed income declared under sub-section (*1*) of section 199C within the time specified therein shall be chargeable to tax at the rate of thirty per cent. of the undisclosed income.

(*2*) The amount of tax chargeable under sub-section (*1*) shall be increased by a surcharge, for the purposes of the Union, to be called the *Pradhan Mantri Garib Kalyan* Cess calculated at the rate of thirty-three per cent. of such tax so as to fulfil the commitment of the Government for the welfare of the economically weaker sections of the society.

Penalty.

199E. Notwithstanding anything contained in the Income-tax Act or in any Finance Act, the person making a declaration under sub-section (*1*) of section 199C shall, in addition to tax and surcharge charged under section 199D, be liable to pay penalty at the rate of ten per cent. of the undisclosed income.

Deposit of undisclosed income.

199F. (*1*) Notwithstanding anything contained in the Income-tax Act or in any other law for the time being in force, the person making a declaration under sub-section (*1*) of section 199C, shall deposit an amount which shall not be less than twenty-five per cent. of the undisclosed income in the *Pradhan Mantri Garib Kalyan* Deposit Scheme, 2016.

(*2*) The deposit shall bear no interest and the amount deposited shall be allowed to be withdrawn after four years from the date of deposit and shall also fulfil such other conditions as may be specified in the *Pradhan Mantri Garib Kalyan* Deposit Scheme, 2016.

Manner of declaration.

199G. A declaration under sub-section (*1*) of section 199C shall be made by a person competent to verify the return of income under section 140 of the Income-tax Act, to the Principal Commissioner or the Commissioner notified in the Official Gazette for this purpose and shall be in such form and verified in such manner, as may be prescribed.

Time for payment of tax, penalty, surcharge and deposit.

199H. (*1*) The tax and surcharge payable under section 199D and penalty payable under section 199E in respect of the undisclosed income, shall be paid before filing of declaration under sub-section (*1*) of section 199C.

(*2*) The amount referred to in sub-section (*1*) of section 199F shall be deposited before the filing of declaration under sub-section (*1*) of section 199C.

(*3*) The declaration under sub-section (*1*) of section 199C shall be accompanied by the proof of deposit referred to in sub-section (*1*) of section 199F, payment of tax, surcharge and penalty under section 199D and section 199E, respectively.

Undisclosed income declared not to be included in total income.

199-I. The amount of undisclosed income declared in accordance with sub-section (*1*) of section 199C shall not be included in the total income of the declarant for any assessment year under the Income-tax Act.

Undisclosed income declared not to affect finality of completed assessments.

199J. A declarant under this Scheme shall not be entitled, in respect of undisclosed income referred to in section 199C or any amount of tax and surcharge paid thereon, to re-open any assessment or reassessment made under the Income-tax Act or the Wealth-tax Act, 1957, or to claim any set-off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment. 27 of 1957.

Tax, etc., not refundable.

199K. Any amount of tax and surcharge paid under section 199D or penalty paid under section 199E shall not be refundable.

Declaration not admissible in evidence against declarant.

199L. Nothwithstanding anything contained in any other law for the time being in force, nothing contained in any declaration made under sub-section (*1*) of section 199C shall be admissible in evidence against the declarant for the purpose of any proceeding under any Act other than the Acts mentioned in section 199-O.

Declaration by misrepresentation of facts to be void.

199M. Notwithstanding anything contained in this Scheme, where a declaration has been made by misrepresentation or suppression of facts or without payment of tax and surcharge under section 199D or penalty under section 199E or without depositing the amount in the Deposit Scheme as per the provisions of section 199F, such declaration shall be void and shall be deemed never to have been made under this Scheme.

Applicability of certain provisions of Income-tax Act.

199N. The provisions of Chapter XV of the Income-tax Act relating to liability in special cases and of section 119, section 138 and section 189 of that Act shall, so far as may be, apply in relation to proceedings under this Scheme as they apply in relation to proceedings under the Income-tax Act.

Scheme not to apply to certain persons.

199-O. The provisions of this Scheme shall not apply—

(*a*) in relation to any person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:

52 of 1974.

Provided that—

(*i*) such order of detention, being an order to which the provisions of section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the report of the Advisory Board; or

(*ii*) such order of detention, being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (*3*) of section 9, or on the report of the Advisory Board under section 8, read with sub-section (*2*) of section 9, of the said Act; or

(*iii*) such order of detention, being an order to which the provisions of section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (*3*) of that section, or on the basis of the report of the Advisory Board under section 8, read with sub-section (*6*) of section 12A, of the said Act; or

(*iv*) such order of detention has not been set aside by a court of competent jurisdiction;

(*b*) in relation to prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Unlawful Activities (Prevention) Act, 1967, the Prevention of Corruption Act, 1988, the Prohibition of *Benami* Property Transactions Act, 1988 and the Prevention of Money-Laundering Act, 2002;

45 of 1860.
61 of 1985.
37 of 1967.
49 of 1988.
45 of 1988.
15 of 2003.

(*c*) to any person notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992;

27 of 1992.

(*d*) in relation to any undisclosed foreign income and asset which is chargeable to tax under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

22 of 2015.

Removal of doubts.

199P. For the removal of doubts, it is hereby declared that save as otherwise expressely provided in sub-section (*1*) of section 199C, nothing contained in this Scheme shall be construed as conferring any benefit, concession or immunity on any person other than the person making the declaration under this Scheme.

Power to remove difficulties.

199Q. (*1*) If any difficulty arises in giving effect to the provisions of this Scheme, the Central Government may, by order, not inconsistent with the provisions of this Scheme, remove the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date on which the provisions of this Scheme come into force.

(*2*) Every order made under this section shall be laid before each House of Parliament.

Power to make rules.

199R. (*1*) The Board may, subject to the control of the Central Government, by notification in the Official Gazette, make rules for carrying out the provisions of this Scheme.

(*2*) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the form and manner of declaration and verification to be made under section 199G; and

(*b*) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules.

(*3*) Every rule made under this Scheme shall be laid, as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.'.

———

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

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GMGIPMRND—3952GI(S3)—15-12-2016.

DECODING REGISTRATION PROVISONS OF THE REVISED MODEL GST LAW

CA Ayush Vimal

Registration provisions under GST are enshrined in Chapter VI and Schedule V of the Revised Model GST Law (hereinafter referred to as the "Act") released by the GST Council in November, 2016. The aim of this article is to deal with provisions of the draft law with regard to registration of new assessees and not migration of existing assessees into the GST Regime.

For the purpose of gaining an insight into the registration provisions, it would be convenient to divide persons into the following 3 categories:

Category I – Persons not liable to Registration:

- Any person engaged exclusively in the business of supplying goods and/or services that are not liable to tax or are wholly exempt from tax under the Act
- An agriculturist, for the purpose of agriculture

Category II – Persons requiring Compulsory Registration:

- Person making any inter-state taxable supply
- Casual taxable person or Non-Resident taxable person
- Persons liable to pay tax under reverse charge
- Electronic Commerce Operator or his representative in India
- Persons liable to deduct TDS
- Persons liable to collect TCS
- Persons supplying goods on behalf of other taxable persons as an agent or in any other capacity
- Input Service Distributor
- Persons making supplies through an electronic commerce operator required to collect TCS
- Persons supplying Online Information and Database Access or Retrieval Services from abroad to an unregistered person in India
- Other persons or classes of persons as may be notified.

Category III – Person not covered in Category I or Category II:

Such person shall be liable to be registered if his 'aggregate turnover' in a financial year exceeds twenty lakh rupees (ten lakh rupees in case of Special Category States).

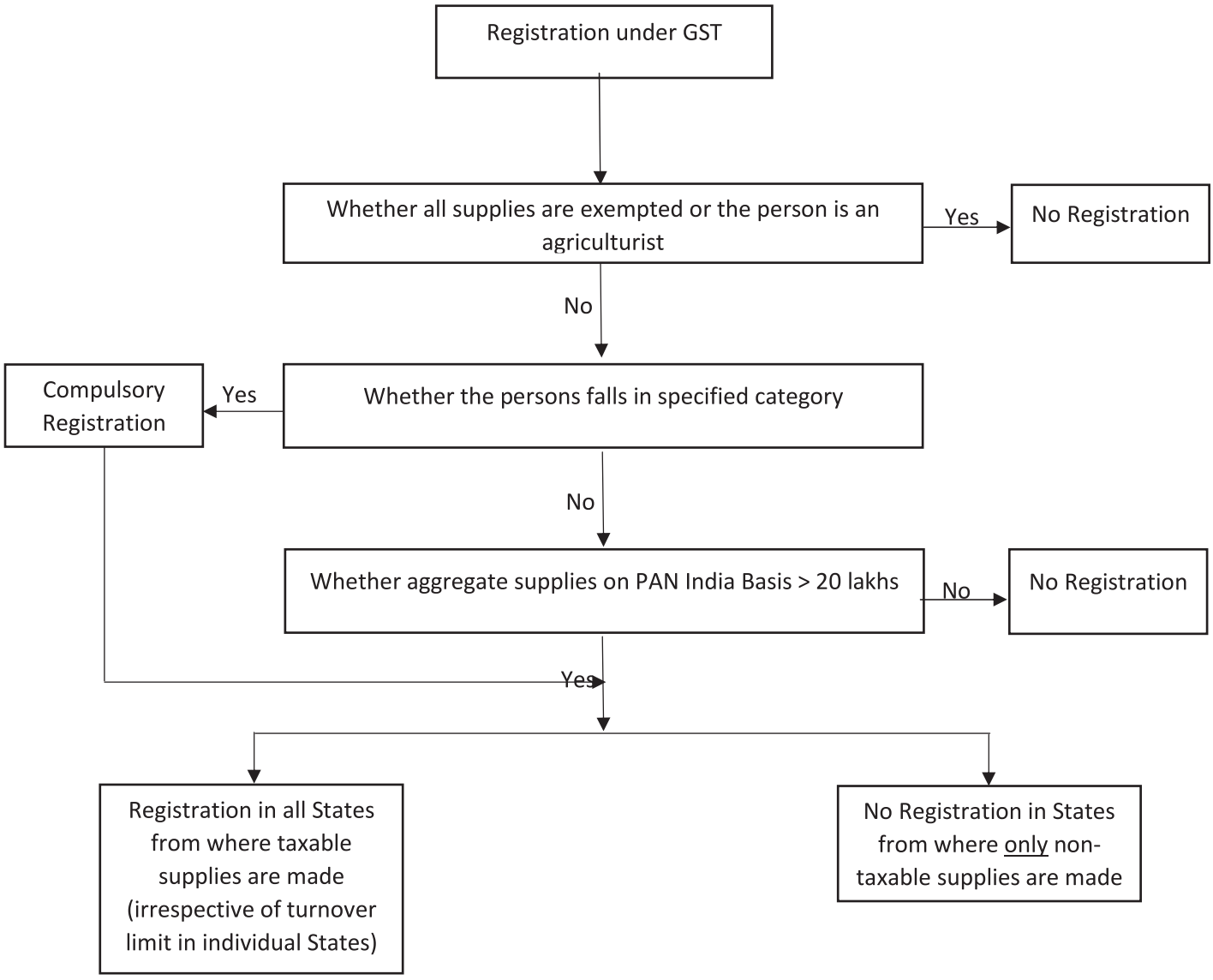
'Aggregate Turnover' as defined in Section 2(7) read with Schedule V of the Act means aggregate value of all:

- Taxable Supplies
- Exempt Supplies
- Export of Goods and/or Services
- Inter-state supplies
- Supplies made on behalf of all principals
- Supplies made by a job-worker on behalf of a principal exercising the option given in Section 55 of the Act of a person having the same PAN and to be computed on all India basis but excludes:
- Tax charged under the Act
- Value of Inward Supplies on which tax is payable on reverse charge basis.

The manner in which registration is to be obtained in individual states by a person crossing the threshold of 'aggregate turnover' on all India basis is as under:

- Registration in all states from where a taxable supply is made irrespective of the turnover in individual states
- No registration required in states from where only non-taxable / exempt supplies are made

The criteria for determining when to take registration can be diagrammatically represented as under:



It is pertinent to note that the Act also allows assessees to obtain more than one registration in a state if they have multiple business verticals in the state. Business vertical, in this context, is defined as a:

- distinguishable component of an enterprise
- engaged in supplying an individual product or service or a group of related products or services
- subject to risks and returns that are different from those of other business verticals

However, obtaining separate registration for every business vertical within a state is optional for the assessee.

Illustration A –Mr. X, a manufacturer has factories in West Bengal, Gujarat & Maharashtra. The issue as to whether registration is required to be taken by him may be analysed under various scenarios. Turnover given represents local sales in each scenario unless otherwise mentioned.

Scenario I –

State	Turnover (Rs. in lakhs)		
	Taxable	Exempt	Total
West Bengal	15	-	15
Gujarat	1	4	5
Maharashtra	1	-	1
Total	17	4	21

Conclusion – Since, the aggregate turnover has crossed the threshold limit of Rs 20 lakhs, registration will have to be obtained in West Bengal, Gujarat & Maharashtra.

Scenario II –

State	Turnover (Rs. in lakhs)			Remarks
	Taxable	Exempt	Total	
West Bengal	-	5	5	
Gujarat	2	5	7	
Maharashtra	1	-	1	Taxable turnover is inter-state stock transfer
Total	3	10	13	

Conclusion – Since stock transfer is an inter-state supply, Mr X is compulsorily required to register himself although his aggregate turnover falls below the overall threshold limit. Mr X will have to obtain registration in Maharashtra and Gujarat only since he is not providing taxable services from West Bengal.

Scenario III –

State	Turnover (Rs. in lakhs)		
	Taxable	Exempt	Total
West Bengal	-	55	55
Gujarat	-	1	1
Maharashtra	-	1	1
Total	-	57	57

Conclusion – Since all supplies are exempted, Mr X will not have to obtain registration even though his aggregate turnover has crossed the overall threshold limit.

Scenario IV –

State	Turnover (Rs. in lakhs)		
	Taxable	Exempt	Total
West Bengal	-	55	55
Gujarat	-	1	1
Maharashtra	1	1	2
Total	1	57	58

Conclusion –Since, the aggregate turnover has crossed the threshold limit of Rs 20 lakhs, registration will have to be obtained. Mr X will have to obtain registration only in the state of Maharashtra since no taxable supplies are being made from West Bengal & Gujarat.

Illustration B – A Chartered Accountancy firm having taxable turnover of Rs. 30 lakhs on PAN India basis has branches in Delhi, Mumbai & Chennai. The Head Office is located in Kolkata. Services are being rendered from the HO as well as the branches. At present, the firm is having Centralised Service Tax Registration. How will the position change under GST ?

Answer – Since, the overall turnover of the firm is above the threshold limit of Rs. 20 lakhs and taxable services are being rendered from the branches as well as the head office, the firm will have to obtain separate registrations under GST for each of its 4 offices. Moreover, invoices and accounting records will also have to be maintained separately for each of the 4 offices in respect of the services rendered by them. Consequently, compliances under GST relating to filing of returnsand payment of tax will also have to be separately made by each office.

The above illustration is a classic example of the impact that GST will have on service providers having Centralized Service Tax Registration. A Chartered Accountancy firm which is accustomed to filing 2 service tax returns in every financial year will now be forced to file a total of 37 returns for every state in which it is registered.

The concept of state-wise registration will particularly impact banking companies and financial institutions. At present, it is generally observed that banks have a system of centralized invoicing and accounting inspite of having a presence in almost all states of the country. This is owing to the fact that banks are required to file various returns with the Reserve Bank of India on a periodic basis containing information of all its branches.

However, under GST, such banks and financial institutions will be required to take registrations in all the states in which they have a presence. This would result in these institutions often obtaining registration in all 29 states of the country resulting in increased compliance burden. This may present a significant problem as employees of the bank in various small states may also not be technically competentto deal with Tax Authorities and handle periodic assessments / audits. Decentralizing control may result in the bank taking varying positions in common taxation issues across the country. This may also lead to avoidable litigation. Further, handling the litigations at the state level would also be a mammoth task.

Section 23(3) of the Act, provides an assessee with the option of voluntarily obtaining registration even when he is not liable for registrationunder the Act. The inevitable question that arises out of this provision is whether it is indeed beneficial for a small assessee to obtain registration even when he is not liable to do so.

The advantages of obtaining registration under GST are significant from a business perspective even for small assessees. By virtue of obtaining registration, an assessee comes within the GST credit chain. He is eligible to take credit of tax charged on all supplies made to him. He is also eligible to issue tax invoices, thereby allowing his customer to take credit of taxes charged by him. Thus, cost of the final product sold by an assessee registered under GST is lower as compared to that sold by an unregistered dealer. It may be therefore beneficial for assessees to register under GST even when they are not compulsorily required to do so under the Act in order to remain competitive in the market. However, one needs to weigh this advantage against the cost of compliance which will increase significantly under GST.

CREDIT MECHANISM UNDER MODEL GST

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FCA, LLB Advocate

Relevance of credit mechanism under indirect tax laws:

Credit mechanism (initially called Modvat credit scheme which later became Cenvat credit scheme under Central laws and Input Tax credit under State VAT laws) was introduced with an objective to streamline the process of payment of duty and to prevent the cascading effect. The Apex Court in Ichalkaranji Machine Centre's case[1] observed that credit mechanism is basically a duty-collecting procedure, which aims at allowing relief to a manufacturer on the duty element borne by him in respect of the inputs used by him.

With introduction of tax on services, in 1994, the service tax credit mechanism was introduced in the year 2002. Though this scheme was similar to that of Cenvat scheme, it was limited only to credit on input service used in providing taxable output services. In the year 2004, new set of rules called Cenvat Credit Rules, 2004 was introduced wherein Manufacturer and service providers were allowed to avail and utilise credit on inputs, inputs services and capital goods. Similarly on introduction of Value Added Tax (VAT) in the place of sales tax in 2005, the VAT laws also provided for input tax deduction which is restricted to deduction of taxes paid under the said state tax laws alone.

Goods and Service Tax :

In order to streamline and consolidate the Indirect Tax regime in India, Central Government proposes to introduce a comprehensive and a common indirect tax in the form of Goods and Services Tax (GST). For this purpose, Constitutional amendment has been made vide 101st Constitutional Amendment Act, 2016 with effect from 16th September 2016. The idea is to have a dual GST, wherein both the Centre (CGST) as well as state (SGST) would levy and collect tax on same transaction. Interstate supply as well as import of goods and services would get levied to Integrated GST (IGST), which is levied and collected by Union but would be distributed to states. GST proposed would be a value added tax in the sense that an assessee in effect would be liable to pay tax on the value addition made by him on the supply of goods or service. This would be achieved through credit mechanism.

Credit mechanism under Model GST law :

Input credit and restrictions

Section 16 of the Model GST law (herein after referred to as 'GST law') provides that a registered dealer shall be entitled to take credit of input tax charged on supply of goods him which are used or intended to be used in the course or furtherance of his business. The phrase input tax in relation to a taxable person, means the GST (IGST, including that on import of goods, CGST and SGST) charged on any supply of goods or services to him and includes the tax payable under as recipient in terms of Section 8(3) of GST law.

The definitions of terms 'capital goods', 'input' and 'input service' have revised and with unified condition that all goods and services which are used in the course of furtherance of business would get covered therein. In order to be termed as 'capital goods', the requirement of 'capitalised in the books of account' has been inserted.

It is to be noted that though the Section 16 is wide in scope which allows availment of input tax on all goods or services used in the course or furtherance of business, section 17(4) lists out certain supplies under restrictive category, on which no credit would be allowed. The said list is summarized below:

a) Motor Vehicles / other conveyances except when used for,
   i) Further supply of such vehicles
   ii) Transportation of passengers
   iii) Imparting training on driving etc.
   iv) Transportation of goods
b) Goods and / or services provided in relation to food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, except for making such outward supply of same category of goods or services

[1] 2004 (174) E.L.T. 417 (S.C.)

c) Membership of a club, health and fitness centre,

d) Rent a cab, life insurance, health insurance except where government notifies the services which are obligatory for employer to provide to its employees

e) Travel benefits extended to employees on vacation such as leave or home travel concession

f) Works contract services / goods used for construction of immovable property other than plant and machinery. Input tax on Works Contract / goods could be availed for provision of Works Contract services

g) GST paid under composition scheme under section 9;

h) Goods and/or services used for private or personal consumption, to the extent they are so consumed.

i) Goods lost or stolen/ written off/ disposed off by way of free sample or gift etc.

j) Tax paid after adjudication where there involves fraud etc./ detention / confiscation of goods

The above list of restricted supplies is more or less replica of the restrictions contained in the present Cenvat Credit scheme. The restrictions would defeat the basis intent of cascading effect of taxation. Restricting the credit on rent a cab, insurance, vehicles, works contract services etc., is without any basis and the government should come out of restrictive mindset and allow seamless credit for a simple and transparent GST.

Procedure for availment of credit

It is to be noted that in terms of Section 36 of GST law, credit availment by a registered taxable person shall be provisional and would be finalized only upon the credit availment is matched with supply details of supplier in terms of Section 37.

Section 16 provides that the input credit could be availed subject to following conditions:

- ✓ The taxable person is in the possession of document to avail credit
- ✓ Such person has received goods / services on which credit is being availed.
- ✓ Tax which is sought to be availed has been actually paid to the Government
- ✓ The registered person has furnished returns as required under the GST law.
- ✓ In the case of availment of credit on services, if payment is not made to supplier within 3 months of date of supply, amount equal to credit so availed to be paid as output tax with interest
- ✓ In the case of capital goods, no credit shall be allowed to the extent of depreciation (under IT Act) claimed on tax amount. It shall be noted that capital goods has been defined to mean those goods which are capitalized in the books of accounts of the person claiming the credit and are intended for used in furtherance of business.

  Further, where goods or services or both on which credit has been availed are used both for taxable and non taxable (excluding zero rated supplies such as exports) / business and non business purposes, then in such cases, credit shall be availed proportionate to the use in taxable supplies or business activity subject to conditions, restrictions and manner of computation would be prescribed. However, in the case of banking companies could opt for availment of 50% of the total credit eligible in the tax period.

Time limit for availment of credit

Further, the credit shall be taken at the earliest of the following dates:

a) Date of filing of return for the month of September in next Financial Year

b) Date of filing of Annual return for the relevant current financial year which is 31st of December of next year.

Matching and finalization of credit

The credit availed by the registered person is treated as provisional availment and would be finalized on the basis of the matching with the supply invoice uploaded by the supplier. The procedure of matching and finalization is summarized below:

- ✓ Registered person shall avail credit provisionally after receipt of goods and invoice;
- ✓ Supplier to file returns along with supply details and pay taxes;
- ✓ Recipient to file return along with inward details and pay balance taxes;
- ✓ The credits which are availed by the registered person are correlated with respective supplier invoice returns;
- ✓ Credits which match to the supplier details are treated as finalized;

- ✓ Credits which are not matched or excess on account of duplication etc. would be treated as tax payable and intimated to the recipient. Vendors also would be intimated about mismatch;
- ✓ The said amount of credits not matched would be paid along with interest in the next month in which the intimation is sent;
- ✓ Where the vendor rectifies and uploads, to such an extent credit would be allowed and balance shall be payable with interest.

Input service distributor (ISD)

Similar to the concept of input service distributor (ISD) under the current cenvat credit scheme, ISD provisions are also been provided under the GST law. ISD is an office of the supplier of goods or services who receives tax invoices for receipt of services. Manner of distribution of credit would be prescribed. Further, the ISD shall distribute the credit subject to following conditions:

a) the credit can be distributed against a prescribed document issued to each of the recipients of the credit so distributed, and such invoice or other document shall contain such details as may be prescribed;

(b) the amount of the credit distributed shall not exceed the amount of credit available for distribution;

(c) the credit of tax paid on input services attributable to a supplier shall be distributed only to that supplier;

(d) the credit of tax paid on input services attributable to more than one supplier shall be distributed only amongst such supplier(s) to whom the input service is attributable and such distribution shall be pro rata on the basis of the turnover in a State of such supplier, during the relevant period, to the aggregate of the turnover of all such suppliers to whom such input service is attributable and which are operational in the current year, during the said relevant period.

Other aspects relating to credit mechanism

Voluntary Registration: In case a taxable person obtains voluntarily registration under GST and intends to pay tax even though such person is within the non taxable limits, then in such case, the credit of tax on goods in stock immediately day prior to registration could be availed by him

Registration after crossing exemption limit: where a taxable person cross the basic exemption limit and obtains registration and is liable to pay GST, then in such case, the Credit of tax on goods in stock immediately day prior to registration could be availed subject to following conditions:

- ➢ Such person has applied for registration within 30 days from the date on which he is required to obtain registration;
- ➢ Registration has been granted.

A registered person, who ceases to be person liable to pay under composition and pays under normal scheme: where a registered person, who is operating under composition scheme and decides to switch over to regular scheme then in such case, the credit on input tax contained in stock, semi-finished goods or finished goods as on the date of such conversion could be availed subject to conditions and restrictions which would be prescribed.

Exempt supply becomes taxable supply: where supplies effected by taxable person which was exempted becomes taxable, then in such case, credit of tax on goods in stock immediately day prior to supply becomes taxable could be availed.

It is to be noted that in all the above cases, the credit shall not be allowed beyond one year from the date of the invoice.

Credit of input tax in respect of pipelines and telecommunication tower fixed to earth by foundation or structural support including foundation and structural support thereto:

Credit of tax paid on respect of pipelines and telecommunication tower fixed to earth by foundation or structural support including foundation and structural support thereto shall not exceed—

(a) one-third of the total input tax in the financial year in which the said goods are received,

(b) one third in the balance two-third of the total input tax, shall be availed in the financial year immediately succeeding the year referred to in clause (a) in which the said goods are received, and

(c) the balance of the amount of credit in any subsequent financial year.

Conclusion:

The revised Model GST law has widened the definitions of 'capital goods', 'input' and 'input service' to cover all goods and services which are used in the course or furtherance of business. Though the provisions relating to credit mechanism under GST law allows to large extent credit on goods or services used in the course or furtherance of business, the provisions restricting credit on vehicles, rent a cab, food & beverages, catering, insurance and works contract service etc. is uncalled for. It appears that these restrictions create bottlenecks in the credit mechanism under GST and hence it would be advisable that these artificial restrictions to be removed, in order to have a smooth, transparent and seamless credit mechanism.

PAYMENT OF SERVICE TAX UNDER WRONG REGISTRATION NUMBER

CA Kashish Gupta

FACTS OF THE CASE

One payment of service tax, amounting to Rs.2 Crores for the month of June 2016, has wrongly been made to Registration Code-2 instead of Registration Code-1. Details of payment are as follows:

Date	Challan Identification No. as mentioned in challan	Description of Accounting head (as mentioned in Challan)	Accounting code (as mentioned in Challan)	Amount (Rs.)	Paid under Registration Number	Correct Registration Number
04-07-2016	xxxxxxxx	Telecommunication Service	00440398	2 Crores	xxxxxxx	Xxxxxxx

MATTER TO BE DISCUSSED

Whether payment is required to be made again or transfer from wrong registration code to correct registration code could be made?

STATUTORY PROVISIONS

a. Remedies provided in Trade Notices

i. Trade Notice No. 03/2014 60 dated 10.07.2014 – Cochin Commissionerate

Sub: Ratification of remittances made against wrong accounting code and or wrong STC Code / C.Ex. Registration Number ' Procedure' Regarding.

There has been number of representations from registered service providers/receivers and Central excise assessees for rectification of mistakes occurred during remittances of service tax or Central excise duty against wrong accounting head and/or incorrect registration numbers.

The Central Board of Excise & Customs vide S.T. Circular No.58/7/2003 (F.No.157/2/2003 Cx.A) dated 20/05/2003 has clarified that in such instances the matter should be sorted out with the P.A.O. and the assessee need not be asked to pay Service Tax again. The transfer entries has to be effected by the PAO, as per Pr. Chief Controller of Accounts, New Delhi's letter No.Coord/2(1)/76/e-PAO (Chennai)/13-14/159 dated 04/09/2013 and the Civil Accounts Manual of the PAO, read with letter Chord/2(8)/Cex/13-14/224 dated 1/05/2014, even for previous years.

The instances, resulting in remittances against wrong Head of accounts/STC numbers/C.Ex. Registration number, are cited below:-

1. Service Tax has been paid in the wrong accounting code of a difference service than which is rendered, where the mistake has occurred under same registration number.
2. Service Tax has been paid against incorrect Accounting Minor Heads of Education Cess, interest, penalty Secondary Higher Education Cess and or vice versa. For eg: interest paid under Secondary Higher Education Cess etc.
3. Service Tax has been paid against the STC number of another assessee/same assessees (having multiple registrations) different registration number.
4. Service Tax has been paid against Central Excise Registration number of the assessee instead of Service Tax Code Number or vice versa (major heads-Customs-037, Central Excise-038 and Service Tax-044).
5. Service Tax has been paid against cancelled/surrendered registrations on obtaining centralized registration.

In such instances, in order to ensure uniformity and to avoid hardships to the assessees, the following procedure is prescribed to be followed by the assessee and the field formations.

Case 1. The assessee should represent (Through Range and Division) to the Commissioner of Central Excise and Service Tax, describing the mistake occurred/reasons for such errors along with certified copies of the remittance challans, ST-3 Returns for the relevant period and any other document pertains to the issue to establish the genuine mistake and to ratify the error.

Case 2. Same as above.

Case 3. The assessee should obtain a no objection Certificate from the assessee or any other person against whose registration number to which the wrong remittances have been made by e-payment to transfer

the amount from their registration number, certified by the concerned Range Officer of Central Excise/Service Tax that the said amount has not been utilized or paid by him and does not surface in his ledger (Books of accounts) and attach with the representation besides the documents enumerated against Case I above."

As may be observed, para no.'3' and para no. 'Case-3' of the said Trade Note squarely cover the situation obtaining in the present case and lay down a procedure for rectification of such mistake.

ii. Trade Notice No. 01/2014-15 ST Dated 05.08.2014 – Bhopal Commissionerate

Sub: Rectification of mistake of payment of service tax under wrong accounting code and wrong service tax code

2.1 However, another type of mistake noticed is payment of Service Tax under the Service Tax Code of another assessee. The said mistake might happen because of the following reasons:-

a) The assessee hols multiple service tax codes on same PAN for different branches within or across Commissionerate and pays the service tax liability against the wrong service tax code belonging to the same assessee. This also includes the cases where some of the registrations have become defunct because, either the assessee has stopped operating business from the said premises or the assessee might have taken Centralised registration, but by mistake service tax payment has been made in the incorrect service tax code.

2.2 Requests are made by assesses to transfer the amount of Service tax from one Service Tax Code to another service tax code. The issue has been examined and it is clarified that, presently there is no system available whereby Service tax paid into wrong Service tax Code can be transferred to correct Service tax Code. It is reiterated that even in case of same legal entities having different Service tax Code with same PAN, the transfer of amount from one Service tax Code to another Service tax Code is not possible. However, the following legal remedies are available to the assesses to rectify their mistake.

a) As per Rule 6 (4A) of Service Tax Rules, 1994. Service Tax amount paid wrongly, can be adjusted against liability for succeeding month or quarter, as the case may be.

b) In case, facility at (a) cannot be availed, the assessee may file a refund application under Section 11B of the Central Excise Act, 1994 for the amount wrongly paid within the time limit prescribed under law.

It is further clarified that, notwithstanding availing the above mentioned remedy, the assesse is also required to make Service Tax payment under correct Service Tax Code. Any delay in making Service Tax payment, may attract interest as per provisions of Service Tax law.

2.3 It is reiterated that in case of payment under wrong Service Tax Code, there is no remedy available under the present system to transfer the money from one Service Tax Code and therefore, the assessee should avail the option given at para 2.2.

b. Circular Number 58/07/2003 ST dated 20th May, 2003 F.No. 157/2/2003 CX 4

Subject:- Using a wrong accounting Code for payment of Service Tax clarification- Regarding.

I am directed to say that a representation had been received by the Board raising apprehensions regarding using wrong Accounting Code for payment of Service Tax. Whether, amounts to having paid the Service Tax or not.

2. The Board has examined the issue. In this connection, I am directed to clarify that the assessee need not be asked to pay the service tax again. In such cases the matter should be sorted with the P.A.O. As regards to the cases where the assessee was asked to pay service tax again, the amount thus paid may be refunded by the concerned divisional Asst. Commissioner/Deputy Commissioner.

c. M/s. Sahara India TV Network Versus C.C.E. & S.T., Noida 2015 , 2015 (10) TMI 2037

In the case of *M/s. Sahara India TV Network Versus C.C.E. & S.T., Noida 2015,*the appellant was a trader having two outlets; one located in NOIDA and the other in Mumbai.Both outlets were having separate Service tax registrations. While making the payment for the period of April, 2009 to September, 2009 the NOIDA unit deposited ¹ 25 lakhs but in challan by mistake mentioned the registration number of its Mumbai unit. After some time on realising the said mistake, appellant filed an application before the concerned authorities that it inadvertently paid the said amount by mentioning the registration number of its Mumbai unit and

requested the said amount to be counted towards its NOIDA unit. The Assistant Commissioner, Service Tax in charge of the appellants Mumbai unit has categorically mentioned that the impugned amount of Service tax (Rs25 lakh) deposited has not been utilized towards paying service tax by the Mumbai unit. The Hon'ble CESTAT held that there is complete absence of mala fide and the mistake was brought to the notice of Revenue by the appellant itself. In effect, essentially, overall there has not been any short or delayed payment of service tax by appellant. In these circumstances, the question of penalties would not arise. In these circumstances, even the question of interest would not arise in the wake of CBEC Circular dated 20.05.2013. We are in the view that the procedure prescribed by the Cochin Commissionerate in its **Trade Notice No. 3/2014 60 dated 10.07.2014** is reasonable for the purpose of rectification of such mistake without any risk to revenue.

INTERPRETATION

a. Once the levy of tax is attracted in terms of provisions of the Chapter V of Finance Act, 1994 it is required to be collected from the assessee in the manner prescribed. Such manner has been prescribed under rule 6 of the Service Tax Rules, 1994. Sub rule (1) of rule 6 of said rules says that service tax is required to be paid by 5th or 6th day of the month following the month in which service is deemed to be provided.

b. However, if the service tax is paid in excess of the amount required to be paid as service tax voluntarily, then self-adjustment of such advance paid is allowed against the liability for subsequent period provided that assessee has intimated the details of excess payment within 15 days of such payment and should indicate the details of payment and adjustment in the return also. These details are required to be shown in return belonging to registration code for which payment has been made.

c. However, if service tax is paid on estimated basis on account of uncertainty prevailing on account of any reason other than interpretation of law, taxability, applicability of exemption or valuation and it is not a case of provisional assessment or payment of tax which subsequently has been found as paid in excess, self-adjustment is allowed to the assessee against service tax liability for the subsequent period.

There is no provision under the present service tax law for adjustment of service tax payments from one account of one registered unit to the account of another registered unit. **[M/s Plastichemix Industries v Commissioner of Central Excise & S.T., Vadodara 2015 (10) TMI 2036 – CESTAT Ahmedabad**]. It however does not say that there is any provision in the service tax law which prohibits such adjustment

d. On account of non-availability of adequate provisions in the law and consequent to raising queries by the trade to sort out this anomaly, different remedies have been provided by the different Commissionerate of Service Tax by way of Trade Notices explained below:

i. Cochin Commissionerate: The matter should be sorted out with the P.A.O. and the assessee need not to be asked to pay service tax again. The transfer entries has to be effected by the PAO.

- Assessee should obtain 'no objection certificate' from the jurisdictional officer having jurisdiction over registration number in which service tax is wrongly paid, to transfer the amount from their registration number, certified by the Range Officer of Service Tax that the said amount has not been utilised or paid by him and does not surface in his books of accounts.
- Said 'no objection certificate' should be submitted in the Range along with certified copies of the remittance challan, ST-3 returns for the relevant period and any other document pertains to the issue to establish the genuine mistake.

ii. Bhopal Commissionerate: At present there is no remedy to transfer the amount from one service tax code to another service tax code. Assessee can do the either of the following:

- Self-adjust against the liability for subsequent period, or
- Claim refund under the provisions of the section 11B of the Act.

Liability required to be paid from the correct service tax code shall be paid and that too along with interest.

Different Judicial Pronouncements:

View 1: Pay service tax along with interest in correct registration code and other unit shall

make self-adjustment in correct registration code:

In case of **M/s Plastichemix Industries v Commissioner of Central Excise & S.T., Vadodara 2015 (10) TMI 2036 – CESTAT Ahmedabad** it was held that:

"3. Heard both sides and perused the records. Shri Willingdon Christian, (Advocate) appearing for the appellant fairly agreed with the mistake on the part of the appellant in depositing service tax under wrong Registration number. He, however, argued that both the units of Plastichemix Industries are under the same management and the amount has gone to the credit of the Government, and thus the appellant is very much entitled for requested adjustment of the deposit in the appropriate account of the appellant. On the other hand, Shri Manoj Kutty, (AR) appearing for the Revenue argued that there was no provision for such adjustment. I agree with the Ld. AR that there is no provision under the present service tax law for adjustment of service tax payments from the account of one registered unit to the account of another registered unit. The only course for the appellant is to make the payment of the confirmed demand along with interest. However, the other unit of the appellant is eligible to take credit of the amount paid in their relevant records."

View 2: Adjustment is allowed. Neither interest nor penalty is required to be paid.

In case of **Commissioner of Central Excise & S.T., Bhopal v KK Kedia 2014 (10) TMI 602 – CESTAT New Delhi** also reported as 2014 (35) S.T.R. 383 (Tri.-Delhi) it was held that:

"3. I do not find any infirmity in the finding of the appellate authority. Admittedly, the Service Tax was wrongly deposited in a wrong code belonging to partnership firm which was dissolved at the relevant time. As such, it is a mistake on the part of the respondents which is required to be rectified and the amount deposited in the partnership firm is required to be adjusted in the assessee's registered code."

In case of **M/s Sahara India TV Network V C.C.E. & S.T. Noida 2015 (10) TMI 2037 – CESTAT New Delhi** also reported as 2016 (41) S.T.R. 145 (Tri-Delhi) it was held that:

"6. ….. It is evident from the facts of the case narrated that the legal person for both the registrations (one for NOIDA unit and other for Mumbai unit) is the same. Further, it is evident that it is simply a case of wrong service tax registration number having been mentioned in the service tax deposit challan. In this case the wrong registration number happens to be of the appellant itself though belonging to its different unit…… Such mistakes can happen and it can scarcely be anybody's case that such mistakes are beyond rectification. In this case, the Assistant Commissioner, Service Tax in charge of the appellants Mumbai unit has categorically mentioned that the impugned amount of service tax (Rs.25 lakhs) deposited has not been utilised towards paying service tax by the Bombay unit. The CESTAT judgement in the case of Plastichemix Industries (supra) makes a summary observation that there is no provision under the present service tax law for adjustment of service tax payments from the account of one registered unit to the account of another registered unit. It however does not say that there is any provision in the service tax law which prohibits such adjustment. Further, as stated earlier, the ***issue is not so much of law but of a mistake of incorrectly mentioning the registration number*** *in the service tax deposit challan. That* ***such mistakes do happen is also evident from the fact that Commissionerate of Cochin issued a Trade Notice No. 3/2014 60 dated 10.07.2014.***

7. In the present case, there is complete absence of mala fide and the mistake was brought to the notice of Revenue by the appellant itself. In effect, essentially, overall there has not been any short or delayed payment of service tax by appellant. In these circumstances, the question of penalties would not arise. In these circumstances, even the question of interest would not arise in the wake of CBEC Circular dated 20.05.2013 cited above. We are of the view that the procedure prescribed by the Cochin Commissionerate in its Trade Notice dated 10.07.2014 is reasonable for the purpose of rectification of such mistakes without any risk to Revenue."

ANSWER

OPTION 1: Assessee should follow Cochin Commissionerate instructions which squarely covers the present issue and also give reference to the official letters via which instructions had been issued to P.A.O. to adjust the amount of tax.

Step 1: Write a letter to the Jurisdictional AO intimating payment of service tax under wrong registration number.

Step 2: Assessee should obtain the 'no objection certificate' from the Officer of Registration Code 2 to transfer the amount from their registration number duly certified by the concerned Range Officer of Service Tax that the said amount has not been utilised or paid by him and does not surface in his ledger (books of account) and should annex certified copies of the remittance challans, ST3 Returns for the relevant period and any other document pertains to the issue to establish the genuine mistake.

Note: It should also be cited that Trade Notice No. 03/2014/ST dated 10.07.2014 issued by Commissioner, Cochin had prescribed procedure for rectification of such mistake.**Neither interest nor penalty is required to be paid.**

OPTION 2: In case adjustment is not allowed.

Step 1: Write a letter to the Jurisdictional AO intimating payment of service tax under wrong registration number.

If adjustment is not permitted by the AO, then do the following:

Step 2: Apply for refund of amount wrongly paid under section 11B of the Central Excise Act, 1944. On receipt of refund, pay the liability for previous period without any interest and penalty because intimation has already been given to department.

Or Liability could be paid before applying for refund, depending upon decision of management. **Neither interest nor penalty is required to be paid.**

OPTION 3: Pay liability in correct registration code again and either claim self-adjustment or refund under registration code where payment has been made.

Consider it as advance payment for registration code 2 and self-adjust the liability of future periods. Pay the service tax for registration number 1 again along with interest.

This option would entail opportunity cost and interest cost on Rs.2 Crores to the assesse.

DISCLAIMER:

This article is given based on the facts of the case as understood by the author, analysis of the facts and interpretation of law as I understand. It represents our perception of the matter, in the outcome of which author do not have any interest pecuniary or otherwise.

This article is not binding on the reader and acceptance of it including any subsequent and resultant planning or action will be at reader sole discretion and risk, without recourse.

SERVICE TAX – RECENT NOTIFICATIONS, CIRCULARS & INSTRUCTIONS

CA Ayush Vimal

1. **Notification No 46/2016-Service Tax dated 09.11.2016**

   Amendment in Place of Provision of Service of "Online information and database access or retrieval services" with effect from 1st December, 2016

   The Central Government has amended the Place of Provision of Service Rules, 2012 to stipulate that the place of provision of Online information and database access or retrieval services shall be the location of the service recipient.

2. **Notification No 47/2016-Service Tax dated 09.11.2016**

   Amendment in Mega Exemption Notification for withdrawal of exemption to import of "Online information and database access or retrieval services" with effect from 1st December, 2016in specific cases

   The Central Government has withdrawn the exemption in relation to import of service by the Government, local authority, governmental authority or an individual using the service for non-business purposes in so far as it relates to import of Online information and database access or retrieval service.

3. **Notification No 48/2016-Service Tax dated 09.11.2016**

   Provides the manner in which compliances are to be made by a person located in non-taxable territory providing "Online information and database access or retrieval services"(OIDAR) to "non-assesse online recipient" as defined therein

   The Central Government has defined "non-assesse online recipient" as:

   - The Government, a local authority, a governmental authority or an individual receiving OIDAR for non-business purpose, and
   - Such Government, local authority, governmental authority or individual is located in taxable territory

   In addition to the above, any unregistered person receiving OIDAR from a person located in non-taxable territory shall also be deemed to be "non-assesse online recipient".

   It has been stipulated that OIDAR received by "non-assesse online recipient" from a person located in non-taxable territory shall be taxable under normal charge and not reverse charge. The service provider has been deemed to be an intermediary located in non-taxable territory arranging or facilitating the provision of service in certain conditions. However, the burden of discharging service tax liability has been imposed upon a representative, if any, of the service provider in the taxable territory.

   If no such representative is available, registration will have to be taken by the person located in non-taxable territory liable for paying tax under normal charge on OIDAR. Form ST-1A has been prescribed as the form for application for registration. Further, the time limit for obtaining registration has been prescribed to be 30 days from the date of levy or date of commencement of services as applicable. Form ST-2A has been prescribed as the Certificate of Registration in response to Form ST-1A and it has been stipulated that registration shall be deemed to be granted from the date of receipt of application. Form ST-3C has been prescribed as the Form in which return is to be filed by the aforesaid persons.

   It is pertinent to note that OIDAR received by persons other than "non-assesse online recipient" from a person located in non-taxable territory shall continue to be taxable under reverse charge mechanism.

   The definition of OIDAR has also been expanded to include various services which were not specifically mentioned therein earlier.

4. **Notification No 49/2016-Service Tax dated 09.11.2016**

   Amendment in Reverse Charge Provisions to

exclude "non-assesse online recipient" receiving OIDAR from service providers located in non-taxable territory

The Central Government has amended Notification No. 30/2012- ST, dated the 20th June, 2012with effect from 01.12.2016 so as to put the compliance liability of service tax payment on to the service provider located in the non-taxable territory with respect to OIDAR provided to "non-assesse online recipient".

5. Notification No 50/2016-Service Tax dated 22.11.2016

Provides exclusive jurisdiction over cases of OIDAR

The Central Government has amended Notification No. 20/2014-ST dated 16th September, 2014 to provide exclusive jurisdiction to LTU-Bangalore with respect to OIDAR provided by a person located in non-taxable territory and received by a "non-assesse online recipient".

6. Notification No 51/2016-Service Tax dated 30.11.2016

Exclusion of OIDAR from telecommunication service

The Central Government has amended the definition of telecommunication service in the Place of Provision of Service Rules, 2012 to exclude OIDAR from within its ambit.

7. Notification No 52/2016-Service Tax dated 08.12.2016

Exemption ofservices provided by an acquiring bank in relation to settlement of money through payment cards

The Central Government has amendedMega Exemption Notification No. 25/2012-ST dated 20.06.2012 so as to exempt services by an acquiring bank, to any person in relation to settlement of an amount upto two thousand rupees in a single transaction transacted through credit card, debit card, charge card or other payment card service.

8. Notification No 53/2016-Service Tax dated 19.12.2016

Provides relaxation in relation to raising invoices to persons in non-taxable territory providing OIDAR to "non-assesse online recipient"

The Central Government has inserted a proviso to Rule 4C of the Service Tax Rules, 1994 so as to allow a person located in non taxable territory providing OIDAR to a non-assesse online recipient under normal charge to issue online invoices not authenticated by means of a digital signature upto 31st January, 2017.

9. Circular No 202/12/2016-Service Tax dated 09.11.2016

FAQs in relation to taxability of cross border B2C OIDAR services provided online/electronically from a non-taxable territory to consumers in taxable territory

With the inclusion of cross border OIDAR within the service tax net and the increasing quantum of such transactions, the CBEC has come out with FAQs dealing with various issues that assesses may face. The Circular contains 46 questions with detailed answers and explanations.

10. Instruction issued vide F. No.137/155/2012-Service Tax (Part-I) dated 09.12.2016

Clarification in relation to assessment of prior years

It has been clarified by the Board that enhanced turnover in the books of accounts in the current year as compared to prior years on account of adopting digital modes of payments will not be the sole reason for reopening past assessments.

DEMONETISATION OF HIGH VALUE CURRENCY NOTES IN INDIA : UNDERSTANDING THE IMPLICATIONS

Team Vinod Kothari Consultants (P) Ltd.

On the eve of 9/11, the Government of India, launched yet another surgical strike, this time not across the border but within the border, by demonetizing High Value Currency Notes (HVCN) notes in India, i.e., notes with the denomination of Rs. 500 and Rs. 1000. The Government has decided to replace the old HVCN with new set of HVCNs, which will be denominated by notes of Rs. 500 and Rs. 2000.

The Prime Minister, in his speech of forty minutes, stated that there are primarily to major reasons which prompted the Government to take this step:

1. Fake Indian Currency Notes: The Government is of the view that there are fake currencies prevalent in the market, in large quantum, which are used mainly for carrying out subversive activities like espionage, smuggling of arms, drugs etc.
2. Black Money: The other reason is the presence of a large amount of Black Money which had led to the creation of a long parallel shadow economy in the country. At several times in the past, it has been observed that the HVCNs make it convenient for storing Black Money.

Therefore, to combat with the above, the Government of India has come out with, what we can call the biggest *swacch bharat* campaign.

Considering the sensitivity of the matter, in this article we have tried to address a few apparent queries with respect to the legal aspects of this policy and its implications.

Links to relevant notifications

Within a very short span of time, the Government of India, along with the Reserve Bank of India has come up a large number of notifications. Here are the links to such notifications:

Notifications of Ministry of Finance

1. Gazette Notification No. S.O. 3407(E) – RBI's recommendation with respect to cancellation of legal tender - http://finmin.nic.in/172521.pdf
2. Gazette Notification No. S.O. 3408(E) – Exemptions with respect to usage of old HVCN for emergent and urgent transactions - http://finmin.nic.in/172522.pdf
3. Gazette Notification No. S.O. 3409(E) – Notification of new denomination of bank notes of Rs. 2000 - http://finmin.nic.in/172523.pdf

Notifications of the RBI

1. FAQs on withdrawal of Legal Tender Character of the existing bank notes in denominations of Rs. 500 and Rs. 1000 - https://rbi.org.in/Scripts/FAQView.aspx?Id=119
2. Withdrawal of Legal Tender Character of the existing Rs. 500 and Rs. 1000 Bank Notes - https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10684&Mode=0
3. Issue of new set of Rs. 500 banknotes in Mahatma Gandhi (New) Series - https://rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=38524
4. Issue of Rs. 2000 banknotes - https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=38523
5. ATMs –Non-dispensing of Old High Denomination Notes – Closure of operations - https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10683&Mode=0

FAQs

1. What is demonetization?

The term has neither been defined under the RBI Act, 1934 or the High Denomination Bank Notes (Demonetization) Act, 1978[1]. In general terms, demonetization is the act of stripping a currency unit of its status as legal tender. Demonetization is necessary whenever there is a change of national currency. The old unit of currency must be retired and replaced with a new currency unit. In India, the power to demonetize any currency unit is vested vide Section 26(2) of the RBI Act, 1934 under which the Central Government on recommendation of the Central Board declare any series of bank notes of any denomination to cease as legal tender.

2. Is demonetization same as devaluation?

No, devaluation and demonetization are not the same

[1] http://lawmin.nic.in/ld/P-ACT/1978/The%20High%20Denomination%20Bank%20Notes%20(Demonetisation)%20Act,%201978.pdf

thing. Devaluation is typically done in context of a foreign currency. Notable, term currency depreciation often resembles to devaluation. Both currency depreciation and currency devaluation end up with a currency that is worth less than it previously was in comparison to the currencies of other countries. The difference is in how the currency comes to be worth less. Depreciation occurs only in countries that allow their exchange rates to float. That is, these countries allow supply and demand to determine the value of their currency relative to the currencies of other countries. Depreciation occurs when the forces of supply and demand cause the value of their currency to drop. By contrast, devaluation occurs only in countries that do not allow their exchange rates to float. These countries' governments control the official value of their currency. They typically use government money to buy or sell currency so as to keep the exchange rate where the government wants it to be. Devaluation occurs when a government decides that it needs to have its currency be worth less. It then allows its currency to become weaker. In general, depreciation is considered to be a better thing because it happens "naturally" where devaluation is artificial.

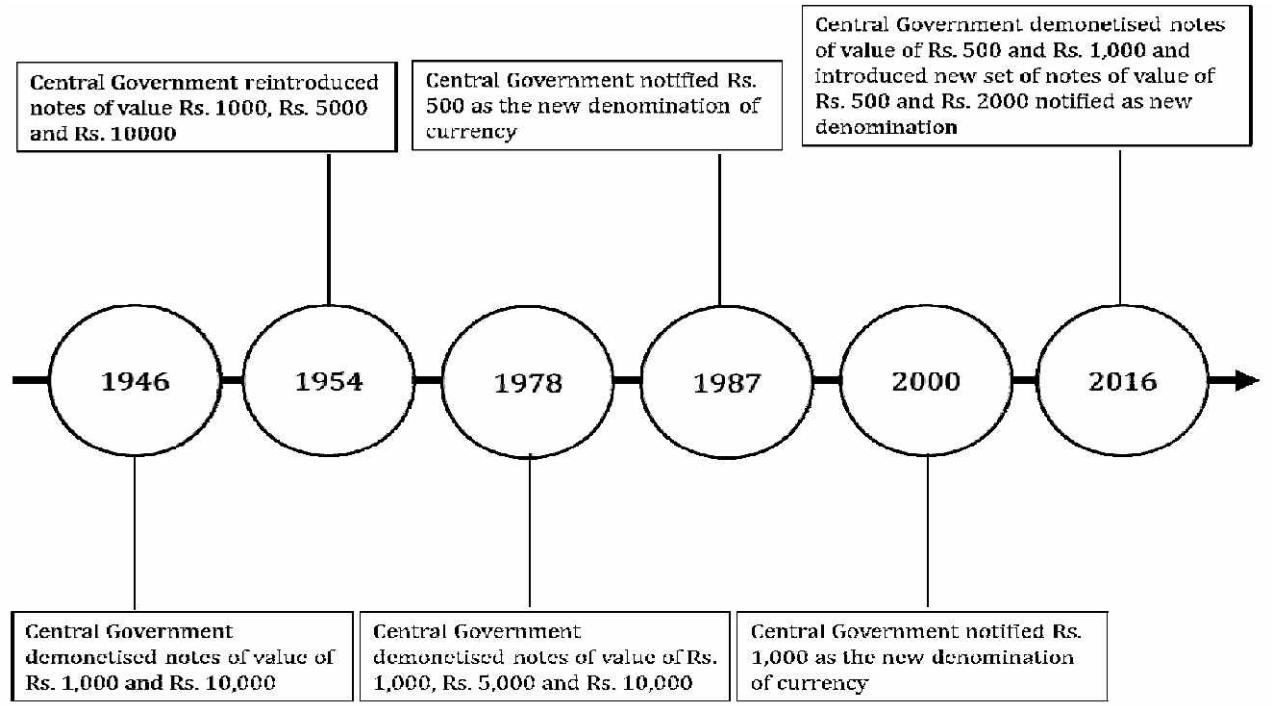
Whereas on the other hand, demonetization is a low governed process of making any denomination of a currency unit as prohibited/restricted for legal tender. The government does not take this step to bring ups and downs in the value of the currency but to control the flow of money in the country and/or to regulate any misuse of the currency unit being demonetized.

3. How demonetisation began in India?

The root of demonitisation in India, goes back to 1946, when the Central Government, for the first time demonetised, HVCNs with denominations of Rs. 1,000 and Rs. 10,000 which were then in circulation. However, the HVCNs of denominations of Rs. 1,000, Rs. 5,000 and Rs. 10,000 were reintroduced in 1956.

Thereafter, the second instance of demonetization in India took place in 1978 with the enactment of High Denomination Bank Notes (Demonetization) Act, 1978. This was an enactment by the Government to provide in the public interest for the demonetisation of HVCNs of denomination of Rs. 1,000, Rs. 5,000 and Rs. 10,000 and for matters connected therewith or incidental thereto. The intent was to track the situation at that time due to which the availability of high denomination bank notes used to facilitate the illicit transfer of money for financing transactions which were considered to be harmful to the national economy or which were being deployed for illegal purposes and it was therefore necessary in the public interest to demonetise high denomination bank notes through this legislature.

The chart below shows the history of demonetization in India:



Legal powers of demonetisation

4. What is a legal tender? What law governs the same?

In order to understand the meaning of the expression "legal tender" reference must be made to a recent case law known as Sri. Venkatesh Kabade, Hubli v Assessee[2] in which the Income Tax Appellate Tribunal held the following

> *"The meaning of legal tender has not been defined in the Income-tax Act. However, the dictionary meaning of 'legal tender' as mentioned in 'Aiyer's Law Terms and Phrases', is "the coinage of a county in which the debts may be paid and which the creditor is bound to accept". The dictionary meaning of the coin is; "metal used for the time being as money and stamped and issued by the authorities of the state in order to be used". Therefore, it can be said that legal tender means the currency of a state which is to be used as money."*

Further, Section 26 of the Reserve Bank of India Act, 1934 (hereinafter referred as the "Act, 1934") provides that every banknote issued by Reserve Bank of India shall be legal tender at any place in India in payment or on account for the amount expressed therein, and shall be guaranteed by the Central Government.

Apart from the Act, 1934, the statute governing legal tender is The Legal Tender (Inscribed Notes) Act, 1964[3] (hereinafter referred as the Act, 1964) which extends to the whole of India. The legislative mandate of this statute is to restrict the negotiability of currency and other notes inscribed with messages of a political character.

According to the Act, 1964 the following cannot be categorised as a legal tender:

> Notes bearing messages of a political character
>
> Notwithstanding anything contained in the Reserve Bank of India Act, 1934 (2 of 1934), or in the Currency Ordinance, 1940 (Ord. 4 of 1940), or in any other law for the time being in force, a currency note of the Government of India, a bank note issued by the Reserve Bank of India, or a Government of India one-rupee note issued under the Currency Ordinance, 1940, which bears written upon it any extrinsic words or visible representations intended to convey or capable of conveying a message of a political character.

For such instruments which cannot be categorised as legal tender as enumerated above, the Reserve Bank of India shall not be under any legal obligation to receive any such note, or to issue rupee coin or other coin or currency notes or bank notes in exchange for any such note, or to refund the value of any such note; provided that the Reserve Bank of India may refund as of grace the whole or part of the value of any such note.

5. What are the provisions of sec. 26 of the RBI Act?

Section 26 empowers the Central Government to notify a currency as legal tender money in the country and also to demonetize a currency. The important extracts of the section have been reproduced below.

> *(1) Subject to the provisions of sub-section (2), every bank note shall be legal tender at any place in India in payment or on account for the amount expressed therein, and shall be guaranteed by the Central Government.*
>
> *(2) On recommendation of the Central Board the Central Government may, by notification in the Gazette of India, declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender save at such office or agency of the Bank and to such extent as may be specified in the notification.*

6. Do the provisions of sec. 26 of RBI Act extend to the state of Jammu and Kashmir?

Yes, the provisions of the RBI Act were extended to the state of J&K in 1956.

7. What are the powers of the Central Government under Section 26(2) of the RBI Act to declare certain currency notes not to be legal tender?

The legislative power of the Central Government to enact laws in relation to currency, coinage and legal tender and foreign exchange is derived from Entry 36 of the Union List of the Seventh Schedule of the Constitution of India, 1950. Further, according to Section 26(2) of the Act, 1934 the Central Government, on recommendation of the Central Board, has the power to issue a notification in the Gazette of India by means of which any bank notes of any denomination shall cease to have the character of a legal tender to such extent as specified in such notification.

8. Who has to exercise the power – the Central Board of the RBI or the Central Government?

According to Section 26(2) of the Act, 1934 the Central Government has the power to demonetize and declare certain currency notes as not legal tender, however, the Central Government shall exercise such powers upon the recommendation of the Central Board.

9. Have there been past rulings on the legal powers of sec. 26 (2) for demonetization?

In the case Somi Horam Tongkhul Naga vs Union of India & Ors[4], the Guwahati High Court rejected the

[2] S.P.No.77/Bang/2012 (In ITA No.313/Bang/2012), decided on 25th May, 2012 available at- https://indiankanoon.org/doc/175495087/

[3] ACT NO. 28 OF 1964 [30th September, 1964]

[4] Decided on 29th February, 1980 available at- https://indiankanoon.org/doc/1699786/

contention that fundamental right to property of the petitioner has been affected in any manner and held that there is a property right in high denomination notes until such notes retain the character of a legal tender and after demonetisation their value in exchange can only be realised in accordance with the Demonetisation Act, 1978. Further, it was held that, by means of a writ of mandamus, the Reserve Bank of India cannot be made to exchange the demonetised notes which have ceased to be legal tender, and which have not been accounted for and presented as per procedure prescribed under the Act.

10. In what way are the provisions of the Demonetization Act 1978 different from the present notification?

The contents of the Demonetisation Act, 1978 and notification number 3407 are on similar lines except for the fact that the Demonetisation Act, 1978 provided for the following additionally:

a. Exchange of HVCN by entities – The Demonetisation Act, 1978 specifically named the persons who could exchange currencies, based on the nature of entity. Like, in case of an HUF, the Karta could exchange the currencies, in case of companies, Managing Director or in its absence any Director could exchange the currencies. The present notification is however, silent in this regard.

b. Penalties – The Demonetisation Act, 1978 provided for specific penalties with respect to non compliance with the provisions of the Act, which included imprisonment for a term which may extend to three years, or with fine, or with both. Nothing as such has yet been notified by the Central Government.

11. Are there any significant principles protecting the genuine rights of citizens that may be inferred from past SC /court rulings on the issue?

A. *Ram Lal v State*[5] - The Allahabad High Court observed that a declaration that high denomination notes ceased to be legal tender did not interfere with the fundamental rights of people as such declaration is made in the interest of general public. Further, the Court observed that any restriction on transfer of high denomination bank notes which have ceased to become legal tender is reasonable as such high denomination notes can be exchanged for notes of smaller denominations provided certain mandatory condition, as prescribed by the Government, are fulfilled.

B. J.M. D'Souze v. Reserve Bank of India[6] - This is a case where appellant was refused by RBI for exchange of his money which was demonetized. Under this, the Appellant sought writ of mandamus to be issued against the RBI for performance of its duties. However, the same was dismissed stating that whatever name may be given to this transaction, the word " exchange " is used for it in Section 39 of the Act, in its ordinary meaning of " giving and taking of one thing for another," and the Ordinance debars the owner or holder of high denomination bank notes from claiming such an exchange from the bank without giving the required declaration.

C. *Smt. Bimladevi, Smt. Sunaina vs Union Of India (Uoi) And Anr* [7]. on 24 August, 1980 – This was a case challenging the validity of Sections 7 and 8 of the demonetisation Act, the petitioners are also aggrieved by the orders, passed under the Demonetisation Act, declining to pay them the exchange value of the demonetised notes held by them. It was submitted that according to Section 3 of the Demonetisation Act the high denomination notes were to cease to be legal tender "in payment or on account" at any place According to Petitioner this, and the other provisions of the Demonetisation Act, did not prohibit the Reserve of India from discharging its statutory liabilities and obligations under the provisions of the R.B.I. Act. But this contention was put down by the Court stating that the liability under the said section existed as long as the bank notes are in circulation. When the circulation of the bank notes comes to an end on 16-1-78 in the present case, then simultaneously the liability of the issue Department also ceases. There were 3 other grounds in this appeal but all of them were put down. Two other important grounds were that RBI was not satisfied by the particulars of the declaration and also was not satisfied for reasons of delay in filing the declaration.

D. *Jayantilal Ratanchand Shah vs Reserve Bank Of India & Ors* [8] on 9 August, 1996 [JT 1996 (7), 681 1996 SCALE (5)741] – the petitioners contended that such extinguishment of debts amounted to compulsory acquisition of property within the meaning of Article 31(2) of the Constitution and since the acquisition was not made for a public purpose nor adequate and appropriate provisions were incorporated in the impugned Act for payment of compensation in respect thereof the impugned Act was violative of the above Article.

[5] Decided on 20th July, 1954 available at- https://indiankanoon.org/doc/285129/
[6] https://indiankanoon.org/doc/1541020/
[7] https://indiankanoon.org/doc/434370/
[8] https://indiankanoon.org/doc/1199635/

Contentions and reliefs of the case are as follows –

i. The impugned Act extinguished the debts due and owing from the Bank to the holders of the high denomination bank notes and that their property was compulsorily acquired – This was accepted by the Court in view of Pathak vs. Union of India (1978) 2 SCC 50 wherein it has been held that property within the meaning of Article 19 (1) (f) and clause (2) of Article 31 comprises every form of property, tangible or intangible, including debts and chooses in action and that extinguishment of a public debt due and owing from the State amounts to compulsory acquisition of such debt.

ii. Whether such acquisition was for a public purpose for under Article 31 (2) as no property could be compulsorily acquired except for a public purpose. – This contention was put down by court stating that the preamble clearly mentions that the enactment was for public and economy at large.

iii. Third contention was to challenge RBI's unsatisfaction to the reasons of delay filed in the declaration for exchange of value – this was also put down as the Bench agreed with RBI's contention of being unsatisfied of the reasons.

12. Every currency notes contains a public declaration signed by the Governor of the RBI saying that he promises to pay equivalent of the value of the currency note. Is that promise being belied?

No. there is no question of the Government/RBI falling back on the promise of not paying equal value.

The fact that the currency notes cease to be legal tender means that in commercial bilateral transactions of payment and settlement, these currency notes will not be accepted. However, there is no question of a holder of the currency notes not being permitted to deposit the same in his bank.

Further, the notification no 3407 (E) is clear in this regard. Para 2(iii) of the said notification states that there shall be no limit of depositing the currency notes into a bank account, where the KYC is complete. There shall be a limit of Rs 50,000/- where the KYC is not complete. The extracts of the Para have been provided below:

> *2. The specified bank notes held by a person other than a banking company referred to in sub-paragraph (1) of paragraph 1 or Government Treasury may be exchanged at any Issue Office of the Reserve Bank or any branch of public sector banks, private sector banks, foreign banks, Regional Rural Banks, Urban Cooperative Banks and State Cooperative Banks for a period up to and including the 30th December, 2016, subject to the following conditions, namely:*
>
> *iii. there shall not be any limit on the quantity or value of the specified bank notes to be credited to the account maintained with the bank by a person, where the specified bank notes are tendered; however, where compliance with extant Know Your Customer (KYC) norms is not complete in an account, the maximum value of specified bank notes as may be deposited shall be Rs.50,000/-*

13. What will happen if someone uses the demonetized HCVNs even after the date of the demonetization? Will it be considered to be illegal?

Under the Demonetisation Act, 1978, section 4 provided the following:

> ***Prohibition of transfer and receipt of high denomination bank notes.—***
>
> *Save as provided by or under this Act, no person shall, after the 16th day of January, 1978, transfer to the possession of another person or receive into his possession from another person any high denomination bank note.*

On reading of the above text of law it is very evident that transfer of HVCN after the demonetisation was clearly barred. But there is no corresponding provision in the current of set of notifications.

Therefore, transfer of HVCN after demonetisation shall not be treated as illegal.

14. Is the limit of Rs 50000/- per account, or per account per deposit?

Looking at the text of the Notification, it seems that the limit is per account. That is to say, the aggregate limit in an account where KYC is not complete, is Rs 50000/-. Further, RBI's notification dated 19th December, 2016 [9] read with notification dated 21st December, 2016 [10] states that in case of KYC non-compliant accounts, amount in excess of Rs. 5,000/- can be deposited in the bank account only once till 30th December, 2016. The upper limit will still be applicable.

15. Para 2 (iv) and para 2 (v) of notification number 3407(E) provide for credit of equivalent value. What is the meaning of equivalent value?

Para 2(iv) and (v) states –

[9] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10784&Mode=0
[10] https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10790&Mode=0

(iv) the equivalent value of specified bank notes tendered may be credited to an account maintained by the tenderer at any bank in accordance with standard banking procedure and on production of valid proof of Identity;

(v) the equivalent value of specified bank notes tendered may be credited to a third party account, provided specific authorisation therefor accorded by the third party is presented to the bank, following standard banking procedure and on production of valid proof of identity of the person actually tendering;

The words "equivalent value" in the aforesaid paragraphs means value equal to the amount being deposited. Therefore, it means that the bank will credit the account of the tenderer or the third party, as the case may be, with equal value of amount of old HVCN deposited.

16. Is Para 2 (iv) or Para 2 (v) of notification number 3407(E) in addition to the deposit being referred to in Para 2 (iii)?

In our view, the answer to this question is negative. Para 2 (iv) and (v) in our reading simply amplifies the contents of Para 2 (iii). Therefore, what it means is as follows:

a. In case of KYC-completed account, there is no limit as to deposit of HVCNs. The money can be deposited in the account of the tenderer.

b. In case of a deposit in the account of a third party, the money can be deposited in the account of the third party only on a valid authorization of the third party.

17. Para 2(v) of the of notification number 3407(E) uses the words "third party authorization"? What will the authorization contain?

Para 2(v) of the aforesaid notification states, where a tenderer attempts to deposit an amount in the bank account held by a third party, then an authorization will have to be accorded by the third party in whose account the amount is to be credited, will have to be presented to the bank. There are however, no details with respect to the nature and form of the authorization as of now and one may expect the Ministry of Finance or the Reserve Bank of India come out with further directions in this regard.

However, since the idea is apparently to trace the proof of the money, the intent of this authorization is to make sure that the onus of proving the ownership/origin of the money falls back on the third party and not on the tenderer.

18. Does it mean that the third party has to demonstrate that the third party owned the money as on the date of the deposit?

While details are yet to be seen, but our prima facie view is that the third party has only to authorize the person depositing to deposit the money. In other words, if the money lawfully belongs to X, there is no reason why it cannot be deposited in the bank account of Y.

19. Say for instance a financial institution has extended loans to a customer and is expecting repayment. In such a situation, can the financial institution authorize the customer to deposit the amount in an account held by the financial institution on its behalf?

Looking at the language of Para 2(v) of the notification number 3407(E), a tenderer can deposit money with the bank to the credit of a third party; however, such should be backed by an authorization by the third party. In essence, the onus will be on the third party to prove the validity of the source.

Therefore, in the present case, the financial institution can authorize the borrower to deposit the amount on its account on its behalf. A sample of letter of authorization forms a part as Annex A.

Additionally, if the borrower decides to authorize someone else to deposit the amount on its behalf, then a separate letter of authority will have to be executed by the borrower in favour of the person who will actually tender the amount in the bank account of the lender. A sample letter of authorization forms a part of this write up as Annex B.

20. If a financial institution decides to offer relaxation of one month in payment due date to all such borrowers who have had a good track record of payment, owing to the concerns relating to demonetization of HVCN, will be considered to be a case of restructuring?

Before we answer this question, we will have to consider the following facts –

a) the relaxation has been offered after the policy changes triggered,

b) it is offered to a class of customers in a particular product type,

c) the class of customers to who the relaxation is offered are not displaying any signs of stress in repayment.

Considering the above and the fact that the relaxation is not offered to a single customer but to all customers across – it does not result in restructuring.

Whether or not all customers decide to avail the relaxation is an option in the hands of the customer, however the fact that a financial institution is offering the scheme across customers does not trigger in restructuring concerns.

Further, in this regard, the Reserve Bank of India has come up with a notification allowing a respite of 60 days for payment of installments falling due between 1st November, 2016 and 31st December, 2016 without treating it to be a restructuring.

REAL ESTATE/INFRASTRUCTURE PROJECTS – COMPANIES ACT, 2013 PERSPECTIVE

CS Atul Kumar Labh

Companies Act, 2013 ("the Act") recognises the importance of "Infrastructural Projects" or "Infrastructural Facilities". A separate Schedule (Schedule VI) as attached to the Act has been specifically dedicated to it, covering, inter alia, the following aspects of the Corporate world :

(A) **Issue and redemption of Preference Shares :**

Section 55 of the Act, inter alia, provides, that a Company limited by shares and if authorized by its Articles may issue redeemable Preference Shares which are liable to be redeemed within a period not exceeding twenty (20) years from the date of their issue.

Provided that a Company may issue Preference Shares for a period exceeding twenty years for infrastructure projects, subject to the redemption of such percentage of shares as may be prescribed on an annual basis at the option of such preferential shareholders.

(B) **Loan and Investment by Company :**

Section 186 of the Act, inter alia, provides conditions for making loan, investments and / or providing security/guarantee, viz, quantum, rate of interest, etc. by the Companies.

However, Section 186(11) exempts almost all the relevant provisions of Section 186 for the companies engaged in the business of providing infrastructural facilities.

(C) **Deposit :**

Rule 2(1)(c)(xii)(c) of the Companies (Acceptance of Deposits) Rules, 2014, inter alia, exempts any amount received in the course of, or for the purposes of, the business of the Company, as advance, accounted for in any manner whatsoever, received in connection with consideration for arrangement, provided that such advance is adjusted against the property in accordance with the terms of agreement or arrangement.

(D) **Schedule VI :**

The term "infrastructural projects" or "infrastructural facilities" includes the following projects or activities:—

(1) Transportation (including inter modal transportation), includes the following:—

(a) roads, national highways, state highways, major district roads, other district roads and village roads, including toll roads, bridges, highways, road transport providers and other road-related services;

(b) rail system, rail transport providers, metro rail roads and other railway related services;

(c) ports (including minor ports and harbours), inland waterways, coastal shipping including shipping lines and other port related services;

(d) aviation, including airports, heliports, airlines and other airport related services;

(e) logistics services.

(2) Agriculture, including the following, namely:—

(a) infrastructure related to storage facilities;

(b) construction relating to projects involving agro-processing and supply of inputs to agriculture;

(c) construction for preservation and storage of processed agro-products, perishable goods such as fruits, vegetables and flowers including testing facilities for quality.

(3) Water management, including the following, namely:—

(a) water supply or distribution;

(b) irrigation;

(c) water treatment.

(4) Telecommunication, including the following, namely:—

(a) basic or cellular, including radio paging;

(b) domestic satellite service (i.e., satellite owned and operated by an Indian company for providing telecommunication service);

(c) network of trunking, broadband network and internet services.

(5) Industrial, commercial and social development and maintenance, including the following, namely:—

(a) real estate development, including an industrial park or special economic zone;

(b) tourism, including hotels, convention centres and entertainment centres;

(c) public markets and buildings, trade fair, convention, exhibition, cultural centres, sports and recreation infrastructure, public gardens and parks;

(d) construction of educational institutions and hospitals;

(e) other urban development, including solid waste management systems, sanitation and sewerage systems.

(6) Power, including the following:—

(a) generation of power through thermal, hydro, nuclear, fossil fuel, wind and other renewable sources;

(b) transmission, distribution or trading of power by laying a network of new transmission or distribution lines.

(7) Petroleum and natural gas, including the following:—

(a) exploration and production;

(b) import terminals;

(c) liquefaction and re-gasification;

(d) storage terminals;

(e) transmission networks and distribution networks including city gas infrastructure.

(8) Housing, including the following:—

(a) urban and rural housing including public / mass housing, slum rehabilitation, etc;

(b) other allied activities such as drainage, lighting, laying of roads, sanitation and facilities.

(9) Other miscellaneous facilities/services, including the following:—

(a) mining and related activities;

(b) technology related infrastructure;

(c) manufacturing of components and materials or any other utilities or facilities required by the infrastructure sector like energy saving devices and metering devices;

(d) environment related infrastructure;

(e) disaster management services;

(f) preservation of monuments and icons;

(g) emergency services (including medical, police, fire and rescue).

(10) such other facility service as may be prescribed.

RESOLVING CORPORATE GOVERNANCE ISSUES IN COMPENSATION AGREEMENTS : SEBI LATEST APPROVAL IN ITS BOARD MEETING

Mr. Rohit Sharma

SEBI, the capital market regulator in India, had issued a consultative paper regarding the corporate governance issues in Compensation Agreements[1] in order to curb the side agreements entered into by the private equity (PE) firms with top personnel and key managerial personnel (KMPs) of a listed entity. These agreements are entered into without any disclosure or approval from the shareholders and therefore may lead to unfair practices by the KMPs in order to enhance the performance of the company for a particular term in order to make gains for such term.

A Compensation Agreement is an agreement between the PE and the management of the listed entities whereby the PE agrees to share an agreed proportion of the profits above a certain threshold limit made by them at the time of selling the shares, and which are also dependent on the fact that the company attains a performance criteria. Such rewards are a part of the profit earned by such PE through the management's extra effort which in return enables the PE earn such high returns. SEBI felt that these agreements may lead to aggressive measures being adopted by the management of the company which consequently may adversely affect the overall shareholder value of such company.

What SEBI is referring to can be understood by the following example- PE firms make a pact with a promoter to transfer 20% of the profit beyond a 30% internal rate of return on the sale of shares. The extra incentive of 20% is given by the PE as a reward for handling day-to-day business in a way which led to increased returns to the PE.

In order to put a halt to these agreements, SEBI had proposed for a new sub-regulation (6) to regulation 26 of the SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015 (Listing Regulations) :-

"No employee, including key managerial personnel, director or promoter of a listed entity shall enter into any agreement with any individual shareholder(s) or any other third party with regard to compensation or profit sharing unless prior approval has been obtained from the Board as well as shareholders by way of an ordinary resolution".

"No employee, including key managerial personnel, director or promoter of a listed entity shall enter into any agreement with any individual shareholder(s) or any other third party with regard to compensation or profit sharing unless prior approval has been obtained from the Board as well as shareholders by way of an ordinary resolution".

SEBI had also discussed the reasons for coming out with the above mentioned proposals:-

1. There should not be any scope for side agreements, without the approval of board and the shareholders in case of listed companies; and
2. Principle of disclosure and transparency in governance of listed entities would otherwise be hampered.

Therefore, before the board enters into such agreements, there rises a need for scrutiny of the same by the directors and public shareholders through voting on the resolution. SEBI desired public opinion on the proposed amendments to be implemented for corporate governance issues in compensation agreements in case of listed companies.

The reason for SEBI coming up with this proposal can be linked to the exit of certain investors from PVR Limited. An 'Incentive Fee structure' was signed between the MD and the CEO of PVR, and the same was not disclosed to the shareholders or the stock exchanges basis the consideration that no such consideration was to be paid from the books of PVR. The deal struck between the MD and the CEO was that the MD would receive additional 20% of the amount received by the investors in excess of 30% return on their investments. By the current mechanism / strategy deployed in PVR case, the remuneration limits of the managerial personnel as described in the Companies

[1] http://www.sebi.gov.in/cms/sebi_data/attachdocs/1475575683683.pdf

Act, 2013 (which imposes a limitation of 11% of the net profits of the company or the limits specified in Schedule V of the Act depending on the profitability of the company) was also safeguarded as the commission amount was not paid by the company, instead by the PE.SEBI issued a press release on November 23, 2016[2] whereby on the basis of public comments received thereon, following norms have been revised for such disclosures and shareholders' approval:-

1. No employee including key managerial personnel, director or promoter of a listed entity shall enter into any agreement for himself or on behalf of any other person, with any shareholder or any other third party with regard to compensation or profit sharing unless prior approval has been obtained from the Board as well as public shareholders.
2. All such agreements entered during the past three years from the date of notification shall be informed to the stock exchanges for public dissemination including those which may not be currently valid.
3. Existing agreements entered into prior to the date of notification and which may continue to be valid beyond such date shall be informed to the stock exchanges and approval shall be obtained from public shareholders by way of an ordinary resolution in the forthcoming general meeting. The term 'public' shall carry the same meaning as defined under Rule 2 of Securities Contracts (Regulation) Rules, 1957.
4. Interested persons involved in the transactions shall abstain from voting on the said resolution.

It is pertinent to note that the revised clause of the regulation suggested by SEBI intends to provide for obtaining approval (ordinary resolution) from the "public shareholders". Quite obvious, in case the promoters are a party to such agreements, it becomes meaningless to include the votes of promoter shareholders while getting such agreements approved.

As is the case in majority of the Indian companies, the promoters hold the major voting power and therefore involvement of such promoters in the shareholders approval shall be of no relevance therefore in order to abstain these promoters from voting, SEBI has given cognizance to only "public" shareholders for the purpose of ordinary resolution.

However, as understood from the context above, it is not always necessary that the promoters are a part of such agreements. Such compensation agreements can be entered by a PE investor on one part and any employee of the company (whether or not a promoter) on the other part. Therefore, where the promoters are not a part of such agreements, their votes should not be left unconsidered. The universal idea of discarding vote of an individual / group is to discard the vote of an "interested party". Accordingly, the promoters vote should be disregarded only when they are party to the agreement. Also, as per Sub-section 4(c) of section 178 of the Companies Act, 2013 provides –

> Remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

This signifies that the NRC committee should take into consideration any incentive pay to directors, KMPs, and SMPs to ensure that it is working towards the working goal of the Company. As these agreements can lead to short term gain for a long term risk to the company, the proposal of such agreements should also be placed before the NRC for its approval to the BOD of the Company.

These arrangements between the company and the PE investors cannot be considered illegal as because these are merely transfer of reward from the PE to the KMPs of the investee company for all the hard work done by the KMPs to enhance the performance of the company and help PE investors earn the desired return. Even though the shareholders, along with the KMPs, will also be gaining from such extra effort put in by the KMPs but without neglecting the fact that the promoters/directors/KMPs/SMPs will be earning extra reward, the same shall be placed before the shareholders for approval.

These amendments in the listing agreement will keep the shareholders and the public at large aware of any such side agreements entered into by the KMPs of the company.

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[2] http://www.sebi.gov.in/sebiweb/home/detail/35234/yes/PR-SEBI-Board-Meeting

INFORMAL GUIDANCE ON RECLASSIFICATION OF SHAREHOLDERS U/R 31A- WHETHER SHAREHOLDER'S APPROVAL IS REQUIRED?

Ms. Trupti Upadhyay

Background

On 17th October, 2016[1], Securities and Exchange Board of India (hereinafter referred to as "SEBI") answered the query of the Company, Alembic Pharmaceuticals Limited (hereinafter referred to as "APL") with respect to applicability of the newly introduced Regulation 31A of SEBI (Listing Obligation and Disclosure Requirement) Regulation, 2015 (hereinafter referred to as "Listing Regulations" is discussed.

Facts of the case

APL was incorporated on 16.06.2010 under the provisions of Companies Act, 1956 pursuant to demerger of the Alembic Limited. The equity shares of APL are listed on BSE Limited ("BSE") and the National Stock Exchange of India Limited("NSE").

The issued and paid- up share capital of APL comprise of 18, 85, 15,914 equity shares out of which the shareholding of the promoter group is 74.13%. Out of total 25 persons in the promoter group, 5 persons have expressed their desire to reclassify their shareholding from promoter group to the public category. These five persons cumulatively hold 1.45% of the equity share capital of APL.

The reasons for reclassification are provided by APL are as follows:

- These five persons are senior citizens and they are leading their lives and occupations independently and have no connection (directly/indirectly) with the affairs ofAPL.
- These five persons do not exercise control (directly/indirectly) over the affairs of the Company. They have never held any position of key managerial personnel in the Company. They also do not have any special rights through formal or informal arrangements with the Company or promoters or any person in the promoter group. Any price sensitive information of the Company was never possessed by these fivepersons.

Accordingly, as per the Company the reclassification satisfies the conditions of Regulation 31A (7) of the Listing Regulations.

After the reclassification the shareholding of the promoter group will become 72.68%.

Guidance sought by the Company

The Company wanted to know whether the requirement of obtaining the shareholder's approval [as required under Regulation 31A (5) and (6)] be dispensed and the Company may directly approach the Stock Exchanges (NSE and BSE) for permission under Regulation 31A (2) & (3) of Listing Regulations.

[1] Source:
http://www.sebi.gov.in/cms/sebi_data/commondocs/Alembic-sebiletter_p.pdf

The Company contented that the proposed reclassification is not under Regulation 31A (5) & (6) and therefore, as per Company's understanding shareholder's resolution is not required to be obtained.

Reply of SEBI

SEBI in a very diplomatic manner has responded that though the Company was not required to take approval of the shareholders but the proposed reclassification can take place only after the permission for the same is granted by the stock exchanges (NSE and BSE). Further, the proposed reclassification must be in compliance to the provisions of Regulation 31A of Listing Regulations.

Conclusion

The provisions of Regulation 31A of Listing Regulations should be complied in order to make reclassification of equity shares. Sub-regulation (2) of Regulation 31A specifically provides that the reclassification should be allowed by the stock exchanges having nationwide terminals only upon receipt of a request from the concerned listed entity or the concerned shareholders along with all relevant evidence and the stock exchange shall allow the reclassification/modification on being satisfied with the

[1] Source: http://www.sebi.gov.in/cms/sebi_data/commondocs/Alembic-sebiletter_p.pdf

compliance of conditions mentioned in Regulation 31A. Sub-regulations (4), (5) and (6) of the said Regulation provide for different situations under which reclassification/modification can be sought for, ie.

(a) In case of transmission/succession/inheritance [sub-regulation(4)];

(b) When a new promoter replaces the previous promoter subsequent to an open offer or in any other manner [sub-regulation(5)];

(c) Where an entity becomes professionally managed and does not have any identifiable promoter the existing promoters [sub-regulation(6)];

Sub-regulations (5) and (6) specifically provide for approval of shareholders of the company in case the reclassification is as per the reasons stated therein. However, sub-regulation (7) on the other hand provides for conditions which are necessary for reclassification of promoters and the same is without prejudice to sub-regulations (5) and (6).

Therefore, what transpires from the above provisions is that while the approval of stock exchanges is mandatory for reclassification/modification of promoter/promoter category, seeking shareholders' approval is not required in every case except that mentioned in sub-regulation (5) and (6).

Though SEBI has made the reply very diplomatically without citing any reasons whatsoever and making a generic reply but in view of the author the approval of the shareholders would not be required considering that the case for reclassification does not fall within the scope of either sub- regulation (5) or (6). However, approval of the stock exchanges will be required as per sub- regulation (2) and the conditions specified in sub-regulation (7) shall have to be met.

WHY PROFESSIONALIZING THE BUSINESS IS NECESSARY

"A man does not build a business, he builds an organization. An organization builds a business."

CA Rajesh Jain

Sign hanging in Dunkin' Donuts stores

Once a man was going through a jungle. He came across a low height wooden bridge. As he started crossing the bridge, he saw the tail of a lion coming out of a hole in the bridge. Out of the overpowering fear, he tightly clasped the tail. The bridge worked as a lever and the lion could not free itself from his grip. However, it was difficult to understand whether he was holding the lion or the lion was holding him. The struggle continued for some time, but he started to feel tired. After some time a stranger came passing by. He enquired about the situation. The man replied, "Why don't you hold the tail, till I tell you the story and straighten my back." The other man did as was asked. Our man now had many options including walking away.

Without going further in the story, the point made is that when you are stuck with something, it is necessary to find some help. Then only you can open options for you.

The owners, be it of a business or a professional firm, struggle hard to succeed and grow. Over time, they might get tired of slogging day in and day out. They don't need to remain stuck with daily operations.

The world of business is a jungle and there are many threats. You can't fight it alone. If you have started feeling tired, why not get some help?

It is well understood that entrepreneurship and managerial capabilities are two different sets of qualities.

At the entrepreneurial stage, individual brilliance is the key; but when the organization becomes bigger and moves on to become an institution, ability to manage becomes vital. Moreover, it is not necessary that good entrepreneurs will be good managers too.

Most family businesses and professional service providers confuse themselves with the issue of ownership and management. The right to manage is considered an integral part of the right to ownership. The two are different.

Ownership can be inherited. On the other hand, management requires certain skills. These skills are acquired with education, training and experience. They cannot be inherited. Hence non-family managers are appointed to bridge the gap and/or partnerships and alliances are entered into.

We all might agree that as the owner of an asset, one should have the interest of maximizing its value. But in reality, we are not so objective. In fact, professionals rarely think in terms of the brand value of their firms.

Separation Of Ownership And Management

Owners are like mothers. They are good in nurturing the firm in its infancy stage. But every good mother knows that beyond a point, her affection and care alone cannot make the child grow. The child needs to learn things that are beyond her sphere of knowledge and experience. So he is sent to school, to learn from the teachers and also from other children. A good mother enjoys the feeling that her child is learning new things and growing up in the process. She does not feel sad for this dependence on others. Rather, she moves ahead with other agendas of life.

This does not mean that the child does not require her attention and care. But the dependence has surely lessened. Her job is now confined to monitor the growth and progress of the child. Child psychologists will testify that the more we identify the individuality of the child, the more opportunities we give him to deal with freedom, the faster he learns and grows.

This is what owners have to understand. They have to learn to separate themselves from the firm. No doubt it is their creation, but still it is different and separate. Once they get out of the operational and day-to-day affairs of the firm, maybe they can do better justice to the role as leaders. Management can be hired, leadership cannot be. Indian firms are starving for leadership and vision.

One can learn from the Hindu mythology. Brahma is the creator of the Universe, but Vishnu is the manager. Brahma is only one, while Vishnu has many Avatars (incarnations), depending on the need of the time. Vishnu is a situational leader. In the context of business, owners are Brahma. They need to pass on the baton to other professionals and support staff, who bring the versatility demanded by the situation. If the affairs are not managed well, Shiva takes over and causes destruction so that a new beginning could be made.

Entrepreneurship is crucial in itself. In today's competitive world, innovation and renewal are

necessary to sustain growth. Knowledge and experience become redundant. Brands get commoditized unless new elements of differentiation are added at a pace faster than that of the competitors. Owners can delegate management, but all said and done, it is extremely difficult to delegate risk taking. If owners withdraw from day-to-day operations, they can maintain their core strength and do better service to the firm by focusing on business renewal and innovation. Strong firms even delegate innovation too to competent people.

Growth requires long-term commitment. In the Indian context, growth requires change of radical proportions. Growth requires immense strength of character and persistence. These are not the functions of managers. They are the functions of leaders. Professionals, whose continuity with the organization cannot be taken for granted, may not play these roles perfectly. But they understand numbers. They understand achievement. They understand accountability. They understand 'how to'.

Somewhere, the entire concept of separation of ownership from management is grossly misunderstood. The roles are looked as adversary in nature, whereas in reality they are complimentary. None excludes the other. Each has its role and each has to play the assigned role to perfection to reach to the aspired heights.

Firms deserve to have the best managerial talent. An individual needs to be recruited on the basis of his or her ability to contribute. Needless to say, competent individuals from the family deserve to be provided employment within the business and may also be put on a fast track to the top. However, if they are not competent, they should relinquish management roles to competent non-family partners/managers.

Growth may necessitate increase in the number of employees. As the circle of business widens, more and more people get distanced from the center and work on the fringe. These employees are to be trained and managed. At times, some problems may arise which may require specialized skills. Outsourcing itself requires time in terms of identification of the right source and also for interaction. All this may consume a major part of the owners' time. They may fail to attend to the strategic needs of the firm.

If owners are engaged in the day-to-day activities, they often fail to keep themselves up-to-date with the latest developments. This affects competitiveness of the firm. Many firms have a separate center away from the administrative office of the organization so that the seniors can distance themselves from operational work.

The deterrents

'Corner-room syndrome' or passion for power on the part of owners is the major deterrent to true professionalization. This makes the entire process self defeating. Non-family managers can not perform with a sense of powerlessness.

Eileen C. Shapiro has developed a new sarcastic set of definitions:

Accountability: A worthy constraint that everyone else in the organization must demonstrate to a far greater extent than do today. Not to be confused with authority, which is what I need more of.

Authority: A form of power of which I need more if I am to do my job properly. Not to be confused with accountability, the discipline that everyone else in the organization sorely lacks.[1]

Professionalization cannot happen if seniors are not accountable and if juniors are not empowered.

Powerlessness corrodes and absolute powerlessness corrodes absolutely. Wherever people have a sense of power commensurate with their responsibility, they are motivated and they do the work.

Many owners tend to be authoritarian and control-oriented and view the firm as an extension of themselves and their families, rather than as an independent entity.

“What usually prevents most … owners from delegating, leaving their hands off things, relaxing, and finally retiring, is their inability to accept some dust. They can always see something wrong and they fix it. Other people always seem to leave more dust than they ever did. But what they fail to realize is that others don't do a worse job. They just tend to dust in different place, for different reasons, under different priorities, in different times.”[2]

Conclusion

Nobody expects owners to be masters of all aspects of operations. Naresh Goyal of Jet Airways is not needed to fly the aircrafts, nor is Azim Premji needed to program software. These things can be best left to the experts appointed for the vertical. However, I have sadly observed many owners micro-managing the experts that they hire and pay hefty salaries to. The experts are forced to make compromises and the end result is a mess nobody understands and everybody blames the other party for the failure. In any case, success has many fathers and failure is an orphan.

There is a saying: 'Where attention goes, energy flows.' The biggest problem that man faces today is one of too much clutter. We don't have time to pay attention to even important aspects of our lives.

Playing the roles of owners and governors is very critical, and ideally speaking should occupy the major attention of business owners. However, in reality, most owners find themselves occupied with playing management roles. In the process they lose sight of the broader vision and fail to manage the value of their business asset.

[1] “Fad Surfing In The Boardroom” by Eileen C. Shapiro

[2] “Inside the Family Business” by Dr. Leon A. Danco, Ph.D.

FROM THE DESK OF GENERAL SECRETARY - ACTIVITIES SINCE 14.09.2016

SL. No.	Date	Name of Programme	Speaker
1.	18.10.2016	Meeting on "Board Report and Issues In Annual Filing" & " Functioning of NCLT" at DTPA Conference Room	CS. Rupanjana Dey & CS. Siddhartha Murarka
2.	21.10.2016	Meeting on " GST - An Indepth Analysis" at DTPA Conference Room	CA. Sushil Goyal & CA. Shivani Shah
3.	15.11.2016	Meeting on "Analysis of Insolvency & Bankruptcy code, 2016" and demonetisation at DTPA Conference Room	CA. Vinod Kothari & CA. A. K. Tibrewal
4.	16th, 17th & 18th Nov. 2016	3 days Workshop on "Goods & Services Tax(GST)" at DTPA Conference Room	CA. Sushil Goyal, CA. D. S. Agarwala CA. Shubham Khaitan, CA. Arun Agarwal CA. Vikash Parakh, CA. Harsh Gadodia& CA. Ankit Kanodia
5.	25.11.2016	Group Discussion Meeting on "Time & Place of Suppply Under GST' at DTPA Conference Room	CA. Rajeev Kr. Agarwal
6.	02.12.2016	Meeting on "Penalty Provisions u/s 271(1) (c) / 270A Income -Tax Act, 1961 & Direct Tax Dispute Resolution Scheme, 2016 Important Issues" at DTPA Conference Room	CA. P. R. Kothari CA. Sanjay Bhattacharya
7.	10.12.2016	Full Day Seminar on "Goods & Services Tax "at Kalamandir(Kalakunj)	CA. Sunil Gabhawalla(Mumbai) CA. Udyan Choksi(Mumbai) CA. Mandar Telang(Mumbai) CA. Govind Goyal(Mumbai)
8.	12.12.2016	Meeting jointly with ACAE on "DEMONETIZATION VIS-À-VIS PENALTY PROVISIONS UNDER INCOME TAX ACT, 1961, SECOND AMENDMENT BILL PASSED BY LOK SABHA AND BENAMI TRANSACTIONS (PROHIBITION) ACT, 2016 at Kalakunj(Kalamandir)	Adv. N. K. Poddar Adv. S. M. Surana Adv. Subash Agarwal
9.	21.12.2016	Meeting jointly with EIRC & ACAE on " Awareness Programme on Income Tax Settlement Commission" at R. Singhi Hall, EIRC Auditorium , Kolkata	Shri D. K. Gupta, Vice Chairman, IT SC Shri S. M. Ashraf, Member, IT SC Shri H Jain, Member, IT SC Shri Mithilesh Jha, Kolkata

Full Day Seminar on "Goods & Services Tax"
on 10th December 2016
at Kalamandir (Kalakunj)
in association with
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