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A Monthly Journal of
The Chamber of Tax Consultants

Estd. 1926
ज्ञानं परमं बलम्

Chamber's CADRE

THE CHAMBER'S JOURNAL

Your Monthly Companion on Tax & Allied Subjects

Vol. XI | No. 9 | June 2023

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THE CHAMBER'S JOURNAL

Editorial

Dear Readers,

The month of May 2023 has not been short of action for us professionals, as also for Indian citizens. The biggest news that hit all of us hard, was on 19th May 2023, when the Reserve Bank of India (RBI) announced the withdrawal of Rs. 2,000 currency notes from circulation. The official statement for this withdrawal suggests that these notes, first issued in 2016 post demonetisation, are now at the end of their useful life and under the 'Clean Note Policy', these notes are being withdrawn. Fortunately, these notes still continue to be legal tender and also a window for exchange of these notes has been provided till 30th September 2023, which has not resulted in citizens running helter-skelter to exchange these, immediately. Come 30th September, it will be interesting to see the RBI's stand on this issue. Press Reports suggest that 80percent of these in value terms are already back with the banks but 30th September is a key date for us, not only in terms of submission due date for audit reports but also in terms of what the RBI will come up with on the Rs. 2,000 notes.

This is not the only issue that clients have been repeatedly engaging us with. A slew of amendments on the income-tax front, has kept us busy in the traditional 'off season'. To name a few, scrutiny guidelines were announced, the new faceless appeals scheme where appels will also be heard by Additional and Joint Commissioners (Appeals), in terms of the amendment in the Finance Act, 2023, was notified. New rules to compute income from online gabling were notified as were draft rules for computing income for levy of 'angel tax', one of the most talked about provisions in the recent past. Charitable Trusts continued to receive attention from the Government with the issue of Circular 6/2023 dated 24th May 2023, which again will spark a fresh row of training requirements to their already burdened trustees.

All of this has made us unusually busy in this unusually hot season, the extreme heat being a warning we should not ignore. Climate change is a serious phenomenon, and while it probably is inevitable, as the earth's population keeps growing and also India's, we can do a lot in terms of small steps to slow the change down. Much has been written on this in various media and I would not like to repeat it here, but we all need to introspect, and more importantly, implement our good thoughts on this burning issue, for the world at large.

The 2023 edition of the Indian Premier League (IPL) also concluded this moth with a record number of teams, a record number of games, a record number of sixes, so on and so forth. The captain of the winning team, Chennai Super Kings, a 41 year old 'veteran', Mahendra Singh (M.S.) Dhoni, taught us valuable leadership lessons in the course of his adept captaincy. Staying calm under pressure, never giving up, reposing full faith in the team, being absolutely unselfish, and above all, respecting the audience, are some of the lessons we must take on board from this iconic cricketer. India has produced a 'one of a kind' cricketer in Dhoni and his name will be remembered in cricket's history for years and years to come.

India is also playing the world test championships final as I pen this editorial. Let's pray that we do our very best and come out victors, not merely in terms of the result, but also in terms of showing the world, that we are truly the best sportsmen, playing the game with all due respect and sportsman's spirit.

Coming to the present issue of the Journal, this issue presents before you a very useful collection of 'Frequently Asked Questions (FAQs) on Prosecution' under the tax laws which have been dealt with by various eminent professionals who assist the citizens in dealing with this draconian part of the tax laws. Unfortunately, rendering assistance to the Government in collection of taxes is not regarded as the work of good citizens, but is regarded as the responsibility and obligation of everyone. The way prosecution is initiated and continues, is nothing but a deeply onerous obligation with no willingness for clemency at all, from the authorities. The Journal Committee and the authors have done a really fantastic job of educating and guiding tax practitioners and clients, through these feared provisions, by bringing this issue out.

I must take this opportunity to express my deepest thanks and sincere gratitude to Shri Paras K Savla, Past President and Chairman of the Journal Committee. For the past three years, Paras has shouldered this huge responsibility of the Journal with poise and elan, working through trying times. He has showed that with grit and determination, even the most daunting of obstacles can be overcome and I would

once again convey grateful thanks on behalf of the readers, the Chamber and on my own behalf to Paras for doing such a great job as Chairman of the Journal Committee for these three years. I am sure his guidance and experience will always be available to the Journal in the times to come.

As this issue of the Journal deals with prosecution, let me end this editorial with a quote from Sonia Sotomayor, the first Hispanic, and the third woman to serve on the United Staes Supreme Court, since 2009:

"My job as a prosecutor, is to do justice. And justice is served when a guilty man is convicted, and an innocent man is not".

VIPUL K. CHOKSI
Editor

From the President

Dear Members,

The National Education Policy (NEP) has emerged as a transformative force in India's education system, aiming to move away from traditional book-based learning and foster practical, experiential methodologies. By emphasizing skill-based education, the NEP seeks to cultivate critical thinking, creativity, and problem-solving abilities among students. It recognizes the importance of vocational training, providing avenues for students to acquire practical skills aligned with the demands of the job market. The NEP holds great promise in reshaping education to empower learners with holistic development and real-world relevance.

As tax consultants, we understand the value of practical knowledge and staying updated in our field. The NEP presents a significant opportunity for us to collaborate with educational institutions and shape the future of education in India. By working closely with them, we can contribute to developing curricula that align with industry needs, equipping students with the skills necessary for success in the job market. Through practical training initiatives and mentorship programs, we can empower students to excel in their professional journeys.

At CTC, we wholeheartedly encourage all members to embrace the NEP and collaborate for the betterment of our students. Together, let us embark on a transformative journey to revitalize our education system and ensure that our students receive a superior education that equips them with the expertise and acumen required to thrive in the dynamic 21st-century job market.

Recent notifications under the Prevention of Money Laundering Act (PMLA) have significant implications for our profession. We must stay informed, adapt, and be proactive in our approach. The inclusion of Chartered Accountants, Company Secretaries, and Cost and Works Accountants in the PMLA means that we are now responsible for complying with its provisions. This includes reporting suspicious transactions, maintaining records, and safeguarding our clients' interests. Furthermore, the second notification emphasizes the need to identify and verify beneficial owners, enhancing transparency and combating money

laundering. These changes have far-reaching effects on compliance, training, and potential legal consequences. It is crucial for us to understand the intricacies of these notifications, adjust our practices accordingly, and diligently adhere to the PMLA provisions to maintain our professional integrity.

As professionals, we have an essential role in upholding integrity and compliance. Staying updated on the PMLA provisions and their implications is paramount. We must prioritize compliance requirements, training needs, and potential legal consequences in our professional duties. It brings additional responsibilities, such as reporting suspicious transactions and maintaining accurate records to protect our clients. Additionally, reporting beneficial ownership information plays a crucial role in promoting transparency and combating money laundering. It is incumbent upon us to familiarize ourselves with these notifications, adapt our practices, and strictly adhere to the PMLA provisions. By doing so, we preserve our professional integrity and shield ourselves from penalties. Let us seize this opportunity to lead by example, invest in knowledge and training, and navigate these changes successfully. By upholding the highest ethical standards, we contribute to the greater good of our profession and society as a whole.

I extend my heartfelt congratulations to the Chairman of the Direct Tax Committee for orchestrating a remarkable program focused on "Tax and Regulatory Issues in Relation to Self Re-Development" last month. The esteemed speakers delivered exhaustive presentations, delving into the intricacies of tax implications, compliance requirements, and other regulatory matters associated with such agreements.

During last month, the Indirect Study Circle organized a virtual study circle meeting focused on the Hospitality and Tourism sector. This meeting served as a platform for an in-depth discussion on the significant GST issues faced by these industries. The participants engaged in a thorough examination of the various challenges and complexities arising from the application of the Goods and Services Tax (GST) in this sector.

The Delhi chapter recently organized a study circle meeting focusing on the recent judgments on income tax. Honourable ITAT JM Shri Sudhanshu Srivastava from the Lucknow bench chaired the meeting, accompanied by panel members Adv. Ruchesh Sinha and Adv (CA) Prakash Sinha. This initiative by the Delhi chapter highlights their commitment to professional development and staying updated on crucial legal developments. The presence and expertise of the distinguished panel added immense value to the discussions, benefitting participants and contributing to the tax community's collective knowledge.

The Chamber is organizing a seminar focusing on two important topics: income tax amendments and key disclosures for non-corporate taxpayers' return filing in AY 2023-24.

The seminar aims to provide a comprehensive understanding of recent tax amendments, covering changes in laws, compliance requirements, and their financial implications. It will also address practical challenges associated with filing returns before the July 2023 deadline. Expert speakers will offer valuable guidance on income reporting, deductions, and common filing issues. This seminar demonstrates the chamber's commitment to providing relevant and practical guidance in the ever-evolving landscape of income tax laws.

The current issue of the Journal is on the subject of 'FAQ on Prosecution'. I thank all the authors for giving their articles on the subject and sparing their valuable time for the Chamber.

Change is the only thing that is constant. As I pen down my last communication through Journal, I would like to thank Editor, Editorial Board, Chairman of Journal Committee and other members of Journal Committee in bringing out unique Special Stories every month. I would like to convey my appreciation to my office bearers, Vice President Shri Haresh Kenia (now President-elect), Jt. Secretaries Shri Vijay Bhatt & Shri Mehul Sheth and Treasurer Ms. Neha Gada for their constant support. I continuously received guidance from my predecessors Shri Ketan Vajani, Shri Anish Thacker and Shri Vipul Choksi. Chairman/ Chairpersons of all the committee deserve special thanks for giving their cent percent to the activities of CTC. I would also like to thank other council members for their support and guidance. I would also like to thank CTC Staff and other core group members who helped CTC in completing this year with great success. I am sure CTC will achieve greater hights under dynamic leadership of CA Haresh Kenia. I wish good luck to Shri Haresh Kenia and his team for the next year.

I conclude with best wishes to all the readers.

Jai Hind

PARAG S. VED
President

Aditya Ajgaonkar
Advocate

FAQs on some general and basic principles of Prosecution under Income Tax Act, 1961

Q.1. Does the Income Tax Act, provide a separate mechanism/procedure for prosecution?

Ans. Chapter XXII of the Income-tax Act, 1961, provides for prosecution under the Income-tax Act. Though there are some procedural Section in this Chapter, the provisions are by large, substantive in nature. Most of the procedural Sections do not prescribe much with regard to the trail for the offenses under the Act, but with regard to initiation of prosecution, e.g. Section 279 of the Act provides that sanction needs to be obtained from the relevant authority to initiate prosecution under the Act. The Act does provide for the applicability of the Code of Criminal Procedure, 1973, to proceedings before the special court through Section 280D. It reads as follows:

280D. Application of Code of Criminal Procedure, 1973, to the proceedings before Special Court.

(1) Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bails or bonds) shall apply to the proceedings before a Special Court and the person conducting the prosecution before the Special Court shall be deemed to be a Public Prosecutor:

***Provided** that the Central Government may also appoint for any case or class or group of cases a Special Public Prosecutor.*

(2) A person shall not be qualified to be appointed as a Public Prosecutor or a Special Public Prosecutor under this Section unless he has been in practice as an advocate for not less than seven years, requiring special knowledge of law.

(3) Every person appointed as a Public Prosecutor or a Special Public Prosecutor under this Section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of Section 2 of the Code of Criminal Procedure, 1973 (2 of 1974) and the provisions of that Code shall have effect accordingly.

Therefore, it is clear that the provisions of the Code are to be followed unless the contrary is specially provided for by the Act. An exception to this is Section 292A of the

Act which prescribes that Section 360 of CrPC (Order to release on probation of good conduct or after admonition) and the Probation of Offenders Act, 1958 would not apply to a person convicted of an offence under the Income-tax Act unless the accused is under the age of Eighteen. Therefore, it can be said that the Income-tax Act, 1961, provides for a mechanism to before instituting cases before the Special Court, it does not provide for a separate/mechanism procedure once the complaint is filed.

Q.2. What is the procedure governing prosecution proceedings to be followed by the department before moving the court?

Ans. The Central Board of Direct taxes in their Circular No. 24/2019 have given instructions that:

"As per section 279(1) of the Act, the sanctioning authority for offences under Chapter XXII is the Principal Commissioner or Commissioner or Commissioner (Appeals) or the appropriate authority. For proper examination of facts and circumstances of a case, and to ensure that only deserving cases below the threshold limit as prescribed in Annexure get selected for filing of prosecution complaint, such sanctioning authority shall seek the prior administrative approval of a collegium of two CCIT/DGLT rank officers, including the CCIT/DGIT in whose jurisdiction the case lies. The Principal CCLT(CCA) concerned may issue directions for pairing of CCslT/DGIT for this purpose. In case of disagreement between the two CCIT/DGIT rank officers of the collegium, the matter will be referred to the Principal CCIT(CCA) whose decision will be final. In the event that the Pr. CCIT(CCA) is one of the two officers of the collegium, in case of a disagreement the decision of the PLCCIT(CCA) will be final".

The Opportunity of being heard is often given by the concerned Commissioner before the launching of prosecution under this Chapter. However, the Act does not provide that the Commissioner has to necessarily afford before deciding to initiate proceedings as held by the Supreme Court in ***ACIT vs. Vellippa Textiles Ltd*** **(2003) 263 ITR 550 (SC)**

Q.3. What is the purpose behind setting up Special Court?

Ans. The purpose of setting up a Special Court seems to be for the effective and efficient disposal of tax prosecution cases. The Finance Bill 2012 and memorandum states that Section 280A, 280B, 280C and 280D were introduced into the statute to strengthen the prosecution proceedings and to expedite the process of prosecution.

The Special Court for persecution of Income Tax offenses is one as notified under Section 280A of the Income-tax Act, 1961 which reads as follows:

(1) The Central Government, in consultation with the Chief Justice of the High Court, may, for trial of offences punishable under this Chapter, by notification, designate one or more courts of Magistrate of the first class as Special Court for such area or areas or for such cases or class or group of cases as may be specified in the notification.

Explanation.— In this sub-section, "High Court" means the High Court of the State in which a Magistrate of first class designated as Special Court was functioning immediately before such designation.

(2) While trying an offence under this Act, a Special Court shall also try an offence, other than an offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

Q.4. What is the procedure before the court?

Ans. The Procedure regulating prosecution under the Income-tax Act, 1961, is governed by the Criminal Procedure Code, 1973, unless contrary is provided eg. S. 292A of the Act provides that S. 360 of the Code of Criminal Procedure Code, 1973 (Order to release on probation of good conduct or after admonition) and the Probation of Offenders Act, 1958 would not apply to a person convicted of an offence under the Income-tax Act, unless the accused is under eighteen years of age.

On the basis of complaint before a Court, on recording satisfaction, the Court issues process and sends summons to the accused along with the copy of complainant to attend before the Court on a particular date and time either in person or through an authorized representative. The matter is then triable as a 'summons case' if the imprisonment prescribed is for a period not exceeding two years as laid down by Chapter XX of the Criminal Procedure Code, otherwise as a warrant case as prescribed by Chapter XIX of the Code.

Q.5. What is the difference between cognizable offence vs non-cognizable offence?

Ans. A cognizable offense is one in which a Police officer may, without an order from a magistrate arrest the accused without a warrant. A non-cognizable case is one in which a police officer cannot arrest the accused without the issue of such a warrant.

Income Tax officers do not have the power to arrest under the Income-tax Act, 1961, therefore the offenses as envisaged in Chapter XXI of the Act are non-cognizable in nature. Therefore, the Income Tax officer files a complaint before the special court for offenses under this Act so that the special court, after applying its judicial mind, may issue process for the same.

Q.6. What are the differences between bailable offence vs non-bailable offence?

Ans. Offenses, with regard to bail fall under two wide categories – (i) Bailable (ii) Non – bailable.

Bailable offenses are those offenses where the grant of bail is a matter of course and as a matter of right. Section 436 of the Code of Criminal Procedure, 1973, dealing with bailable offenses, prescribes as follows—

"(1) When any person other than a person accused of a non- bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or

is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail":

Non Bailable offenses are those in which bail can be furnished subject to the discretion of the Courts. Section 437 of the Code of Criminal Procedure, 1973, dealing with bailable offenses, prescribes as follows-

"When any person accused of, or suspected of, the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail.."

The word used in Section 437 of the Code is 'may' instead of the word 'shall' used in Section 436. Therefore, the release on bail for a bailable offense is a matter of right, while under Section 437 is a matter of discretion.

Q.7. What is bail? Is it necessary to take bail in income tax prosecution matters?

Ans. Granting of Bail refers to process of procuring the release of an accused by ensuring his attendance in court for the purposes of criminal proceedings. Though the Court have held that "Bail is the rule, Jail is the exception" as read from Right to liberty ***Gudikanti Narasimhulu vs. Public Prosecutor, High Court of A.P., (1978) 1 SCC 240***], economic offenses are placed on a different footing as held by the Courts in cases such ***ITO vs. Gopal Dhamani [1988] 172 ITR 462 (Raj)*** where the Rajasthan High Court laid down the proposition:-

"Jail and not bail in serious economic, anti-social, white-collar crimes." The Supreme Court has held that "Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country."

Y.S. Jagmohan Reddy vs. Central Bureau of Investigation(2013) 7 SCC 439.

At the time of granting bail in cases involving non-bailable offences particularly where the trial has not yet commenced, the court should take into consideration various matters such as the nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State and similar other considerations. As held in State through ***Dept. Comm'r of Police vs. Jaspal Singh (1984) 3 SCC 555.***

It is necessary to take bail in Income Tax Prosecution cases before the Special Court.

Q.8. Whether bail can be granted during the proceedings?

Ans. It is necessary to take bail in Income Tax Prosecution cases before the Special Court. At the time of granting bail the Court shall only look at the prima facie material and should not go into merits of the case by appreciating evidence. Bail can be taken during the Prosecution proceeding upon appearing before the Special Court or Anticipatory bail application can be moved before Court of Sessions/High Court when a person anticipated being arrested. Anticipatory Bail is governed by Section 438 of the Code of Criminal Procedure. The Court may, for granting anticipatory bail take into consideration, the following factors, namely:

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant;

(iii) the possibility of the applicant to flee from justice;

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested

- Either reject the application forthwith or issue an interim order for grant of anticipatory bail.

Q.9. Whether personal appearance is required during every hearing?

Ans. The Complaint filed before the special court, being criminal complaint the accused must be present before the Court to face trial, unless the Court gives a specific exemption for the same, usually upon an application being made. Section 205 of the Code of Criminal Procedure, 1973, prescribes that the Magistrate may dispense with personal attendance of accused –

(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.

The granting of exemption therefore is discretionary and in the hands of the Special Court trying the offenses under the Income-tax Act,1961.

Q.10. What if the accused does not appear before the Court?

Ans. The Accused are supposed to present themselves in Court as per the summons. If the accused is not present on such particular date, the Court may issue a warrant against the accused, unless the accused secures bail, he may be arrested and produced before the Special Court.

Upon being granted bail, the Accused shall have to remain present in court on the dates of hearing unless an exemption is granted. If the accused does not remain so present, the Court may issue a bailable or non-bailable warrant to secure the presence of the accused. The court can refuse bail even if offense is bailable if conditions that were imposed while granting bails are violated as held in ***Sukar Narayan Bakhiya vs. Rajnikant R. Shah (1982) GLH 778.***

Q. 11. What would be the place for the Trial?

Ans. The Place for the trail shall be the Jurisdictional Special Court notified under Section 280B of the Income-tax Act, 1961, exercising territorial jurisdiction upon the place where the alleged offense has occurred.

Q. 12. What is a Trial? What is the difference between a summons case vs. a warrant case?

Ans. A criminal offense needs to be 'tried' after charges are framed by weighing evidence to establish facts unlike tax proceedings of assessment that are 'summery' in nature. The process of establishing the guilt of an accused by weighing evidence and the law is called a 'trial'.

All cases not punishable by death, imprisonment for life or for more than two years are summons cases while those so punishable are warrant cases. Procedure in case of summons cases is faster than that in the case and warrant cases. Framing of charges is not mandatory in summons cases. The Accused may not necessarily have to remain present in the case of a summons case, he may plead guilty even by post or through a pleader while the presence of the accused in case of a warrant case is mandatory. If an accused does not remain present in the case of a warrant case, in the absence of an exemption application, a 'warrant' may be issued against him to compel his appearance. A Summons case can be converted into a warrant case if the cases relate to an offense that entails more than 6 months of imprisonment as punishment at the discretion of the Judge in the interest of justice.

A matter is then triable as a 'summons case' if the imprisonment prescribed is for a period not exceeding two years as laid down by Chapter XX of the Criminal Procedure Code, otherwise as a warrant case as prescribed by Chapter XIX of the Code. Section 280C of the Income-tax Act, 1961 prescribes as follows-

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court, shall try, an offence under this Chapter punishable with imprisonment not exceeding two years or with fine or with both, as a summons case, and the provisions of the Code of Criminal Procedure, 1973 as applicable in the case of trial of summons case, shall apply accordingly.

Q.13. What is the general time limit in completion of trial?

Ans. The Income-tax Act, 1961 does not provide for a timeframe for the conclusion of a trial. The Supreme Court in ***P. Ramachandra Rao vs. State of Karnataka, (2002) 4 SCC 578*** has held that:

"Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation, which, in our opinion, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally we may interpret Articles 32, 21, 141 and 142 of the Constitution. The dividing line is fine but perceptible. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps, but they cannot entrench upon in the field of legislation properly meant for the legislature. Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time-limits or chalking out a calendar for proceedings to follow, to redeem the injustice done or for taking care of rights violated, in a given case or set of cases, depending on facts brought to the notice of the court. This is permissible for the judiciary to do. But it may not, like the legislature, enact a provision akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973. It is neither advisable nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in the aforesaid four cases could not have been so prescribed or drawn and, therefore, are not good law. Criminal courts are not obliged to terminate trial of criminal proceedings merely on account of lapse of time, as prescribed by the directions made in the aforesaid cases. This was re-iterated by the Supreme Court in ***State vs. Narayan Waman Nerukar (Dr), (2002) 7 SCC 6: 2002 SCC (Cri) 1542****"*

If one feels that one's Article 21 (Constitution of India) right to a speedy trial is being violated, one may always seek the trial to be expedited by approaching the High Court under Article 226 of the Constitution of India.

Q.14. Is the Assessing officer required to be present during the Trial?

Ans. The Assessing officer is not required to be present during the entire trial before the special court. However, if the prosecution wishes to lead evidence through the Assessing Officer, then the Assessing officer shall need to be present to lead such evidence and must be subject to cross examination. It may not be required that the same assessing officer who has passed the Assessment Order be required to lead evidence in the prosecution proceedings.

Q.15. What is Cross-examination and the procedure to cross-examine?

Ans. Cross examination of a witness is a part of principles of natural justice and is an integral part of the Indian Evidence Act. Section 137 of the Indian Evidence Act states that "The examination of a witness by the adverse party shall be called his cross-examination".

Section 135 of the India *Evidence Act* states "*The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court".*

Section 138 of the Indian *Evidence Act* states - *Order of examinations. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Q.16. What is a deposition? Can it be relied upon before the Court?

Ans. A deposition is the process of recording a witness's sworn, out-of-court oral testimony. This evidences may then be turned into a written transcript for use in court. Proceedings before the Income tax authorities can be relied upon before the Special Court. Statements recorded by the Income Tax Authorities, taken in course of proceedings can be relied upon before the Special Court, however, these have to be proved under the relevant sections of the Indian Evidence Act, 1872. The authorities under the Income-tax Act have the powers of a Civil Court in certain circumstances to call for witnesses and record evidence. The statement recorded under Section 132(4) of the Income-tax Act can be expressly used in any proceedings under the Act.

Section 33 of the Evidence Act reads as follows :

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Q. 17.Can the accused call for an expert witness?

Ans. A plain reading of Section 243 clarifies that an accused can call for any witness for the purpose of examination or cross-examination, subject to the provisions of the Section. Such a witness may include an expert witness. However, the admissibility of the opinion of experts shall be governed by Section 45 of the Indian Evidence Act, 1872.

As per Section 243 of the Code of Criminal Procedure, the accused is to produce his evidence. Defense witness may be called upon with the aid of the same. Section 243 of the Code reads as follows:

243. Evidence for defence

(1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

***Provided** that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.*

The provision for calling upon an expert witness is Section 45 of The Indian Evidence Act. Section 45 of the Evidence Act reads as follows:

45. Opinions of experts.–

When the Court has to form an opinion upon a point of foreign law or of science, or art, or as to identity of handwriting 2[or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, 3[or in questions as to identity of handwriting] 2[or finger impressions] are relevant facts.

Such persons are called experts…

Whether a witness can be called upon as an 'expert witness' or not shall be at the discretion of the Court. For income tax prosecutions, an accountant that has prepared books of accounts may not be termed as an expert or a forensic auditor that has audited books of accounts may not be exactly be termed as an 'expert witness' but can nevertheless be called upon to be a witness for the defence.

■●■

CA Jayesh Gogri

FAQs on Prosecution – Goods and Services Tax Act

Q.1. What are the offences, under Goods and Services Tax Act for which, an Assessee/Person can be prosecuted?

Ans. Following are the offences (Specified offences)[1] where the person can be prosecuted if he/she:

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax

(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill

(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due

(e) evades tax or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d)

(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act

(g) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder

1. Section 132 (1) of the Central Goods and Services Act, 2017

(h) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder

(i) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (h)

Q.2. Whether for the offences committed under Goods and Services Tax Act, 2017, Prosecution can also be launched under Indian Penal Code.

Ans. Yes. It is possible to have prosecution under Indian penal code for the offences committed under GST law. However, it may be noted that prosecution can not be launched under both the laws for the same offence. The concept of double jeopardy is an important principle in relation to such situations.

Q.3. What is the punishment for second and subsequent offences?

Ans. For the second and for every subsequent offences, punishment would be imprisonment for a term which may extend to five years and with fine[2]. It may be noted that the quantum of fine is not quantified in the law.

Q.4. Is prosecution automatic in case of a default/offence?

Ans. Prosecution is not automatic. Prosecution cannot be initiated without prior sanction of the Commissioner[3]. Moreover, the person to be prosecuted, will have to be afforded adequate opportunity of being heard. As per instructions issued by CBIC[4], prosecution has serious implications and therefore, cannot be launched in the absence of adequate proofs even if adjudication authority has confirmed demands. Supreme Court in the case of ***Siddarth vs. State of Uttar Pradesh***[5] held that *Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it.*

Q.5. Whether the prosecution proceedings can be launched even before the completion of adjudication proceedings

Ans. In the case of Standard Chartered Bank[6], apex court held that prosecution proceedings can be launched simultaneously with adjudication proceedings. However, it may be noted that if the adjudicating authority, after examination of all facts has already concluded that there is no offence committed, then in such a case prosecution cannot be launched as held in the case of G.L. Didwania[7] by the Supreme Court.

2. Section 132 (2) of the Central Goods and Services Act, 2017
3. Section 132 (6) of the Central Goods and Services Act, 2017
4. instruction no. 4/2022-23 [Gst- Investigation] dated 1.9.2022
5. Criminal Appeal No. 838 of 2021
6. 197 ELT 18 (SC)
7. 108 ELT 16 (SC)

Q.6. What is the relevance of the findings in the appeal on merits in the criminal proceedings?

Ans. If the findings in the appeal on merits suggest that the prosecution was not required to be initiated, prosecution cannot continue. Refer the apex courts judgment in case of G.L. Didwania (*supra*).

Such findings also serve as important legal precedents for the future similar cases.

Q.7. Whether the prosecution proceedings be launched against the Chartered Accountant/ Consultant, based on abetment or conspiracy.

Ans. As per S. 132(1)(l) any person who attempts to commit, or abets the commission of any of Specified offences, can be prosecuted. Therefore, prosecution can be launched against the Chartered Accountant/Consultant if the Commissioner is of a clear opinion, that such CA/Consultant was abating any evasion of the department.

Q.8. Can prosecution be launched on senior citizens/women/children?

Ans. Yes, prosecution can be launched on senior citizens/women/children under GST law as well as under CrPC. However, there could be certain concessions for them.

Q.9. Who would be prosecuted in case of offences by a company/LLP/firms/AOP/BOI/HUF etc.?

Ans. Following persons will be prosecuted in case of offences by a company/LLP/firms/AOP/ BOI/HUF etc[8].

Offences By	***Persons to be prosecuted***
Company	1. Every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company 2. where it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer
Limited Liability Partnership (LLP)	Partner
Partnership firm	Partner
Association of Persons (AOP)	Not provided for*
Body of Individuals (BOI)	Trustee in case of a Trust*
Hindu Undivided Family (HUF)	Karta

8. Section 137 of the Central Goods and Services Tax Act, 2017

* *In case of AOP, no specific person has been provided for to be prosecuted. Moreover, in case of BOI, the law has considered as only one scenario of Trust. Therefore, it appears that in such cases, all the persons concerned with the offence can be prosecuted.*

Q.10. Who can be prosecuted, in the case of a LLP/firm, where the partners are limited companies?

Ans. There are no specific provisions in the GST law pertaining to such situation. However, as provided in S. 137 of the Act, in case of partnership firm and the LLP, all the partners can be prosecuted. Limited companies being partners are liable for prosecution. However, being artificial persons, companies per se can not be prosecuted. However, taking recourse of S. 137, it can be said that in case of companies, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, will be liable for prosecution. Moreover, where it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer can be prosecuted.

Q.11. Can a liquidator be prosecuted?

Ans. Section 233 of Insolvency and Bankruptcy Code states that no proceedings should be initiated against liquidator for actions done in good faith. However, if a liquidator commits one more of Specified offences with mala fide intentions, can be prosecuted.

Q.12. Can an insolvency professional be prosecuted?

Ans. Section 233 of Insolvency and Bankruptcy Code states that no proceedings should be initiated against insolvency professional for actions done in good faith. However, if an insolvency professional commits one or more Specified offences with mala fide intentions, can be prosecuted.

Q.13. Does the GST law, provide a separate mechanism/procedure for prosecution?

Ans. Neither Act, nor Rules provide for any mechanism/procedure for prosecution under the GST law. However, CBIC has issued a detailed instructions[9] with regard to Prosecution. These instructions provide the do's and don'ts for officers, records, monitoring and withdrawal of prosecution.

Q.14. What is the procedure governing prosecution proceedings to be followed by the department before moving the court?

Ans. Instructions issued by CBIC provide for the following procedure to be adopted by GST officers before moving the court:

a. Examining the case if it is fit for prosecution as per the provisions of Section 132.

9. instruction no. 4/2022-23 [Gst- Investigation] dated 1.9.2022

b. Gathering evidences relevant to prosecution

c. Recording the reasons by the Commissioner

d. Sanction by the Commissioner

e. Issuance of arrest Memo

f. The grounds of arrest must be explained to the arrested person and this fact must be noted in the arrest memo

g. A nominated or authorized person (as per the details provided by arrested person) of the arrested person should be informed immediately and this fact shall be mentioned in the arrest memo;

h. The date and time of arrest shall be mentioned in the arrest memo and the arrest memo should be given to the person arrested under proper acknowledgment.

i. A woman should be arrested only by a woman officer

j. Medical examination of an arrested person should be conducted by a medical officer in the service of Central or State Government

k. It shall be the duty of the person having the custody of an arrested person to take reasonable care of the health and safety of the arrested person.

l. Arrest should be made with minimal use of force and publicity, and without violence. The person arrested should be subjected to reasonable restraint to prevent escape.

Q.15. Whether sanction for launching prosecution is necessary.

Ans. Yes. As per provisions of S. 132(6) of the Act, previous sanction of the Commissioner is required for launching prosecution against any person.

Q.16. What are the circumstances in which Commissioner cannot grant sanction?

Ans. In the following circumstances Commissioner can not grant sanction:

a. Lack of adequate evidences

b. Small amount of taxes involved

c. Tax demand is arising out of interpretation of law or technical errors

d. The matter is already dropped by adjudicating authorities on merits

e. The taxpayer comes forward voluntarily to pay taxes which were not paid or short paid

f. The person co-operates in the investigation

Q.17. Whether prosecution can be initiated/continued, without levy of penalty?

Ans. Yes. Imposition of penalty is not a pre-requisite to launching of prosecution. However, it may be noted that if penalties are dropped on merits in a case, prosecution cannot continue in such a case.

Q.18. Whether prosecution can be initiated/continued, when the penalty proceedings are dropped.

Ans. Yes. If the penalty proceedings are dropped on account of technical grounds, in such cases, prosecution proceedings can continue.

Q.19. What is the procedure before the court?

Ans. CBIC has prescribed the following procedure[10] before the Court:

a. Once the sanction for prosecution has been obtained, prosecution in the court of law should be filed within a period of sixty days by the duly authorized officer (of the level of Superintendent).

b. In case of delay in filing complaint beyond 60 days, the reason for the same shall be brought to the notice of the sanctioning authority i.e., Pr. Commissioner/ Commissioner or Pr. Additional Director General/Additional Director General, by the officer authorised for filing of the complaint.

c. In the cases investigated by DGGI, except for cases pertaining to single/multiple taxpayer(s) under Central Tax administration in one Commissionerate where arrests have not been made and the prosecution is not proposed prior to issuance of show cause notice, prosecution complaints shall be filed and followed up by DGGI.

d. In other cases, the complaint shall be filed by the officer at level of Superintendent of the jurisdictional Commissionerate, authorized by Pr. Commissioner/Commissioner of CGST.

Q.20. What would be the place for the Trial?

Ans. The place of trial would be governed by the Code of Criminal Procedures, 1973. Normally, the place of trail would be the place where offence has been committed. However, at times the offence can be said to have been committed from the place where all the important decisions relating to GST are being taken which could be the registered office or any other office.

Q.21. What is the difference between cognizable offence vs non-cognizable offence?

Ans. The word 'cognizable' literally means capable of being known. Offences of serious nature, or imprisonment for more than 3 years shall be cognizable. Cognizable offences[11] are those

10. Para 7 of Instruction no. 4/2022-23 [Gst- Investigation] dated 1.9.2022

11. Section 2(c) of CrPC, 1973

in which the police can arrest the accused without a warrant. The police officer can also proceed to investigate without the permission of the court.

Under GST law[12], the following offences are cognizable in nature:

- Supply made without issue of invoice
- Issues invoice/bill without supply
- Collects tax but does not pay to Govt within 3 months

The word 'non-cognizable' means incapable of being known. Non-cognizable offences[13] are less serious in nature. The police officer cannot arrest the accused without an arrest warrant and cannot begin to investigate without the permission of the court. Examples include affray, assault, cheating, forgery, etc.

Under GST law[14], the following offences are non-cognizable in nature:

- Evades tax or fraudulently obtains refund
- Falsifies financial records or produces fake accounts or documents or furnishes false information
- Receives or is concerned with supply of services knowingly in violation of GST Law
- Knowingly obtains possession or is concerned with transporting, removing, supplying, receiving of any goods liable to be confiscation
- Tries or helps in committing above offences

Q.22. What are the differences between bailable offence vs non-bailable offence?

Ans. Bailable offences can be termed as offences where bail is to be granted considering the same are less serious in nature. These are generally offences which are punishable upto three years imprisonment or with a fine. In Bailable Offences[15], bail can be claimed as a right and is granted as a matter of course by the police officer or by court.

Further, all cognizable offences under GST law mentioned in Q21 where quantum of tax evasion involved is upto 500 lakhs are bailable[16] in nature. Also all non-cognizable offences mentioned above are bailable under GST law.

12. Section 132(5) of CGST Act, 2017
13. Section 2(l) of CrPC, 1973
14. Section 132(4) of CGST Act, 2017
15. Section 436 of CrPC, 1973
16. Section 132(4) of CGST Act, 2017

Non-Bailable offences are considered more serious in nature. The quantum of punishment is high in non- bailable offences which may extend to life Imprisonment. Bail[17] cannot be claimed as right and court or the police officer has discretion to grand bail after considering facts and circumstances of each case.

Further all cognizable offences stated in Q21 above where quantum of tax evasion is more than 500 lakhs are non bailable[18] in nature.

Q.23. Whether personal appearance is required during every hearing?

Ans. In cases involving fact finding, testimony, personal appearance may be insisted by GST authorities/Courts. In other cases, appearance can be made through an authorized representative. As per CrPC it is not compulsory, and at discretion of Magistrate.

Q.24. What if the accused does not appear before the Court?

Ans. In case of criminal proceedings, not appearance of the accused can be viewed seriously by the Court. In such a case, Court may either decide in the absence of the accused or may issue a warrant. If the accused is released on bail, such bail can be suspended by the Court. Non-appearance may also impact on the outcome of the proceedings in the form of a strict judgment.

17. Section 437 of CrPC, 1973
18. Section 132(5) of CGST Act, 2017

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FAQs on Prosecution – Goods and Services Tax Act

1. What is a Trial? What is the difference between a summons case vs. a warrant case?

Ans.: Trial in case of criminal proceedings is a process by which both parties produce the evidence and make their arguments to prove or defend the offence committed by the accused and the Judges pass a verdict either convicting or acquitting the accused on appreciation of the evidences and legal arguments.

A summons case is for an offence for which a Police Officer may notify the accused person to appear in a court to a fixed time and place

Whereas a warrants case is for an offence for which the Police Officer will make the arrest without giving any notice to the accused person keeping in mind the severity of the punishment for the offence committed by the accused person.

Thus, the major difference between a summons case and a warrants case is the severity of punishment for the offence being committed by the accused.

2. What do you mean by the burden of proof?

Ans.: Burden of proof is an obligation on the party to prove its allegations based on evidences before the trial court. The onus to prove any claim lies on the person who makes the said claim. The person who makes a certain claim has to legally validate the said claim by proving it on the basis of evidences.

Section 101 of the Evidence Act, 1872 defines burden of proof to mean whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

3. Whether the concept of Mens Rea apply to Criminal proceedings? What is the presumption as to culpable mental state under the Income Tax Act?

Ans.: Mens rea refers to criminal intent. The literal translation from Latin is "guilty mind." It is a settled law that the concept of mens rea will apply to Criminal Proceedings for any

offences committed and tried under CrPC or IPC. However, there is a lot of debate with regards to the applicability of the concept of mens rea for a criminal prosecution under a taxing statute.

Hon'ble Supreme Court in the case of ***Director of Enforcement vs. MCTM Corporation Pvt. Ltd. & Ors., (1996) 2 SCC 471*** held as under:

"Therefore, unlike in a criminal case, where it is essential for the "prosecution" to establish that the "accused" had the necessary guilty intention or in other words the requisite "mens-rea' to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947."

"The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence,", overlooking the position that the "blameworthy conduct" in the adjudicator proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed Under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention."

*In **SEBI vs. Shriram Mutual Fund [SEBI vs. Shriram Mutual Fund, (2006) 5 SCC 361]**, with respect to imposition of penalty on failure to comply with the civil obligation this Court has laid down thus : (SCC pp. 371 & 376, paras 29 & 35)*

"29. … In our opinion, mens rea is not an essential ingredient for contravention of the provisions of a civil Act. In our view, the penalty is attracted as soon as the contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. This apart [that] unless the language of the statute indicates the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred. … the penalty has to follow and only the quantum of penalty is discretionary.

Hon'ble Supreme Court in the matter of ***Guljag Industries vs. Commercial Taxes Officer (2007) 9 VST 1*** held as under:

"We are not concerned with non-filing of statements before the A.O. We are concerned with the goods in movement being carried without supporting declaration forms. The object behind enactment of Section 78(5) which gives no discretion to the competent authority in the matter of quantum of penalty fixed at 30 per cent of the estimated value is to provide to the State a remedy for the loss of revenue. The object behind enactment of Section 78(5) is to emphasise loss of revenue and to provide a remedy for such loss. It is not the object

of the said Section to punish the offender for having committed an economic offence and to deter him from committing such offences. The penalty imposed under the said Section 78(5) is a civil liability."

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is different from the penalty for a crime."

The Supreme Court in the ***Dilip N Shroff vs. Jt. CIT (2007) 6 SCC 329*** *held that in order to attract penalty under Section 271(1)(c), mens rea was necessary. However, the said judgment to the extent of applicability of concept of mens rea was overruled by the subsequent judgment of Supreme Court in the case of* ***Union of India vs. Dharmendra Textile Processors 2008 (231) ELT 3 (SC)****.*

Hon'ble Supreme Court in Commissioner of Sales Tax, ***Uttar Pradesh vs. Sanjiv Fabrics – (2010) 35 VST 1 (SC)*** *while examining whether mens rea is an essential element of an offence created under a taxing statute, held that regard must be had to the following factors;*

"(i) the object and scheme of the statute

(ii) the language of the section; and

(iii) the nature of penalty."

…

"Although in relation to the taxing statutes, this Court has, on various occasions, examined the requirement of mens rea but it has not been possible to evolve an abstract principle of law which could be applied to determine the question. As already stated, answer to the question depends on the object of the statute and the language employed in the provision of the statute creating the offence. There is no gain saying that a penal provision has to be strictly construed on its own language."

Recently Hon'ble Supreme Court in the case of ***State of Gujarat vs. Saw Pipes Ltd. – 2023 SCC Online SC 428****, while dealing with the mandatory nature of penalty under Section 45(6) of the Gujarat Sales Tax Act, 1949, held that the penalty prescribed under Section 45(6) uses is civil liability and hence question of proving mens rea will not arise.*

From the above decision one can conclude the concept of mens rea may not apply to the proceedings under a taxing statute. However, it is important to understand that all the above judgments were dealing with imposition of penalty and not criminal prosecution.

With regards the criminal prosecution, Section 278E of the Income Tax Act presumes the existence of culpable state of mind for prosecution. The accuse shall have to defend to prove the fact that he had not such mental state in respect to the act charged as an offense in that prosecution.

Similarly, Section 135 of the CGST Act, 2017 provides that any prosecution for an offence under that Act which requires a culpable mental state on the part of the accused, the court

shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution

4. Is the Assessing officer required to be present during the Trial?

Ans.: Yes the Assessing officer being a complainant has to be present during the trial. The complainant is required during the trial for examination of evidence. If a complainant does not attend the trial on a summons being issued by the Magistrate, the accused may either dismiss the case or acquit the accused.

Further in the trial of a warrant case, as per Section 249 of CrPC, if the complainant does not appear on the day of the hearing and the offence is such that it can be compounded or is not a cognizable offence, the Magistrate may, at any time before the charge has been framed, discharge the accused.

In the trial of a summons case, as per section 256 CrPC, if the summons has been issued on a complaint and the complainant does not appear on the day appointed for the appearance of the accused or any subsequent day to which the hearing may be adjourned, the Magistrate may acquit the accused, unless he thinks it proper to adjourn the hearing of the case to some other day. However, there are exceptions to this provision. If the complainant is represented by a pleader or by the officer conducting the prosecution or if the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

5. What is Cross-examination and the procedure to cross-examine?

Ans.: Parties to the trial are entitled to produce witness to support their case. The statement given by such witness is called examination in chief. Examination of the witness by the adverse party hall be called a cross examination. The purpose of Cross Examination to verify the statement given by the witness or to discredit the statement, knowledge of credibility of the witness. The procedure for cross examination is provided Chapter X of the Evidence Act, 1872, especially Section 137 to Section 166.

6. What is a deposition? Can it be relied upon before the Court?

Ans.: A deposition is a statement recorded under oath by an officer of the Court or any other quasi judicial authority. The deposition given before an officer is generally reliable before the court unless the person whose deposition is relied upon retracts it. Section 137 of the CGST Act provides that a statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under GST law shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

7. Can the accused call for an expert witness?

Ans.: Section 45 of the Evidence Act, 1872 provides that when the Court has to form an opinion upon a point of foreign law or of science, or art, or as to identity of handwriting, or finger impressions, the opinion of upon that point of experts specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Thus, the accused can call for an expert witness as per the provision of Section 45 of the Evidence Act, 1872.

8. What important aspects Evidence Act are applicable during prosecution proceedings?

Ans.: The provisions relating to relevancy of facts, admission of evidence, cross - examination of witness, burden of proof are few of the important aspects of Evidence Act which are applicable during prosecution proceedings.

9. Is there a time limit for the department to initiate Prosecution?

Ans.: Section 468 of the CrPC provides a limitation for taking cognizance of an offence. The maximum time limit under Section 468 is three years. However, the law of limitation for launching prosecution under Income Tax law, GST law is excluded from Section 468 in view of Economic Offences (Inapplicability of Limitation) Act, 1974. Thus, as far as Income Tax Department or GST Department is concerned, there is no hurry to launch the prosecution as the law of limitation will not apply and also final decision of the income tax and GST authorities will have a bearing on prosecution matter. If the order from the income tax authorities or GST authorities comes in favour of the accused on merits, the prosecution case may have to be dropped accordingly.

10. Can immunity be granted against prosecution? If yes who is empowered to do so?

Ans.: Immunity from the prosecution can be granted by the assessing officer on an application being made by the assessee under Section 270AA of the Income Tax Act. The Assessing office may grant immunity if the assessee has paid the tax and interest as per the order within the time prescribed in the notice of demand and no appeal has been filed by the assessee against the said order.

The other authority which can grant immunity from prosecution is the Settlement Commission.

There is no provision to grant immunity from prosecution under the GST law.

11. Whether the offences are compoundable? If yes, what are the offences which can be compounded?

Ans.: Yes, the offences under the Income Tax Act as well as GST Act are compoundable. Section 138 of the CGST Act, 2017 provides for compounding of offences either before or after

the launching of prosecution proceedings on payment of compounding fee. All offences under the GST law are eligible for compounding once, however following persons are excluded from compounding:

(a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132 and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;

(b) a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;

(c) a person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force;

(d) a person who has been convicted for an offence under this Act by a court;

(e) a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of section 132; and

(f) any other class of persons or offences as may be prescribed.

Similarly under Section 279(2) of the Income Tax Act, any offence under the Income Tax can be compounded either before or after the institution of proceedings.

12. What is the procedure for getting the offences compounded?

Ans.: The person desirous for compounding for his offence, may write an application before the Authorities and make payment of the compounding fees. The compounding shall be not be approved unless the assessee has paid tax, interest and penalty

13. Is there a time limit for compounding offences?

Ans.: There is not time limit for compounding of offences. Compounding of offences can be done even before or after the institution of proceedings.

14. Can an Assessee/Person Apply for compounding even before the department issues notice for prosecution?

Ans.: Yes the Assessee can apply for compounding of offences even before the department issues notice for prosecution.

15. For how many times can an Assessee/Person apply for compounding of offences?

Ans.: As regards GST law, the compounding of offence can be done only once in following cases:

(a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132 and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;

(b) a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees

Under Income Tax law, there is no bar on compounding of offences more than once.

16. What is bail? Whether bail can be granted during the proceedings?

Ans.: Bail is a conditional release of an arrested person who is required to remain present in Court when called for. The Bail is granted against a bond and/or a surety. Yes Bail can be granted during the prosecution proceedings.

17. Can the Accused apply for discharge?

Ans.: Yes the Accused can apply of discharge under Section 27 of CrPC. If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing

18. What are the constitutional remedies available with reference to Prosecution proceedings?

Ans.: The accused has to constitutional remedy of personal liberty during the pending of prosecution proceedings.

19. Can a charge in the complaint under one section be shifted to another section?

Ans.: With the permission of the Court, the complainant may file an additional charge sheet

20. What would be the effect of giving or fabricating false evidence in judicial proceedings?

Ans.: Producing or fabricating false evidence in judicial proceedings may amount to committing an offence under the provisions of India Penal Code and prosecution may be launched against the person.

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FAQs on some general and basic principles of Prosecution under the Income-Tax Act, 1961

Q.1. What are the offences, under Income-Tax Act, 1961, for which, an Assessee/Person can be prosecuted?

Ans. Chapter XXII of the Income-tax Act, 1961 deals with the Offences and prosecutions, they as follows:

Sr. No.	***Relevant Provision***	***Punishment or Fine***
1.	**Section 275A** Contravention of an order made under sub-section (3) of Section 132	Rigorous Imprisonment which may extend to 2 years and Fine.
2.	Section 275B Failure to comply with the provisions of Clause (iib) of sub-Section (1) of Section 132	Rigorous Imprisonment which may extend to 2 years and Fine.
3.	**Section 276** Removal, concealment, transfer or delivery of property to thwart tax recovery	Rigorous Imprisonment for a term which may extend to two years and shall also be liable to fine.
4.	**Section 276A** Failure to comply with the provisions of sub-Sections (1) and (3) of Section 178	Rigorous imprisonment for not less than 6 months which may extend to 2 years.

Sr. No.	*Relevant Provision*	*Punishment or Fine*
5.	**Section 276AB** Failure to comply with the provisions of Sections 269UC, 269UE and 269UL.	Rigorous imprisonment for not less than 6 months which may extend to 2 years and shall also be liable to fine.
6.	**Section 276B** Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII–B.	Rigorous imprisonment for a term which shall not be less than three months, but which may extend to seven years and with fine.
7.	**Section 276BB** Failure to pay the tax collected at source:	Rigorous imprisonment for a term which shall not be less than three months, but which may extend to seven years and with fine.
8.	**Section 276C** Wilful attempt to evade tax etc.	Where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine. In any other case, with rigorous imprisonment for a term which shall not be less than three months, but which may extend to three years and with fine. If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months, but which may extend to three years and shall, in the discretion of the court, also be liable to fine.
9.	**Section 276CC** Failure to furnish returns of income:	Where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine; In any other case, with imprisonment for a term which shall not be less than three months, but which may extend to three years and with fine:

Sr. No.	*Relevant Provision*	*Punishment or Fine*
10.	**Section 276CCC** Failure to furnish return of income in search cases.	Imprisonment for a term which shall not be less than three months but which may extend to three years and with fine:
11.	**Section 276D** Failure to produce accounts and documents	Rigorous Imprisonment for a term which may extend to one year and with fine.
12.	**Section 277** False Statement in verification etc.	In a case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, exceeds twenty-five hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine; In any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and with fine.
13.	**Section 277A** Falsification of books of accounts or documents etc.	Rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and with fine.
14.	**Section 278** Abetment of false returns, etc.	In a case where the amount of tax, penalty or interest which would have been evaded, if the declaration, account or statement had been accepted as true, or which is wilfully attempted to be evaded, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine; In any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

Q.2. Whether for the offences committed under the Income-Tax Act, 1961 Prosecution can also be launched under Indian Penal Code.

Ans. Proceedings under the Income-tax Act initiated through assessment proceedings are civil in nature, however, prosecution for offences committed is tried before a competent Court which is criminal in nature.

Offences committed under the Income-tax Act can be launched and tried under the provisions of The Indian Penal Code for prosecution. The provisions of Section 26 of the General Clauses Act, 1897 state that where an act or omission constitutes an offence

under two or more enactments, the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence and the punishment shall run concurrently. To strengthen the case of the revenue, generally, the revenue also launches prosecution under the various provisions of the Indian Penal Code.

Q.3. What is the time when the offence is said to have been committed? What is the prescribed threshold for launching prosecution?

Ans. The place and time of the offence are as per the nature of the offence. For example, in cases of an attempt to evade tax i.e., section 276C of the Act, the offence is said to be committed at the place where a false return of income is submitted even though it is completely possible that the return has been prepared elsewhere or that accounts have been fabricated at some other place.

In the case of ***J.K. Synthetics Ltd. vs. ITO (1987) 168 ITR 467 (Delhi) (HC),*** the Court held that the offence under Section 277 of the Income Tax Act can be tried only at the place where a false statement is delivered.

Q.4. Which is the competent court for prosecution when the assessee's case is centralised to some other place?

Ans. As per section 280A of the Act, Special Courts, the Central Government, in consultation with the Chief Justice of the High Court, may, for the trial of offences punishable under this Chapter, by notification, designate one or more courts of Magistrate of the first class as Special Court for such area or areas or for such cases or class or group of cases as may be specified in the notification.

CBDT Vide Notification No 59 of 2020 dated August 10, 2020 have notified the trial courts for the State of Maharashtra for any offence committed under the Income-tax Act, 1961 and Black Money Act, 2015.

The Hon'ble Madras High Court in the case of ***Srinidhi Karti Chidambaram vs. Dy. DIT (Investigation) [2020] 121 taxmann.com 91 (Mad.***) held that No prejudice will be caused to assessees in the transfer of their case from Additional Chief Metropolitan Magistrate Court to Special Court even when the right of revision under section 397 of Cr.P.C. is taken away by such transfer

Q.5. Is it necessary to issue a show cause notice before launching prosecution?

Ans. Section 279 of the Income-tax Act, provides for the sanction for launching prosecution. Each offence as per the provisions of Act is separate and distinct. Therefore, the sanction for launching the prosecution by the designated authority as the case may be must be in respect of each of the offences in respect of which there lies a case for prosecution. Launching prosecution without the requisite sanction by the authority concerned shall result in the entire proceedings "Void ab-initio". Each offence under the Income-tax Act is of different nature and therefore in the absence of such separate sanction, the conviction will not be legal.

The Income-tax Act does not provide the authority, granting the sanction for launching the prosecution, to provide an opportunity. Section 279 of the Income-tax Act, does not provide that an opportunity to be heard has to be afforded to the assessee before deciding to initiate proceedings for the prosecution. However, it is often noticed in practice that the authority concerned invariably issues the show cause notice before granting the sanction for prosecution.

The Hon'ble Supreme Court in the case of ***ACIT vs. Velliappa Textiles Ltd. (2003) 263 ITR 550 (SC)*** held that "an order of sanction by itself does not have the effect of conviction or imposing a penalty causing any inquiry of any kind on the accused. The grant of sanction is purely an Administrative Act, and affording an opportunity of hearing to the accused is not contemplated at that stage. No opportunity of hearing was required to be afforded to the respondent before the grant of sanction by the Commissioner". This decision was later overruled by the decision of ***Standard Chartered Bank vs. Directorate of Enforcement (2005) 275 ITR 81 (SC)***. This is because sub-section (3) of 278B of the Act, has been introduced, with effect from October 18, 2014. Further, as provided in the Act, when an assessing officer takes a decision to initiate prosecution proceedings, and the commissioner grants the sanction for such proceedings, on the basis of the circumstances, and the facts on record one has to come to the conclusion, whether prosecution is necessary and advisable in a particular case.

Further, in the case of juridical persons, a Notice may be issued under section 2(35) of the Act before treating an individual as a "principal officer" of the entity.

The Hon'ble Calcutta High Court in the case of ***Hungerford Investment Trust Ltd. vs. ITO [1983] 142 ITR 601 (Cal)(HC)*** held that before treating a person concerned as a principal officer under section 2(35)(b) of the Act by the ITO it is not necessary to determine that question upon hearing the submission or representation of the person concerned.

However, it is being observed that the commissioners are issuing a show cause notice before sanctioning the Sanction for prosecution based on the internal manual.

Q.6. Who is competent to launch prosecution? Can the investigation wing launch prosecution?

Ans. The sanctioning authority under section 279 of the Act is the competent authority to launch a prosecution. The investigation wing can launch prosecution for the offences committed before them.

Q.7. What is the punishment for second and subsequent offences?

Ans. According to section 278A of the Act, if any person convicted of an offence under section 276B or section 276BB or sub-section (1) of section 276C or section 276CC or section 276DD or section 276E or section 277 or section 278 of the Act is again convicted of an offence under any of the aforesaid provisions, he shall be punishable for the second and for every subsequent offence with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.

Q.8. Is prosecution automatic in case of a default/offence?

Ans. A penalty will be imposable only after giving the person an opportunity of being heard in the matter. However, in accordance with the provisions of section 273B of the Act, if a person proves that there was reasonable cause for the said failure to disclose the true income, no penalty shall be imposable.

Similarly, as per CBDT Circular 24 of 2019 dated September 09, 2019, a penalty under section 276C of the Act can be initiated only after confirmation of the penalty by the Tribunal.

Therefore, the nature of the initiation of prosecution depends on the facts of the case.

Q.9. Whether the prosecution proceedings can be launched even before the completion of assessment proceedings.

Ans. The assessment proceedings and criminal proceedings are independent proceedings. The assessment proceedings are conducted by the Income Tax Authorities and are civil proceedings in nature, whereas prosecution for offences committed is tried before a competent court. The provisions of the Law of evidence that do not bind assessment proceedings, are to be strictly followed in criminal proceedings.

The Hon'ble Supreme Court in the case of ***P. Jayappan vs. ITO (1984) 149 ITR 696 (SC),*** the court held that the two types of proceedings could run simultaneously and that one need not wait for the other.

The Hon'ble High Court in the case of ***Kalluri Krishan Pushkar vs. Dy. CIT(2016) 236 Taxman 27 (AP& T) (HC),*** the court held that the existence of another mode of recovery cannot act as a bar to the initiation of prosecution proceedings. In that particular case, the prosecution was initiated under section 276C of the Act, for non-payment of admitted tax and interest.

In case of a search and seizure action, and seizure action prosecution can be initiated and may be launched at any stage of the proceedings before an Income-tax Authority, with the previous approval of the Collegium of two CCIT/DGIT.

Q.10. What is the relevance of the findings in the appeal on merits in the criminal proceedings?

Ans. The Appellate Tribunal is the final fact-finding authority under the Act. Hence, the findings and the orders of the Appellate Tribunal are binding on the Commissioner of Income tax.

On the aforesaid proposition, the two important questions that may arise are:

(1) If there is a finding of the Appellate Tribunal that there is no concealment and no false statement, etc., then whether or not the Commissioner of Income tax would be stopped from initiating proceedings under section 277 of the Act? and

2) How far are the findings of the Appellate Tribunal in the assessment proceedings binding upon the trial court in respect of the proceedings for prosecution under section 277 of the Act?

The Hon'ble Supreme Court in the case of ***Uttam Chand vs. ITO (1982) 133 ITR 909 (SC),*** while dealing with prosecution proceedings under section 277 of the Act, held that the finding given by the Appellate Tribunal is binding on the criminal courts. Therefore, when there is a finding of the Appellate Tribunal leading to the conclusion that there is no prima facie case against the assessee for concealment, then that finding would be binding on the court and the court will have to acquit or discharge the assessee.

If the penalty for concealment is quashed on technical grounds due to limitation or due to violation of the due process of law, as the penalty is not quashed on merits it cannot be said that there should not be any prosecution. Similarly, when the Appellate Tribunal holds that the assessee is liable for the penalty, the conviction is not automatic. The concerned court has to examine the witnesses and has to come to an independent finding as to whether the accused is guilty of the offences by following the due process of law.

In the case of ***P. Sales Corporation vs. section R. Sikdar (1993) 113 Taxation 203 (SC)*** and ***G. L. Didwania vs. ITO (1995) 224 ITR 687 (SC)*** the Hon'ble Apex Court laid down the principle that "The Criminal Court no doubt has to give due regard to the result of any proceedings under the Act having bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act."

In the case of ***K. C. Builder vs. ACIT (2004) 265 ITR 562 (SC),*** the court held that when the penalty is cancelled, the prosecution for an offence under section 276C of the Act for wilful evasion of tax cannot be proceeded with thereafter. Following this principle, the courts have quashed prosecution proceedings on the basis of the cancellation of the penalty by the Appellate Authority (***Shashichand Jain & Ors. vs. UOI (1995) 213 ITR 184 (Bom) (HC)***.

When Tribunal decides against the assessee in quantum proceedings and if there is a possibility of the department launching prosecution proceedings, it may be desirable for the assessee to file an appeal before the High Court. Various courts have held that, when the substantial question of law is admitted by a High Court, it is not a fit case for the levy of penalty for concealment of Income (***CIT vs. Nayan Builders and Developers (2014) 368 ITR 722 (Bom.) (HC), CIT vs. Advaita Estate Development Pvt. Ltd. (ITA No. 1498 of 2014 dated 17/2/2017) (Bom.)(HC), (www.itatonline.org), CIT vs. Dr. Harsha N. Biliangady (2015) 379 ITR 529 (Karn.) (HC).***

A harmonious reading of the various ratios it can be contended that if a penalty cannot be levied upon the admission of a substantial question of law by the Jurisdictional High Court, it cannot be a fit case for prosecution.

In the case of ***V. Gopal vs. ACIT (2005) 279 ITR 510 (SC)***, the court held that when the penalty order was set-aside, the Magistrate should decide the matter accordingly and quash the prosecution.

In the case of ***ITO vs. Nandlal and Co. (2012) 341 ITR 646 (Bom.)(HC),*** the court held that, when the order for levy of penalty is set aside, prosecution for wilful attempt to evade tax does not survive.

Non-initiation of penalty proceedings does not lead to a presumption that the prosecution cannot be initiated as held in ***Universal Supply Corporation vs. State of Rajasthan (1994) 206 ITR 222 (Raj) (HC) (235), A.Y. Prabhakar (Kartha) HUF vs. ACIT (2003) 262 ITR 287 (Mad.) (288).***

However, if penalty proceedings are initiated and after considering the reply, the proceedings are dropped, it will not be a case for initiating prosecution proceedings.

CBDT guidelines had instructed that where quantum additions or penalties have been deleted by the departmental appellate authorities, then steps must be taken to withdraw prosecution (Guidelines F. No. 285/16/90-IT (Inv) 43 dated May 14, 1996).

Q.11. Can a charge in the complaint under one section be shifted to another section?

Ans. No, once a charge is framed the same cannot be shifted to another section.

Q.12. Is there a time limit for the department to initiate Prosecution?

Ans. There is no period of limitation for the initiation of prosecution in economic offences.

Limitation for initiation of proceedings

Chapter XXXVI of the Code of Criminal Procedure, 1973 lays down the period of limitation beyond which no Court can take cognizance of an offence which is punishable with fine only or with imprisonment not exceeding three years. But, for Economic Offences (In respect of applicability of Limitation Act, 1974) it is provided that nothing in the aforesaid chapter XXXVI of the Code of Criminal Procedure, 1973, shall apply to any offence punishable under any of the enactment specified in the Schedule. The Schedule referred to includes Income tax, Wealth tax, etc.

In the case of ***Friends Oil Mills & Ors. vs. ITO (1977) 106 ITR 571 (Ker.) (HC),*** dealing with section 277 of the Act, the Hon'ble Kerala High Court held that the bar of limitation specified in section 468 of the Code of Criminal Procedure, 1973 would not apply to prosecution, under the Income-tax Act (also refer ***Nirmal Kapur vs. CIT (1980) 122 ITR 473 (P&H) (HC).*** In view of this, as there is no fixed period of limitation for initiation of proceedings under the Act, the sword of prosecution can be said to be perpetually hanging on the head of the assessee for the offences said to have been committed by him.

It may be noted that this may result in injustice to the assessee because a person who is in a better position to explain the issue or things in the initial stage, may not be able to do so later if he is confronted with the act of commission of an offence under a lapse of time.

In the case of ***Gajanand vs. State (1986) 159 ITR 101 (Pat) (HC)***, the Hon'ble High Court held that where the Criminal Proceedings had proceeded for 12 years and the Income tax department failed to produce the evidence, the prosecution was to be quashed.

In the case of ***State of Maharashtra vs. Natwarlal Damodardas Soni AIR 1980 SC 593, 1980 SCR (2) 340,*** the Court held that a long delay along with other circumstances is taken into consideration in the mitigation of the sentence.

Circumstances under which the Commissioner cannot initiate proceedings

Section 279(1A) of the Act has provided for the exception to the Power of the Commissioner to initiate proceedings. Therefore, if a particular case falls and is established under section 276C or 277 of the said Act and if an order under section 273A of the Act has been passed by the Commissioner, by using the phrase "has been reduced or waived by an order under section 273A of the Act" in section 279(1A) of the Act, the legislature has made it clear that the order referred to in section 279(1A) of the Act is the order of the Commissioner waiving or reducing the penalty under section 273A of the Act and not the order of non-imposition of penalty by the ITO or the order of cancellation of penalty for lack of ingredients as required by section 271 of the Act by Appellate Authorities. This is relevant because in the cases where the penalty is waived partly under section 273A of the Act, the Commissioner is precluded from granting sanction under section 279 of the Act.

Therefore, the non-existence of the circumstances enumerated in section 273A of the Act is a precondition for the initiation of proceedings for prosecution under section 276C or 277 of the Act. Accordingly, the CIT should ascertain by himself that the circumstances prescribed in section 273A of the Act do not exist. A complaint filed for prosecution under sections 276C or 277 of the Act would be illegal and invalid if the circumstances as provided in section 273A exist. It may be noted that, as per the instruction No. 5051 of 1991 dated February 07, 1991 issued by the Board stated as under:

"Prosecution need not normally be initiated against persons who have attained the age of 70 years at the time of the commission of the offence".

In the case of ***Pradip Burma vs. ITO (2016) 382 ITR 418 (Delhi) (HC)***, the court held that at the time of the commission of the offence, the petitioner has not reached the age of 70 years, hence the circular was held to be not applicable.

■●■

"We are responsible for what we are, and whatever we wish ourselves to be, we have the power to make ourselves. If what we are now has been the result of our own past actions, it certainly follows that whatever we wish to be in the future can be produced by our present actions; so we have to know how to act."

— Swami Vivekananda

Ajay R. Singh
Advocate

Paras S. Savla
Advocate

FAQs on some general and basic principles of Prosecution under Income Tax Act, 1961

Q.1. Who can be treated as a principal officer?

Ans. The principal officer defined under section 2 (35) of Income Tax Act, reads as under:-

"***principal officer***", *used with reference to a local authority or a company or any other public body or any association of persons or any body of individuals, means—*

(a) the secretary, treasurer, manager or agent of the authority, company, association or body, or

(b) any person connected with the management or administration of the local authority, company, association or body upon ***whom the Income-tax Officer has served a notice of his intention of treating him as the principal officer thereof;***

The above definition states that any person connected with the management or administration of the company upon whom the Income Tax Officer has served a notice of its intention of treating him as a principal officer thereof can be prosecuted for the offence under the Act.

S. 278B makes certain provisions with regard to offence committed by companies, firms, association of person and bodies of individuals, whether incorporated or not. Where an offence has been committed by a company, a firm, association of persons, or body of individuals, the person, who was in charge of and was responsible for the conduct of its business at the time when the offence was committed will be deemed to be guilty of the offence, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of the offence.. Under sub-section (1) to sec 278B, the essential ingredient for implicating a person is his being "in charge of" and "responsible to" the company for the conduct of the business of the company. The term responsible is defined in Blacks Law dictionary to mean accountable. Hence, it is necessary that persons at the time when the offence was committed were "in charge of" and "was responsible" to the company for its business and only when the same is proved then persons are required to prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such

offence. Both the ingredients "in charge of" and "was responsible to" have to be satisfied as the word used is "and".

In case of ***Kalanithi Maran vs. UOI - [2018] 92 taxmann.com 308 (Madras) W.P. NO. 34010 OF 2014*** dated MARCH 28, 2018 ;Where there was no material to establish that assessee, a Non-Executive Director of the company, was in-charge of day-to-day affairs, management, and administration of his company, the Court held that the AO could not have named him as Principal Officer and prosecute him under section 276B for TDS default committed by his company.

Q.2. Who would be prosecuted in case of offences by a company/LLP/firms/AOP/BOI/HUF etc?

Ans. Where an offence has been committed by a company, a firm, association of persons, or body of individuals, the person, who was in charge of and was responsible for the conduct of its business at the time when the offence was committed will be deemed to be guilty of the offence, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of the offence. Further, if in the case of a company it is proved that the offence bad been committed with the consent or connivance of or is attributable to any neglect on the part of the company, such director, manager, secretary or others will be deemed to be guilty of the offence and will be liable to be prosecuted and punished accordingly. This provision will also apply in relation to mutatis mutandis committed by a firm, association of persons or body of individuals.

Similarly Section 278C provides for criminal liability of the Karta, or members of a HUF in respect of offences committed by the Hindu Undivided Family. Under this provision, when an offence has been committed by HUF, will be deemed to be liable to be prosecuted and punished accordingly, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the offence. If the offence was committed with the consent or connivance of or is attributable to any neglect on the part of any other member of the family, such other member shall be deemed to be guilty of the offence and shall be liable to be prosecuted and punished accordingly.

In ***Madhumilan Syntex Ltd & Ors vs. UOI (2007) 290 ITR 199 (SC)*** it has been held that company can be prosecuted, only the substantive sentence cannot be imposed other consequences like payment of fine etc would ensue.

In ***Homi Phiroze Ranina vs. State of Maharashtra (2003) 131 Taxman 100/263 ITR 636 (Bom.)(High Court)*** held that unless complaint disclosed a prima facie case against applicant-directors of their liability and obligation as principal officers in the day-to-day affairs of company as directors of the company under section 278B, the applicants could not be prosecuted for offences committed by the company.

In ***Dhrupadi Devi (Smt.) vs. State of Rajasthan (2001) 106 Comp. Cas 90 (Raj.) (HC) (93)***, the court held that criminal liability of partner cannot be thrust upon his legal heirs.

Q.3. Who can be prosecuted, in the case of a LLP/firm, where the partners are limited companies?

Ans. The sec 278B provision will also apply in relation to mutatis mutandis committed by a LLP/firm, where the partners are limited companies.

Under sub-section (1) to sec 278B, the essential ingredient for implicating a person is his being "in charge of" and "responsible to" the company for the conduct of the business of the company.

In ***Onkar Chand & Co. & Ors. vs. Income-tax Department (2009) 237 CTR 530 (HP) (High Court)*** held that complaints for offences under sections 276C, 277 and 278B was filed against the firm and all the partners. In absence of any specific allegation against the partners of the firm other than those who had verified the return of the firm that they were responsible for the conduct of the business of the firm, prosecution against these partners was held to be not sustainable.

In ***ITO vs. Kamra Trading Co. (2004) 267 ITR 170 (P&H) (HC)*** the court held that launching of prosecution against sleeping partner was held to be bad in law for failure to pay the tax.

Q.4. Can a liquidator be prosecuted? Can an insolvent professional be prosecuted?

Ans. The term liquidator is not defined in the definition section i.e. section 2. As per section 178 every person; (a) who is the liquidator of any company which is being wound up, whether under the orders of a court or otherwise; or (b) who has been appointed the receiver of any assets of a company, has to give notice of his appointment to the Assessing officer entitled to assess the income of such company. It may be noted that section 178 refers liquidator as well as receiver, collectively as 'liquidator'. Once the notice is given, the Assessing officer would inform the amount that would be sufficient for any tax or future tax payable by the company. It was the duty of liquidator to set aside such amount and not to part with any assets of the company. Failure to inform the Assessing officer would make liquidator personally liable. Further Section 276A provides for prosecution in the case of failure to give notice or setting aside the sum in compliance with the above provisions of sections 178(1)/178(3) as well as prosecution in case the liquidator parts with any of the assets of the company or the properties in his hands in contravention of the provision of section 178(3). A person who fails to comply with these provisions shall be punishable with rigorous imprisonment for a minimum period of 6 months which may extend to 2 years. The High Court of Himachal Pradesh in case of *HIM ISPAT Limited : Co. Application No. 32/2016* rejected the application for prosecution under section 276C filed against the official liquidator by considering the contention of the official liquidator stating that Office of Official Liquidator is a Government Office and it is neither engaged in running any business nor is the Director or shareholder of the Company in liquidation and the transactions of the Companies under liquidation are under the supervision of the High Court. Therefore, Office of Liquidator cannot be said to have evaded the tax willfully under section 276C. While the High Court ruling may apply to a liquidator, the reasonings may not necessarily apply to Insolvency Professional, as

functions of Insolvency professional are not akin to liquidator. Be as it may, the Finance Act 2023 has amended section 276A by providing a sunset date that no fresh prosecution proceedings shall be initiated under this provision on or after 01-04-2023. This was done as a policy to decriminalise minor offences as a step towards improving ease of business. Further, with the operationalisation of the Insolvency and Bankruptcy Code, 2016 (IBC), waterfall mechanism for payment of dues is now in place for companies under liquidation and sub-section (6) of section 178 (the parent section) provides that section 276A shall not have effect when provisions of the IBC are in contrary. The liquidator works under the oversight of specific laws. Insolvency Professionals and other officers are separately liable for offences under IBC law. Hence post 2023 no fresh prosecution may be initiated against a liquidator. However, earlier prosecution proceedings may continue as per law. In such cases, section 278AA comes to the rescue, which provides that no person shall be punished if he proves the existence of reasonable cause.

Q.5. Whether the prosecution proceedings be launched against the Chartered Accountant/ Consultant, based on abetment or conspiracy.

Ans. **ABETMENT**

S. 278 of the said Act deals with the offence of abetment in the matter of delivering any accounts or a statement or a declaration relating to income chargeable to tax. Though abetment has not been defined in the Income-tax Act the provisions relating to abetment of an offence are dealt with in Chapter V of the Indian Penal Code. In particular S. 107, 108, 108A and 110 of IPC are important. On the perusal of S. 107, it is seen that the offence of abetment is committed in three ways, namely –

(a) by instigation;

(b) by conspiracy; or

(c) by intentional aid.

In order to constitute abetment, the abettor must be shown to have intentionally aided in the commission of a crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough to fulfil the ingredients of the offence as envisaged by S. 107. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional adding and active complicity is the gist of the offence of abetment. (***Shri Ram vs. State of Uttar Pradesh 1975 (SC) (Cr. 87), 1975 AIR 175, 1975 SCC (3) 495***).

For an offence of abetment, it is not necessary that the offence should have been committed. A man may be guilty as an abettor, whether the offence is committed or not. (***Faunga Kanata Nath vs. State of Uttar Pradesh, AIR 1959 SC 673***).

Further, a person can be convicted of abetting an offence, even when the person alleged to have committed that offence in consequence of abetment, has been acquitted. (***Jamuna Singh vs. State of Bihar, AIR 1967 SC 553, 1967 SCR (1) 469***).

In ***Smt. Sheela Gupta vs. IAC (2002) 253 ITR 551 (Delhi) (HC) (552)***, the Court held that, when the Tribunal has set aside the order of the Assessing Officer, the complaint filed for abetment does not survive hence the complaint was quashed.

Liability of an advocate or a chartered accountant for abetment

S. 278 of the said Act, imposes a criminal liability on the abettor for abetment of false return etc. Circular No. 179 dt. 30/1975 (1975) 102 ITR 9 (St.)(25) explain the provision. Under this section, if a person abets or induces in any manner, another person to make or deliver an account, statement, declaration which is false and which he either knows to be false or does not believe to be true, he shall be punishable with rigorous imprisonment of not less than three months. The section casts an onerous duty on the advocates, Chartered Accountants and Income Tax Practitioners to be cautious and careful. The legal profession is a noble one and legal practitioners owe not only a duty towards his client but also towards the court. It would be highly unprofessional if a legal practitioner is to encourage dishonesty or to file such returns knowing or having reason to believe that the returns or declarations so made are false.

In ***P. D. Patel vs. Emperor, (1933) 1 ITR 363 (Rangoon) (HC),*** a warning has been given of which every legal practitioner has to take a serious notice. In this case, an advocate deliberately omitted in a return submitted by him a certain amount of money and persisted in taking up false defenses. The Government lost a huge amount because of the exclusion of the said amount in the return filed by the advocate on behalf of his client. A fine for the said offence was levied by the trial court on an appeal, the High Court took a serious view, of the offence and held that in a case like this, the punishment should be deterrent and exemplary and the assessee was ordered to be kept in simple imprisonment for one month.

In ***Navrathna & Co. vs. State (1987) 168 ITR 788 (Mad.)(HC) (790).*** The court held that, merely preparing returns and statement on the basis of the accounts placed before the Chartered Accountant, the question of abetment or conspiracy cannot arise.

The Supreme Court in the case of ***Jamuna Singh vs. State of Bihar, AIR 1967 SC 553 (Supra)***, has held that a person can be convicted of abetting an offence even when the person alleged to have committed that offence in consequence of abetment has been acquitted.

In ***T.D. Gandhi, ITO vs. Sudesh Sharma (2015) 230 Taxman 572 (P&H)(HC)*** Respondent-accused, an advocate, was a tax practitioner. Main assessee, a Railway contractor, had engaged him for purpose of submission of his returns and supplied him requisite documents, including TDS certificates. Respondent filed return on behalf of main assessee and claimed a refund on basis of TDS certificates. Complainant-ITO opined that TDS certificates were not genuine and refund was wrongly claimed. He thus filed complaint against respondent-accused for commission of offences punishable under sections 418, 465, 468 and 471 of IPC. Trial Court dismissed said complaint. On appeal

to High Court dismissing the appeal of revenue the Court held that ; since complainant ITO had miserably failed to point out that respondent was liable for preparing false documents which were rather supplied to him by main assessee, Trial court was justified in dismissing complaint filed against him. (AY. 1988-89)

Q.6. Can prosecution be launched on senior citizens/women/children?

Ans. CBDT instruction No. 5051 of 1991 dated 07/02/1991 para 4 states "Prosecution need not normally be initiated against a person who has attained the age of 70 years at the time of commission of the offence".

In ***Pradip Burman S. vs. ITO 382 ITR 418 (Delhi)*** the Court laid down that the person should have reached the age of 70 at the time of commission of the offence. The case of the petitioner was that the complaint filed is liable to be quashed on the ground that at the time of filing of the criminal complaint, the petitioner had attained the age of 70 years and thus no prosecution can be initiated against him. Instruction number 5051 of 1991 dated February 7 1991 mandated that no prosecution could be initiated against a person who is above 70 years, "at the time of commission of offence". Further the said instructions do not mandate or make it compulsory since the words "need not normally" used in para 4 do not provide an absolute bar on initiation of prosecution. Thus the emphasis is on time of commission of the offence.

There is no bar in launching prosecution on a women if other ingredient of offence are proved.

The liability of a child will be through the legal representative/guardian. Prosecution will not lie against a child per se under the Income tax Act.

Q.7. Whether sanction for launching prosecution is necessary?

Ans. Yes Sanction is compulsory. Under S. 279, the competent authority to grant sanction for prosecution is Pr. Commissioner, Commissioner (Appeals), Chief Commissioner or the Director General. Prosecution, without a requisite sanction shall make the entire proceedings void ab initio. The sanction must be in respect of each of the offences in respect of which the accused is to be prosecuted. Where the authority has held that an assessee had made a return containing false entries and gave sanction for prosecution for an offence under S. 277, and the accused was found guilty of an offence under S. 276CC, and not under S. 277, it was held in revision that an offence under S. 276CC was of a different nature from that under S. 277, and as there was no sanction for prosecution for an offence under S. 276CC, the conviction was illegal (***Champalal Girdharlal vs. Emperior (1933) 1 ITR 384 (Nag) (HC)***)

If sanction is not proper and offence is not made out only on jurisdictional point initiation of process can be challenged.

Q.8. What are the circumstances in which Commissioner cannot grant sanction?

Ans. If Pr. Commissioner is satisfied with the reply of the assessee he may not grant sanction to the Assessing Officer to file complaint before the Court. The Pr. Commissioner has to apply his mind to the reply and material produce before him.

Few instances is listed here under :

a) No person is punishable for any failure under section 276A, 276AB or 276B if he proves that there was **reasonable cause for such failure (section 278AA)**. If the Pr CIT is agrees with the reasons furnished by the assesses for the default, it can refuse the sanction for prosecution. What is reasonable cause is matter of fact in each case.

b) S. 279(1A) has provided for the exception to the Power of Pr. Commissioner to initiate proceedings. Therefore, if a particular case falls and is established u/s. 276C or 277 of the said Act and if an order u/s. 273A has been passed by the Pr. Commissioner, by using the phrase "has been reduced or waived by an order under S. 273A" in S. 279(1A),the legislature has made it clear that the order referred to in S. 279(1A) is the order of the Pr. Commissioner waiving or reducing the penalty u/s. 273A and not the order of non imposition of penalty by the ITO or the order of cancellation of penalty for lack of ingredients as required by S. 271 by Appellate Authorities. This is relevant because in the cases where the penalty is waived partly u/s. 273A, the Pr. Commissioner is precluded from granting sanction u/s. 279 of the Act.

c) Therefore, the non-existence of the circumstances enumerated in S. 273A is a precondition for the initiation of proceedings for prosecution u/s. 276C or 277. Accordingly, the Pr. CIT should ascertain by himself that the circumstances prescribed in section 273A do not exist. A complaint filed for prosecution u/s. 276C or 277 would be illegal and invalid if the circumstances as provided in S. 273A exist.

d) **CBDT by circular dated 09.09.2019** titled *'Procedure for identification and processing of cases for prosecution under direct tax laws'*, has eased norms for prosecution for TDS and defaults in filing IT returns. The circular lays down limits and time period for proceeding with prosecution in cases where norm – payment of TDS is rupees 25 lakhs or below and delay in deposit is less than 60 days.

e) **By Circular dated 09.09.2019,** CBDT has also relaxed prosecution norms for offences relating to under reporting of income. Where the amount sought to be evaded or tax on under – reported income is Rs. 25 lakhs or below prosecution can only be launched after approval of the Collegium.

This circular allows the field officers to focus on deserving cases, and only prosecute if the offences are grave and can be proved beyond doubt. It also has laid down a transparent approval mechanism to identify these cases.

Q.9. Whether prosecution can be initiated/continued, without levy of penalty?

Whether prosecution can be initiated/continued, when the penalty proceedings are dropped.

Whether prosecution can be initiated/continued, when the penalty is deleted?

Whether prosecution can be initiated/continued, when the penalty is deleted on technical ground?

Ans. All the above questions will be answered together as the same are inter related;

Simultaneous action for imposing a penalty and launching prosecution for the same offence is not barred under the income Tax Act, 1961. For the new Act 1961 does not contain any provision analogous to section 28(4) of the old Act 1922. The omission of this provision from the 1961 act enables the Income Tax Officer to launch prosecution for false verification, concealment of particular of income, abetment etc. Under section 277 and 278 even where penalty proceedings have been initiated under section 271(1)(c) etc.

The recent **circular no. 24/2019 dt 9/9/2019** provides that for the offence u/s. 276C(1) prosecution shall be launched only after confirmation of the order imposing penalty by the ITAT.

In ***S.P. Sales Corporation vs. S. R. Sikdar (1993) 113 Taxation 203 (SC)*** and ***G. L. Didwania vs. ITO (1995) 224 ITR 687 (SC)***, the Hon'ble Apex Court laid down the principle that "The Criminal Court no doubt has to give due regard to the result of any proceedings under the Act having bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act."

In ***K. C. Builder vs. ACIT (2004) 265 ITR 562 (SC),*** the court held that when the penalty is cancelled, the prosecution for an offence u/s 276C for wilful evasion of tax cannot be proceeded with thereafter. Following this principle the courts have quashed prosecution proceedings on the basis of the cancellation of penalty by the Appellate Authority (***Shashichand Jain & Ors. vs. UOI (1995) 213 ITR 184 (Bom) (HC)***.

When Tribunal decides against the assessee in quantum proceedings and if there is possibility of department launching prosecution proceedings, it may be desirable for the assessee to file an appeal before the High Court. Various courts have held that, when the substantial question of law is admitted by a High Court, it is not a fit case for the levy of penalty for concealment of Income (***CIT vs. Nayan Builders and Developers (2014) 368 ITR 722 (Bom.) (HC), CIT vs. Advaita Estate Development Pvt. Ltd. (ITA No. 1498 of 2014 dt. 17/2/2017) (Bom.)(HC), (www.itatonline.org) CIT vs. Dr. Harsha N. Biliangady (2015) 379 ITR 529 (Karn.) (HC)***.

A harmonious reading of the various ratios it can be contended that if penalty cannot be levied upon the admission of a substantial question of law by the Jurisdictional High Court, it cannot be a fit case for prosecution. However there is no legal bar for the dept to initiate prosecution.

In ***V. Gopal vs. ACIT (2005) 279 ITR 510 (SC),*** the court held that when the penalty order was set-aside, the Magistrate should decide the matter accordingly and quash the prosecution.

In ***ITO vs. Nandlal and Co. (2012) 341 ITR 646 (Bom.) (HC),*** the court held that, when the order for levy of penalty is set aside, prosecution for wilful attempt to evade tax does not survive.

Non-initiation of penalty proceedings does not lead to a presumption that the prosecution cannot be initiated as held in ***Universal Supply Corporation vs. State of Rajasthan (1994) 206 ITR 222 (Raj) (HC) (235), A.Y. Prabhakar (Kartha) HUF vs. ACIT (2003) 262 ITR 287 (Mad.) (288).*** However, if penalty proceedings are initiated and after considering the reply, the proceedings are dropped, it will not be a case for initiating prosecution proceedings.

CBDT guidelines had instructed that where quantum additions or penalty have been deleted by the departmental appellate authorities, then steps must be taken to withdraw prosecution (Guidelines F. No. 285/16/90-IT (Inv) 43 dated 14-5-1996).

- where penalty have been deleted by the departmental appellate authorities, then steps must be taken to withdraw prosecution :

If the penalty is quashed on " technical grounds such as " Limitation" or " Violation of the due process of law" penalty not quashed on merits as such it does not impact the prosecution proceedings.

In ***Radheshyam Kejriwal vs. State of West Bengal (2011) 333 ITR 58 (SC)***

The following principles were laid down by the Supreme court:

1) Adjudication proceeding and criminal prosecution can be launched simultaneously.

2) Decision in adjudication proceeding is not necessary before initiating criminal prosecution.

3) Adjudication proceeding and criminal proceeding are independent in nature to each other.

4) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution.

5) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue and

6) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue underlying principle being the higher standard of proof in criminal cases.

In ***ITO vs. Rajan and Co. And Ors (2007) 291 ITR 345 (Del)(HC)*** Question before Delhi High Court was where ITAT had quashed the penalty leived and confirmed by the lower authorities on the ground that same was without recording satisfaction as contemplated u/s. 271(1)(c).

Whether a prosecution u/s 276C of the said Act can be allowed to be continued in such a case holding that the penalty proceeding u/s 271(1)(c) of the said Act were terminated merely on the ground of some technicality and not on merits?
High Court said it was not a mere technicality and penalty was quashed on merits.

Q.10. What do you mean by burden of proof? Who is required to discharge the burden of proof?

Ans. Burden of proof means the obligation to prove one's assertion. "*Affirmanti non neganti incumbit probation*" meaning burden of proof lies upon him who affirms, not upon him who denies. The burden of proof is on that person who claims some benefit, assert something, or wants provision to work in his favour. A burden of proof can vary as per the circumstances of the case. In case of doubt, the authorities can demand a proof better than what is offered by the Assessee. In normal case, even circumstantial proof may be relied on. In terms of the Indian Evidence Act, the burden of proof always lies on the person who makes a claim. However, once a party leads evidence to support its claim, the 'onus' shall shift to the other party to contest such evidence or claim. There is a distinction between the expressions 'burden of proof' and 'onus'. It has been held in ***A. Raghavamma vs. A. Chenchamma AIR 1964 AC 136*** that burden of proof lies upon a person who has to prove the fact and it will never shift. In contradistinction, onus of proof shifts and such shifting of onus is a continuous process in the evaluation of evidence.

The burden can also be on that person who is in a better position to prove or disprove the application of particular provision because in many cases, the other person or authority may have no facts or evidence in possession. The Assessee cannot be asked to prove the negative. For example, when the Assessee is denied of having been reimbursed the pre-operative expenses then the onus is on the department to prove the contrary by bringing cogent material on record. The Assessee certainly cannot be asked to prove the negative (2014) 43 taxmann.com 195 (Hyd- Tri). Assessee can furnish alternative explanation, i.e. more than one proof for the same thing [Refer ***Addi. CIT vs. Ghai Lime Stone Co. [1983] 144 ITR 140 (MP) and Dhansiram Agarwalla vs. CIT [1995] 81 Taxman 1 (Gau.)***].

Q.11. What is mens rea? Whether mens rea apply to penalty and prosecution proceedings?

Ans. The rule in general criminal jurisprudence established over the years has evolved into the concept of 'Innocent until proven guilty' which effectively places the burden of proving the guilt of the accused beyond reasonable doubt squarely on the prosecution. The intent, which is the driving force behind the illegal conduct, is referred to as *mens rea*. Only when an act is committed with a guilty conscience, it become criminal. The familiar Latin

maxim *'actus non facit reum nisi mens sit rea'*—the act does not render one guilty unless the thought is also guilty—expresses the essential concept of the principle of mens rea. Mens rea is one of the most important aspects of criminal liability.

The word 'wilful' used in section 276C of the Act and other section of Chapter XXII of the Act generally means an act done with a bad purpose, with a evil motive as a constituent element of the offence and it should be established beyond reasonable doubt and there should be presence of mens rea a bad motive and a guilty mind. Thus, mens rea, (culpable mental state) is an important ingredient of the offences under the act also. The word 'wilful' imports the concept of 'mens rea' in contrast to the expression 'without reasonable cause' as used in section 271(1) of the Act.

Mens rea is not an essential element for proving civil liability of a penalty. [Refer ***Union of India vs. Dharmendra Textile Processors: [2008] 174 Taxman 571 (SC)***]

Q.12. What is presumption of culpable mental state in income tax act?

Ans. As discussed earlier, mens rea is an essential ingredient of a criminal offence. Mens rea cannot be presumed. It must be shown that default is willful and deliberate. However, Section 278E introduced by the Taxation laws (Amendment & Miscellaneous Provisions Act) Act, 1986, runs contrary to the well-established principle and states that Court shall presume the existence of culpable mental state, and it shall be for the accused/defendant to prove otherwise. Sub-section 2 to section 278E further states that a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. The said Section places the burden of proving the absence of mens rea upon the accused and also provides that such absence needs to be proved not only to the basic threshold of 'preponderance of probability' but 'beyond reasonable doubt'. This amendment was applicable to all the prosecution proceedings under Chapter XXII of the Income Tax Act after the introduction of section 278E with effect from 10 September, 1986. As per the explanation, the culpable state will include 'intention', 'motive' and 'knowledge'. It further provides that the absence of such culpable state shall have to proved by accused in defense beyond reasonable doubt. The Act does not differentiate in any way between natural and juristic persons. As per the settled law, charge can be framed even on the basis of strong suspicion. [Refer ***VP Punj vs. ACIT: [2001] 119 Taxman 543 (Del HC)]***. The Court has to presume the existence of culpable mental state and absence of such mental state has to be pleaded by an accused as a defense in respect to the act of charged as an offence in prosecution. [Refer ***Prakash Nath Khanna vs. CIT: [2004] 135 Taxman 327 (SC); Punj (VP) vs. ACIT: [2002] 253 ITR 369 (Del HC); Sasi Enterprises vs SCIT: [2014] 41 taxmann.com 500 (SC)***]

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FAQs on some general and basic principles of Prosecution under Income Tax Act, 1961

Q.1. What important aspects of evidence act are applicable during prosecution proceedings?

Ans. The Income Tax Act, 1961 (**"IT Act"**) is an all-India statute. It has its own mechanism and methodology for levy, recovery and collection of taxes. The Income Tax Authorities who are empowered under the Income Tax Act, 1961 have got certain powers which are conferred to them under the Act. However, there are certain areas where for the purposes of proper execution of the Act and the proceedings thereunder resort has to be made to other allied Acts. It is therefore, essential that certain methodologies and procedures prescribed under Indian Evidence Act, 1872 (**"Evidence Act"**), Code of Civil Procedure, 1908 (**"CPC"**) and the Limitation Act, 1963 come into play. However, it must be clarified that if a procedure is prescribed under the Act, then same is required to be followed. It is only in the absence of a particular procedure which is required to be followed that the Income Tax Authorities have to fall back upon and rely upon other allied laws. There are certain provisions in the IT Act where a specific reference is mentioned about the Evidence Act, CPC and the Code of Criminal Procedure (**"Cr.P.C."**).

The Evidence Act is general law which extends to the whole of India and applies to all judicial proceedings in or before any Court, and all persons, except arbitrators, legally authorized to take evidence. The applicability of the Evidence Act to prosecution proceedings under the IT Act is neither excluded under the IT Act nor under the Evidence Act. Thus, the Evidence Act governs the rules and procedures related to the relevancy of facts, admissibility and evaluation of evidence in legal proceedings, prosecution proceedings under the IT Act. Some of the important aspects of the Evidence Act that are applicable in such proceedings include:

1. ***Admissibility of evidence***: The Evidence Act sets out various provisions that determine the admissibility of evidence, such as relevant facts, oral and documentary evidence, opinions of experts, confessions, and electronic evidence. These provisions are relevant in evaluating and presenting evidence during prosecution proceedings under the IT Act.

2. ***Hearsay evidence***: The Evidence Act defines and addresses hearsay evidence, which refers to statements made by a person who is not present in court and is offered as evidence of the truth of its contents. Hearsay evidence is generally not admissible unless it falls within certain exceptions recognized by law.

3. ***Documentary evidence***: The Act provides rules for the admissibility and proof of documentary evidence, such as income tax returns, financial statements, bank records, and other relevant documents. These rules help determine the authenticity and reliability of documents presented during the prosecution proceedings.

4. ***Burden of proof, Estoppel***: The Evidence Act establishes the burden of proof in legal proceedings. In income tax prosecution cases, the burden of proving the alleged offense generally lies with the prosecution, and they must present evidence to establish charges beyond reasonable doubt. Sections 115 to 117 of Chapter VIII of the Evidence Act deal with the issue of estoppel, another rule of leading evidence. These provisions prohibit a person from giving false evidence by preventing them from making contradicting statements in a Court of Law.

5. ***Examination of witnesses***: The Evidence Act contains provisions regarding the examination-in-chief, cross-examination and re-examination of witnesses. These rules ensure that witnesses are properly examined, the order and the manner in which their testimonies are to be recorded, and they can be cross-examined by the defense during the prosecution proceedings.

Q.2. What would be the effect of giving or fabricating false evidence in judicial proceedings?

Ans. Giving or fabricating false evidence in judicial proceedings in India is a serious offense with legal consequences. If a person is found guilty of giving or fabricating false evidence, they may face legal consequences such as fines, imprisonment, or both, depending on the severity of the offense. The specific penalties will be determined by the court based on the applicable laws and the nature of the offense. There are provisions providing punishment for such offence under the IT Act as well as under the Indian Penal Code (**"IPC"**). The effect of such actions can be severe and may include the following:

1. ***Section 277 - False statement in verification, etc.:***

   - Section 277 states that if a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable,

     (a) in a case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, exceeds ₹ 25,00,000/-, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(b) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and with fine.

- Under the IT Act and the rules made thereunder, a person is required to give verifications on number of occasions. If such verifications are false, and which the person either knows or believes to be false, or does not believe to be true, then he shall be punishable u/s. 277.

- Further, where a person delivers an account or statement under the Act or Rules thereunder, he shall be punishable u/s. 277. However, such false statement must lead to evasion of tax. If there is no evasion of tax, then there cannot be any prosecution u/s. 277. This view is also taken by the Hon'ble Andhra Pradesh High Court in case of ***ITO vs. Gadamsetty Nagamaiah Chetty & Ors. (219 ITR 263)***.

2. ***Section 277A - Falsification of books of account or documents:***

- If any person wilfully and with intent to enable any other person to evade any tax or interest or penalty chargeable and imposable under this Act, makes or causes to be made any entry or statement which is false and which the first person either knows to be false or does not believe to be true, in any books of account or other document relevant to or useful in any proceedings against the first person or the second person, under the IT Act, the first person shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and with fine.

- The explanation to Section 277A states that for the purposes of establishing the charge under this section, it shall not be necessary to prove that the second person has actually evaded any tax, penalty or interest chargeable or imposable under this Act.

- This section applies to someone like an accommodation entry provider. The intention of such person, is to enable any other person (beneficiary) to evade any tax or interest or penalty chargeable or imposable under the Act. For such intention, the entry provider makes a false entry or statement in the books of account and also falsifies other documents. In such a scenario, section 277A would apply to entry provider. The explanation to the section expands the scope of section 277A. As per the explanation, evasion of tax, etc. is not necessary to establish charge under this section. Therefore, where the action of any person is to enable other person to evade tax etc., irrespective of actual evasion, the first mentioned person would be punishable u/s. 277A.

3. ***Perjury charges under IPC:***

- Chapter XI of the IPC contains provisions relating to "of false evidence and offences against public justice" from Section 191 to Section 229-A. Giving false evidence (Section 191 of IPC) or fabricating false evidence (Section 192) in a judicial proceeding is a punishable offence under Section 193 with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.
- Giving or fabricating false evidence can hinder the administration of justice and obstruct the truth-seeking process in legal proceedings. It undermines the integrity of the judicial system and prevents the court from making informed and just decisions.
- Moreover, providing false evidence or fabricating evidence can severely damage a person's credibility as a witness or a party to the proceedings. It can impact their reputation and may affect their ability to participate in future legal proceedings or be considered a reliable source of information.

Q.3. Can immunity be granted against prosecution? If yes, who is empowered to do so?

Ans. Yes, under the Income Tax Act, 1956 immunity can be granted against prosecution under certain circumstances as follows:

1. ***Section 270AA - Power of Assessing Officer to grant immunity:*** Section 270AA of the IT Act empowers the Assessing Officer to grant immunity to the assessee from imposition of penalty under Section 270A and initiation of proceedings (i.e. from prosecution) under Sections 276C and 276CC, if the assessee pays the tax and interest as per the assessment/ reassessment order within the time prescribed in the demand notice and does not file an appeal against such order. Sub-section (3) of section 270AA provides that such immunity will not be granted if AO has initiated proceedings for penalty under section 270A concerning under-reporting of income as a consequence of misreporting. This sub section (3) makes the whole power redundant.

2. ***Section 279(1A) - Immunity from prosecution under sections 276C and 277 when penalty under section 270A or 271(1)(c) is waived or reduced under Section 273A***: Sub-section (1A) of Section 279 provides that a person shall not be proceeded against for an offence u/s. 276C or 277 in relation to an assessment for an assessment year in respect of which penalty imposed or imposable under section 270A or 271(1)(c) has been reduced or waived under section 273A of the Act. Thus, in such a situation the assessee gets immunity from prosecution.

3. ***Section 291 - Power of Central Government to grant immunity:***

Sub-section (1) of Section 291 confers on the Central Government a power, under specified circumstances, to grant immunity to the assessee from prosecution for any offence under the IT Act on condition of his making a full and true disclosure of the whole circumstances relating to the concealment of income or evasion of payment of tax on income. However, sub-section (3) of that Section empowers the Central Government to withdraw the immunity so granted if such person has not complied with condition on which immunity was granted or is wilfully concealing anything or is giving false evidence.

Q.4. Can the Accused apply for discharge?

Ans. Yes, the accused can apply for discharge in criminal prosecution in India.

As per Section 280C of the IT Act, the special court trying an offence under Chapter XXII of the IT Act punishable with imprisonment not exceeding 2 years or with fine or with both shall be triable as a summons case.

Wherein the offence under the Chapter XXII is triable as warrant case, discharge application can be filed under Section 239 of the Cr.P.C. It is pertinent to note that there is no specific provision in Cr.P.C. specifically providing for discharge in case of summons triable cases. However, in the case of ***Arvind Kejriwal vs. Amit Sibal[(2014) SCCOnline Del 212***] the Court dealt with Section 251 CrPC wherein it was held that "*10. It cannot be said that, in the above circumstances, courts have no power to do justice or redress a wrong merely because no express provision of the Code can be found to meet the requirements of a case. All courts, whether civil or criminal, possess, in the absence of express provision in the Code for that purpose, as inherent in its very constitution, all such powers as are necessary to do the right and to undo a wrong in the course of the administration of justice. This is based on the principle, embodied in the maxim quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest — when the law gives a person anything, it gives him that, without which, it cannot exist. The High Court has, in addition thereto, and in view of its general jurisdiction over all the criminal courts subordinate to it, inherent power to give effect to any order of any such court under the Code, and to prevent the abuse of process of any such Court, or otherwise to secure the ends of justice.*" This judgment was challenged before the Supreme Court [(2018) 12 SCC 165] but the Court did not go into the merits of the case as both the parties had consented to revert the matter back to the High Court and the Supreme Court refused to say anything on the merit of the case. It can therefore, be concluded that the petition of discharge under Section 251 CrPC can well be considered by the courts in India.

Q.5. A brief checklist of dos and don'ts during the course of prosecution proceedings

Ans. A brief checklist of dos and don'ts during the course of prosecution proceedings under the Indian Income Tax Act:

Dos:

1. *Consult a Tax Professional*: Seek guidance from a qualified tax professional, Chartered Accountant or lawyer who specializes in tax matters. They can provide you with the necessary advice and assistance throughout the prosecution proceedings.

2. *Understand the Charges*: Understand the specific charges levied against you and the relevant provisions of the Income Tax Act. This will help you comprehend the allegations, develop an appropriate defense strategy, and assess the strength of the prosecution's case.

Don'ts:

1. *Do Not Provide False Information*: Do not provide false or misleading information or give false evidence or fabricate false evidence as same is a punishable offense. Providing inaccurate or false information can lead to additional charges and can weaken your defense.

2. *Do Not Destroy or Conceal Evidence*: Do not destroy, tamper with, or conceal any evidence that may be relevant to the prosecution proceedings. Such actions can have serious legal consequences and further undermine your case.

3. *Do Not Delay Legal Proceedings*: Avoid unnecessary delays in legal proceedings. Comply with court orders, attend hearings as required, and submit the necessary documents and evidence promptly.

4. *Do Not Discuss Case Details Publicly*: Refrain from discussing case details or making public statements about the ongoing prosecution proceedings. Premature or inappropriate disclosures can impact the outcome of the case and may be detrimental to your defense.

5. *Do Not Ignore Legal Assistance*: Avoid neglecting or disregarding legal advice or representation. Engage a qualified tax professional or lawyer to ensure your rights are protected and that you present a robust defense.

Q.6. Brief checklist to avoid prosecution

Ans. 1. *Accurate and Timely Tax Filing*: Ensure you file your income tax returns accurately and within the prescribed deadlines. Double-check your tax calculations and include all relevant income sources, deductions, and exemptions.

2. *Maintain Proper Records*: Maintain comprehensive and organized records of your financial transactions, income sources, expenses, investments, and other relevant documents. This will help you substantiate your tax positions and respond to any queries from the income tax authorities.

3. *Compliance with Tax Obligations*: Comply with all tax obligations, including payment of taxes, filing of returns, and responding to any communication or notices from the income tax department. Respond to queries or requests for information promptly and accurately.

4. *Disclosure of Income and Assets*: Make full and accurate disclosure of your income, assets, and investments. Avoid concealing or underreporting any income or assets as it can lead to potential scrutiny and prosecution.

5. *Seek Professional Guidance*: Engage the services of a qualified tax professional or chartered accountant to ensure compliance with the tax laws and regulations. They can provide valuable advice, help you understand your tax obligations, and assist with tax planning strategies.

6. *Maintain Transparency*: Be transparent and cooperative during any tax audit or investigation. Provide complete and truthful information to the income tax authorities when required.

7. *Stay Updated on Tax Laws*: Stay informed about the latest developments and changes in tax laws, regulations, and provisions. Regularly review updates from the income tax department to ensure compliance with any new requirements or provisions.

8. *Avoid Tax Evasion Schemes*: Steer clear of any tax evasion schemes, illegal tax shelters, or aggressive tax planning strategies that may violate tax laws. Consult a tax professional for legitimate tax planning options that comply with the law.

9. *Maintain Proper Documentation*: Keep copies of all tax-related documents, including returns filed, acknowledgment receipts, tax payment receipts, and communication with the income tax authorities. This documentation can serve as evidence of your compliance.

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Sham Walve
Advocate

FAQ on some general and basic principles of 'Prosecution under the Income Tax Act, 1961'

Q.1. What are the offences, under Income-Tax Act, 1961, for which, an Assessee/Person can be prosecuted?

Q.1. Whether the offences are compoundable? If yes, what are the offences, which can be compounded?

Ans. Yes the offences are compoundable as per Section 279(2) of the Income Tax Act, 1961 (the Act) which states as follows:

> *(2) Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by the [Principal Chief Commissioner or] Chief Commissioner or a [Principal Director General or] Director General.*

Some of the offences which can be compounded are divided into categories as per the Guidelines of Compounding issued time to time by the CBDT. For instance Category 'A' includes Section 276B, Category B includes Section 276 etc.

Q.2. What is the procedure for getting the offences compounded?

Ans. The CBDT issues Guidelines from time to time in relation to the procedure for compounding of offences under the Act. The CBDT issued Guidelines for Compounding of Offences dated 14th June 2019 and further issued revised Guidelines for Compounding of Offences dated 16th September 2022 in supersession of all earlier guidelines on compounding of offences under the Act. The 2022 Guidelines hold the field as a new framework for all matters relating to compounding of offences under the Act. Elaborate procedure is given under Clause 11 (Page 8) of the 2022 Guidelines for Compounding.

Q.3. Is there a time limit for compounding offences?

Ans. In Paragraph No. 7(ii) of the 2019 Guidelines for Compounding mentioned above, it was provided that no application of compounding can be filed after the end of 12 months from the end of the month in which prosecution complaint, if any, has been filed in the court

of law in respect of the offence for which compounding is sought. Further, the revised 2022 Guidelines for Compounding have also made no change in this regard. However, the question regarding period of limitation for filing a Compounding Application came up for consideration before the Hon'ble Allahabad High Court in the case of G.P Engineering Works Kachhwa v. Union of India [2022] 139 taxmann.com 130 (Allahabad) wherein the Hon'ble Court held that the CBDT by a circular can neither provide limitation for the purposes of Section 279(2) nor can restrict the operation of Section 279(2) of the Act in purported exercise of its power to issue a circular under the second Explanation appended to Section 279 of the Act.

Q.4. Can an Assessee/Person apply for compounding even before the department issues notice for prosecution?

Ans. Yes, an Assessee/Person can apply for compounding even before the department issues notice for prosecution, as per the explicit wordings of the provision and the Guidelines for Compounding.

> *(2) Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by the [Principal Chief Commissioner or] Chief Commissioner or a [Principal Director General or] Director General.*

Further, the Guidelines for Compounding also provide that the compounding application may be filed *suo-moto* at any time after the offence(s) is committed irrespective of whether it comes to the notice of the Department or not.

Q.5. For how many times can an Assessee/Person apply for compounding of offences?

Ans. It is provided under the Guidelines for Compounding that a Category 'A' offences cannot be compounded on more than three occasions. However, in exceptional circumstances compounding requested in more than three occasions can be considered only on the approval of the Committee. The term 'occasion' is defined in

Para 8.2 of the 2019 Guidelines for Compounding.

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"Each work has to pass through these stages—ridicule, opposition, and then acceptance. Those who think ahead of their time are sure to be misunderstood."

— Swami Vivekananda

S. N. Inamdar
Sr. *Advocate*

HOT SPOT
UNCHARITABLE UPSET

The Hon'ble S.C. delivered a judgment on 19th October 2022, in the case of ***New Noble Education Society vs. Chief CIT***, which seems to have caused a stir dismay, misunderstanding and alarm-not only in the media, but amongst professional fraternity also.

Times of India, in their issue of 20th October put the news on the front page and caption as if it is applicable to all charities.

It is submitted, with respect that the judgment is not read in the proper context and issue involved. The heading read: No. I-T relief for "charity" if charges are high. It continued: 'Ruling will have implication for "many entities". It also avers that S.C. bench says I.T. exemption (will be) allowed if the trust organization advancing general public utility charges on cost basis or nominally above the cost. Some professionals have also remarked that the judgment is in the context of 'advancement of general public utility".

If is seen, that question referred was confined to S. 10(23c)(vi) and not definition of 'charitable purpose in S. 2(15) or interpretation of S. 11. The major part of the judgment is also devoted to the interpretation of "existing solely for purpose of education" which occur only in S. 10(23c)(vi).

It is well settled that a judgment or ruling of the court is an authority for what it decides and not for what flows from it. Obiter Dicta is not binding. Latin language has a better phrase 'ratio decidendi'.

The learned ASG makes a reference to S. 2(15) for the first time, in Para 18 of the judgment, but the purpose for such reference is not clear. He does not pursue it further. All his arguments/submission are confined to interpretation of 'solely' for the purpose of education. The sum and substance of the judgment seems to be that if an educational institution is run on commercial lines (like private coaching classes) and makes undue profits, it may not be qualified for tax exemption u/s 10(23c)(vi).

In para 30 of the judgment, the Hon'ble S.C. refers S. 2(15) as a "relevant provision and does not take its aid in the conclusions it finally draws in para 76.

There can be no disputes with these conclusions so long as they are confined to, S. 10(23c)(vi) and not extended to the word 'education' used in S. 2(15). This is because Hon'ble S.C. itself has held in ***Dharmadepti vs. CIT (1978) 35CC 449 and in 114 ITR 454*** that in any object of general public utility **involving** the carrying on any activity for profit, is confined to the last category "any **other** object of general public utility and does not apply to the first three categories *viz* relief of poor, medical relief and education.

A hospital, for instance even through charitable will charge for medical treatment and medicines. What is overlooked is that law does not prohibit making profit (in the sense of surplus of receipts over expenditure), but what it prohibits is 'profiteering'. If it was not so, there was no point in conferring on it exemption from tax! It may also be noted that Income Tax Act when it grants exemption, it is subject to several restriction as to spending & accumulation.

Even the Hon'ble S.C. has confined its discussion to "total" exemption granted by S. 10(23c)/S.10(22).

It must not be overlooked that the S.C. has held in the para 79, that rendering of services on payment of charges only, cannot be considered "incidental" to education imparted by the Institution.

It must not also be overlooked that the S.C. itself has held in the past that eleemosynary element is not an essence of a charity. Charity does not mean free or below cost.

It is submitted, with greatest respect, that the judgment of the Hon'ble S.C. in Noble's case must be read in the above setting and context. Only in para 71, the Hon'ble S.C. refer to S. 11(4A), but it is submitted, with respect that except a few words, which are common, S. 11(4A) has no relevance to the interpretation of S. 10(23c)(vi). S. 11(4A) is based on the well-recognized position in law that a running business is and can be called 'property' which can be held in trust for charitable purposes. This section actually supports the view advocated above.

Hon'ble S.C. was more concerned with the words "existing solely for the purpose of education" rather than the resulting surplus. Surprisingly nobody brought to the attention of the Hon'ble Court the meaning of the word 'purpose' Oxford dictionary defines the word 'purpose' to mean "intended result of effort, intention to act…"

If it is to be held that the Hon'ble court has held that you must charge only the cost or slightly or nominally above the cost, then a subjective element will be brought in the interpretation. And who will decide what is "slightly or nominally above"? To give only one instance, Rishi valley school in Madanapalli restricts the no. of students in a class to only 25. A municipal/or other charitable school in Mumbai will take 50 students in a class. Which will serve the "purpose" of education better?

One more confusion that is likely to arise is on account of the observation of the Hon'ble S.C. in para 78 to the effect that is, this court is further of the opinion that since the present judgment has departed from the previous rulings regarding the meaning of the term 'solely' in order to avoid disruption, and to give time. This judgment also states that institutions likely to be affected, they may need time to make appropriate changes and adjustments, it would be in the larger interests of society that the present judgment shall operate prospectively. What does it exactly mean? It will apply to Institutions

or trusts made after the date of judgment or after the existing institutions/trusts "behave themselves"?

There are two famous sayings in English.

1. Education begins in the cradle and ends in the grove.
2. Charity begins at home.

Let us not educational charity end in the cradle itself at home, by putting unreasonable restrictions. Instead, try to control the mode and manner of expenditure on charity by an institution!

Before I conclude with my comments on the judgment, let me deal with some aspects relevant to S. 10(23C). I found that there is an impression amongst some professionals also, that seventh proviso to S. 10(23C) supports the view taken in the above decision. In my respectful submission, merely because S. 11(4) & 11(4A) are mentioned in the provisos it will be wrong to take the above view since seventh proviso merely prescribes a condition to be eligible to claim complete exemption under that section. The proviso reads as under:

"**Provided also** that nothing contained in sub-clause (iv) or sub-clause (v) or sub-clause (vi), shall apply to any income of the fund or trust or institution or any university or other educational institution or any hospital or other medical institution (words underlined substitute w.e.f. 01.04.21) being profits and gains of business, unless the business is incidental to the attainment of its objectives and separate books of account are maintained by it in respect of such business.

In my submission, the concept of incidental to objective cannot be imported in S. 11(4) or S. 4(4A) as their function, objective and purpose are entirely different. As stated, by me earlier in this Article, the distinction between a business carried on by a charitable trust on which a running business (which is property by itself), must be kept in mind before jumping to the conclusions or interpretation.

The S.C. in the second case of ***ACIT (Exemption vs. Ahmedabad Urban Development Authority and others decided on 19th October 2022, in Para 155*** itself recognized the distinction between business held under Trust 11(4) and Trust carrying on a business [S. 11(4A)]. The discussion made by the Hon'ble S.C. in the Noble Education case and the relevance of the word 'incidental' and the entire discussion about business profits must be restricted to S. 11(4A) only and not extended to S. 11(4).

Kanga and Palkhiwala in their treatise on Law and Practice of Income Tax, Eleventh Edition Vol. 1 have on page 682 & 683 explained this distinction in a simple and effective manner.

With these remarks, I will now turn to the second decision which deals with S. 2(15) and the phrase 'not involving the carrying on of any activity for profits.'

At the outset, one must greatly appreciate and congratulate the Apex court for a detailed and comprehensive, incisive, learned and purposive statement of law on assessment of charitable institution in India. But one cannot help but observe that sometimes the length of a judgment and its enthusiasm to deal with history of the legislation, wording of it, purpose of it and different views canvassed and their acceptance or rebuttal and discussing all case cited, sometimes may tend to make the law complicated and confusing – particularly when two judgments on more or less the same issues are rendered by the same Bench within a period of one week only.

There can be no serious objection to any of the conclusions drawn by the Hon'ble S.C.

However sometimes it is felt that the language used leaves much to be desired in the interest of clarity and certainly.

A.1 First conclusion is whereby "it is clarified that an assessee advancing general public utility cannot engage itself in any trade, commerce or business, or provide service in relation thereto for any consideration (by way of cess, fee or any other consideration). It would have been better if it was also clarified that what is meant is that the object of general public utility must not involve carrying on trade, commerce or business for profit.

A.2 Conclusions in A.2 on P.141 may only compound the confusion.

A.3 The words used in A.3 "normally charging any amount towards consideration for such an activity (if advancing general public utility) which is an cost/basis or nominally above cost cannot be considered to be trade, commerce or business" run counter to the wording and bring in subjective test a to what is nominally above cost and now to determine the cost. Better principle would be that what the law prevents is not making profit but profiteering. There is no reference to the rule laid down by the Apex court itself that 'eleemosynary principle not an essence of charity'.

A.4 It is absolutely true to say that S. 11(4A) must be harmoniously construed with S. 2(15) with which there is no conflict. But the reference to seventh proviso to S. 10(23c) and third proviso to S. 143(3) and to state this will bring uniformity across the statutory provisions, overlooks the different objectives behind these provisions. For instance, S. 143(3) is a procedural section and merely talks of consequences of breach of conditions subject to which approval was granted. It has nothing to do with any section or clause or its interpretation.

B.1. Interpretation and conclusions are most acceptable.

B.2. This may invite the same issues as stated by me A.3.

B.3. There can be no dispute with the proposition stated in this Para.

B.4. Same comment as in B.3.

C.1. Same comments as made in A.3 above. It is felt that law should aim to finding out whether and how the money is spent on charity rather, than how and to what extent income is earned.

D. While there can be no dispute with the principles laid down, it is not clear what is meant by "providing private rental spaces". Does it amount to carrying on a business or income from property?

The above comments may apply to EFGH if circumstances are similar with the only additional comment that some part of Para H may put unreasonable burden or tasks on the Tax officer. Lastly, it may be said that charity may begin at home, but should not die at the doorstep of the Income Tax Officer!

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K. K. Ramani
Aovocate

HOT SPOT
SECTION 45(5A) OF INCOME-TAX ACT

1. The taxation of stakeholders in development of land or building carried out through the builders, commonly referred to as 'Joint development', has been mired in varied legal views leaving the landowners as well as the builders in a state of uncertainty as to their tax liability. The incidence being very high, the projections going awry, severely impacts the financial viability of the project when sufficient headway has already been made. The conflicting judicial pronouncements and the growing number of amendments from time to time create further complexity and demand a settled, stable and fair tax regime in the interest of an orderly growth of real estate sector.

   In joint development projects, the landowner who is generally not equipped with necessary expertise and resources to carry out the development himself, grants development rights over the land to some builder authorizing him to construct the building thereon, incur all cost, share the constructed space in agreed proportion and deal with the space falling to his share as his ownership property which he can dispose of as such. From the angle of income taxation, the landowner, as a transferor of development rights derive income by way of capital gains and the builder, carrying out the construction as business activity, derives profit from business.

   So far as the landowner is concerned, he is faced with the question as to whether transfer of development rights is a transfer within the meaning of the Act? Whether it results in capital gains and if so, when does it arise and how it is to be computed? It is to address such issues and to relieve the taxpayers from the hardship caused by certain decisions, that the legislature by the Finance Act, 2017 inserted sub-section (5A) to section 45.

2. **Section 45(5A**) reads as under:

   "Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being

an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by "any consideration received in cash or by a cheque or draft or by any other mode" shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset:

Provided that the provisions of this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of the said certificate of completion, and the capital gains shall be deemed to be the income of the previous year in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer."

Explanation.—For the purposes of this sub-section, the expression—

(i) "competent authority" means the authority empowered to approve the building plan by or under any law for the time being in force;

(ii) "specified agreement" means a registered agreement in which a person owning land or building or both, agrees to allow another person to develop a real estate project on such land or building or both, in consideration of a share, being land or building or both in such project, whether with or without payment of part of the consideration in cash;

(iii) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of an immovable property being land or building or both.

Dissecting the section, the position that emerges is-

(i) The provision is restricted to the landowners being individuals and H.U.Fs. It does not apply to other entities.

(ii) It applies to computation of capital gain derived from transfer of land or building or both under registered specified agreement which has the characteristics of a joint development agreement in which the owner transfers land or building or both to another person allowing another person to develop a real estate project on such land or building for consideration.

(iii) The consideration for transfer is given in terms of a share in the developed land or constructed building or both, with or without monetary consideration. In case

the transfer is wholly for cash, the provision has no application.

(iv) After the transfer of capital asset as per Section 2(47)(v) of Income Tax Act the gain becomes chargeable in the previous year in which the Completion Certificate **("CC"**) in respect of the whole or part of the project is issued by the competent authorities and is accordingly, assessable in the relevant assessment year on the basis of market value computed in accordance with stamp duty value of incoming asset and not the value of capital asset transferred.

(v) In case the landowner transfers his share before the issue of completion certificate this sub-section does not apply. In other words, the capital gain in such cases is assessable as per normal provisions of the Act as if Section 45 (5A) does not exist on the statute.

(vi) The full value of consideration for computation of capital gains will be the Stamp Duty Value of the incoming asset on the date of issue of completion certificate.

(vii) Where the capital gain arises from the transfer of an incoming capital asset, being share in the project, in the form of land or building or both received by the assessee after the issue of completion certificates from the developer, the cost of acquisition of such asset, shall be the amount which is deemed to be full value of consideration in sub-section 45(5A) of Income Tax Act. The provision is applicable w.e.f 01.04.2018 that is, in respect of AY 2018-19 onwards.

3. The provision attempts to resolve controversies

The provision has set at rest the controversies in respect of certain areas involving uncertainties leading to litigation. A brief mention of whether and to what extent, the provision has effectively achieved the object, is made hereinafter.

A. Development Agreements involves transfer

The position of transfer of development rights about small lands is peculiar in the sense that the owner grants the right to develop while retaining the legal title over the land in question. Whether such right to develop Land and/or Building amounts to transfer within the meaning of law was a question which stood resolved by recourse to clause (v) of S. 2(47) which makes any transaction involving the allowing of possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in S. 53A of the Transfer Of Property Act,1882 as a Transfer under the Income Tax Act. By giving extended meaning to the term 'possession', the AAR in ***Jasbir Singh Sarkaria*** brought the transaction of execution of Power of Attorney within the purview of the clause. The determination of transfer of immovable property has become a question of fact to be determined in each case on the basis of facts of the peculiar case.

Section 45(5A) being a special provision for computation of gain from such transfers puts a seal of approval to

the view that transfer of development right is a transfer of capital asset attracting capital gains and also prescribes the event of taxability to be applied uniformly in cases of specified development agreements.

B. Year in which the Gain is chargeable

Prior to insertion of this section a big controversy prevailed, as to when the transfer takes place if a joint development agreement is executed between the owners and developer. Normally it is the event of transfer of capital asset that determines the date on which the capital gain arises and the relevant assessment year in which the transaction is subjected to tax. There were many controversies as to the event of transfer in such transactions. Is it when the development agreement is executed? Is it when the possession or Power of Attorney is given to the developer or any other event ? There were varying decisions from various judicial authorities in this respect.

Mention here may be made of the Bombay High Court decision in ***Chaturbhuj Dwarkadas Kapadia vs. CIT (2003) 260 ITR 491*** and also the decision of AAR in ***Jasbir Singh Sarkaria (2007) 294 ITR 196***. Although the penultimate answer in these cases was different, the basic test adopted was the event of passing of control over the property in favour of developer. In Chaturbhuj Kapadia's case such event was held to be transaction of execution of development agreement and accordingly, transfer was held to have taken place in the previous year of entering into the agreement. In Sarkaria's case, such event was held to be the execution of General Power of Attorney. The determination of date of transfer was, therefore, based on facts and no uniform view was taken.

The approach of adopting the date of handing over possession as the date of transfer in a development agreement resulted in hardship to the owners of land as the liability to pay capital gain tax gets triggered much before the receipt of actual consideration. Section 45(5A), as stated in CBDT Circular 2/2018, takes care of such hardship and treats the gain taxable in the previous year in which the CC is issued by the competent authorities and consequently assessable in that assessment year. The provision not only avoids the uncertainty but also goes a long way in relieving the hardship in genuine cases. The object of minimizing the hardship explains why the agreements under which entire consideration is paid in cash have been kept outside the purview of this section.

C. Determination of the Fair Value of consideration

The determination of fair value of consideration in such cases was always a contentious issue. In view of uncertainty as to when the capital gain arises, not only the manner of determining the value of consideration but also the valuation date was an uncertain issue. Whether the consideration should be the market value or any other value and whether it should be the value as on the date when the transfer took place or when the consideration was actually received and whether the provisions of S. 50C apply, were the moot issues.

Section 45(5A) has provided a definite answer to the above questions by laying down that the consideration will be the stamp duty value and such value will be the value as on the date when CC is issued. Such stamp duty value will be increased by monetary consideration, if any. It, therefore, makes it incumbent on the landowner to hold the asset till the date of issue of CC in case he desires to be governed by this provision as this provision will not be applicable to him if he ceases to hold the asset on the date of the issue of Completion Certificate.

Since under the scheme of capital gain taxation, the gain arises as per section 45(1) on transfer of the asset and is chargeable in the year of transfer, the legislature has, by implication, enacted a fiction under which the capital gains become chargeable on the date of issue of completion certificate and not on the date of transfer.

4. Issues arising from the provision

The provision although designed to avoid uncertainties may lead to certain issues in implementation. Divergent opinions are available as to interpretation of the provision. An attempt is made below to discuss few issues which are vital in nature and may need clarification.

A. Applicability of the provision

The Finance act prescribed that the provision will be effective from 1st April, 2018 and will be applicable in relation to AY 2018-19. A question may arise whether it will apply in relation to the agreements executed prior to 1st April, 2017. There will be cases where the development agreements were executed, say in 2015, but the CC was issued on or after 1st April, 2017. Whether the date of coming into force, as prescribed in the Act is applicable in relation to the execution of agreement or issue of completion certificate? This issue needs to be clarified by CBDT.

There is a view that the provision will have no application if the Development Agreements were executed prior to 01.04.2017, even if the CC was issued on or after 01.04.2017. The view is based on the reasoning that this being a substantive provision cannot have retrospective application and, applying the provision to such cases will amount to applying the law retrospectively. The view finds support from the decision of the Hyderabad Tribunal in ***Adinarayana Reddy Kummeta vs. ACIT (2018) 91 Taxmann.com 360*** wherein it has been held that the section being a substantive provision, cannot be applied to development agreements entered into during the year 2008-09.

There is contrary view according to which the provision, although effective from 01.04.2017 (Assessment Year 2018-19) will apply retrospectively being curative in nature as it seeks to minimize the hardship of the landowner. Reliance is placed on the SC decision in ***Allied Motors (p) Ltd. vs. CIT 224 ITR 677*** followed by the court in ***CIT vs. Alom Extrusions Ltd 319 ITR 306*** wherein deletion of second proviso to Sec. 43B by the Finance Act 2003, although effective from 01.04.2004, was held to be effective retrospectively from 1988 as it was enacted for removing the hardships faced by the employers in depositing the PF amount within

the financial year. In case of S. 45(5A), the object has been clearly stated as minimizing the hardship which makes it curative and on the analogy of the SC decision, can be treated as retrospective in nature.

There is another angle to consider the issue. Whether application of Sec. 45(5A) to the gain arising from the agreements entered into prior to 01.04.2017 has retrospective application of law, if the completion certificate is obtained in the FY 2017-18 relevant to the AY 2018-19 and thereafter. The section is applicable in respect of gains assessable in A.Y. 2018-19 onwards by virtue of the CC having been obtained in the FY 2017-18 onward. For this, the agreement has to be of the nature of 'specified agreement' which has certain attributes. One such attribute is the transfer of land or building or both allowing the transferee to develop the land. Once, therefore, the CC is obtained on or after 01.04.2017, in respect of the building, the development of which was in accordance with an agreement having attributes of 'specified agreement', the requirements of the section are complied with, irrespective of the date of entering into the agreement. What is required is existence of a registered agreement having the attributes of a 'specified agreement', irrespective of when it was entered into. The applicability of the provision is in relation to the year of chargeability and not in relation to the timing of various stages in the process of development.

There appears to be a reasonable force in both viewpoints- (i) treating it as having retrospective application and (ii) not giving weight to the time of entering into the agreement so long as the registered agreement is of the nature of specified agreement and completion certificate is issued in A.Y. 2018-19 or thereafter.

B. Determination of Cost of Acquisition

The provision is silent about the manner of determining the cost of acquisition of the transferred capital asset. The issue is relevant to indexation which is done upto the year of transfer. The basic question, therefore, is whether for this purpose, the year of transfer will be as per the general law i.e. the year in which possession is given. In that case the indexation will be upto the year of possession. The other view is that by providing that the capital gain will be chargeable to tax in the year in which CC is issued for the incoming asset, the legislature has impliedly made the year of issuance of CC as the year of transfer. If this view finds favour, indexation will be upto that year.

The former view will result in two different years in relation to which the cost and the sale consideration will be determined which will not be in accordance with the scheme of capital gains taxation. Indexed cost of acquisition and the fair value of consideration are the two ingredients for computation of capital gain and under all provisions, including S. 45(2) which are determined on the same point of time. If a project is going to take say five years for completion, it will be anomalous if the indexed cost is determined five years before the year in which the gain is brought to tax and the fair value of consideration is determined after five years.

C. Transfer of land held as business asset or agricultural land

Where the land to be transferred under the 'specified agreement' is held as an asset of the business and not as a capital asset within the meaning of in the Act, an issue arises as to whether the provisions of s. 45(5A) will be applicable.

Capital gain arises from transfer of capital assets. 'Capital assets' as defined in section 2(14) of the Act excludes any stock-in-trade, consumable stores or raw material held for the purpose of business or profession. If, therefore, the land or building under transfer is the stock in trade of any person engaged in real estate business and the same is transferred by such person for development, the transaction will be outside the purview of this provision. The same will be the case when the transfer is of agriculture land which also is excluded from the meaning of 'capital asset'.

D. Transfer of part of the development potential

In certain cases, the landowner decides not to transfer the entire development potential but retains a portion of it which he gets constructed for his own benefit through a contractor who may also acquire balance development potential under a different agreement by paying monetary consideration only. Even when the retained portion is got constructed by the same person to whom the balance potential is transferred, the person acts as a contractor rendering construction services to the owner in respect of that part of FSI and for another part he acts as the developer. Question may arise whether in such cases, Sec. 45(5A) will apply?

Since developer purchases part of FSI for monetary consideration and for another part he acts as a contractor only. Both the events will be outside the purview of sec. 45(5A).

E. Issue of CC for part of the project

As per the provision, as drafted, the gain becomes assessable when CC for the whole or part of the project is issued by the competent authority. It recognizes part completion certificate without specifying the different outcome of such certificate. On a literal reading it can be interpreted that even a part completion certificate will trigger the taxability of the entire project and the gain from entire share in property will become taxable.

Such an interpretation will be against the cannon of equity and fairness which demands that in case of CC for part of the project, only the gain attributable to the completed part will be subjected to tax. Any other view may not be sustainable.

F. Owners transferring their share before CC

For various reasons, certain owners may not be able to hold the asset till the issue of CC. An issue may arise whether they be denied the benefits of S. 45(5A)?

The answer is clearly provided in the Proviso to the section under which when the owner transfers his share before the issue of CC, the transfer of his share will take place in the year when the share is transferred and not

the year in which CC is issued. Section 45(5A) will have no application in such cases which will be governed by the normal provisions for determination of the year of assessment and fair value of consideration.

5. Section 45(5A) and TDS

Simultaneously with the introduction of section 45(5A), the legislature enacted a separate provision for deduction of tax from payments under the specified agreement referred to in that section. There is a general provision contained in S. 194IA in respect of TDS on payments on transfer of any immovable property. Special provision in respect of payments under specified agreements was made by enacting section 194IC effective from 01.04.2017.

The person responsible for paying to a resident any sum by way of consideration under the "agreement referred to in section 45(5A)" is required to deduct an amount equal to 10% of such sum. The obligation to deduct tax under this section is only in respect of consideration paid in money to a resident.

"Agreement referred to in sub-section (5A) of section 45" implies a joint development agreement with the attributes of a specified agreement under which there is area- sharing, with or without consideration in cash. In other words if the entire consideration is payable in cash only, such agreement will not be 'specified agreement' and section 194IC will have no application. In such a case, TDS obligation will be under section 194IA at the rate of 1% of the sum paid.

The issue whether the expression "referred to in sub-section (5A) of section 45" relates to agreements executed on or after 01.04.2017 only or all the agreements with the attributes of specified agreement irrespective of the date when these were executed, will remain. A discussion made in Part A of para 4 may be referred to?

The TDS provision applies to payments under the agreement referred to in S 45(5A) ie the specified agreement. Such agreement being between individual/ H.U.F and the developer only, the TDS obligation will arise only when payment is made to individuals/H.U.Fs. Further, under the provision, the payee should be a resident which is not a condition in the specified agreement u/s 45(5A). Payment to non-residents is governed by S. 195 only.

6. 'Cost of acquisition' and amendment of Sec. 55 as per Finance Act 2023

Section 45(5A) does not provide for any method of determining the 'cost of acquisition' under specified agreements. The same is governed by the normal provisions of the Income Tax Act. Section 55 governs cost of acquisition of certain intangible assets viz. goodwill, trade mark or brand name and certain rights including tenancy rights, stage carriage permits and loom hours. These assets/rights are either self- generated or do not have any ascertainable cost. Where there is no actual cost, the cost of intangible assets/rights is deemed to be 'nil'.

Finance Act, 2023 while retaining the mention of these assets/rights, followed them by an omnibus provision extending the adoption of deemed 'nil'

cost to all other assets of similar nature. The expression "goodwill of a business or profession, or a trademark, or brand name associated with a business or profession" is now followed by the expression "or any other intangible asset" and the expression mentioning rights, including tenancy rights, stage carriage permits, or loom hours is immediately followed by "or any other rights".

The amendment is of a sweeping nature and in the absence of any meaning given to 'intangible assets,' is susceptible to different interpretations as to the nature of any particular asset. There is an apprehension in the real estate sector that this omnibus provision will upset the projections of tax liability as the FSI may be treated as intangible asset with zero deemed cost by the Assessing Officers.

In our view the apprehension is not well founded for the following reasons:-

(a) FSI is just the other expression of land, being the quotient of floor area to the area of land. Transfer of 10000 sq.ft land with 30,000 FSI can be expressed as transfer of 10000 sq.ft. land or, of 30,000 FSI. It is not an independent asset but just an expression of the tangible asset viz. the land.

(b) So is the case if the transfer is taken to be of development rights. Transfer of these rights is virtually the transfer of land, if these rights are fully taken out there will be hardly any value of the land. When Section 45(5A) is read with Explanation (ii), it becomes clear that transfer of land or building and allowing a builder to develop a real estate project have been treated at par.

(c) That the transfer of FSI/ Development rights are no different from the transfer of land has been recognized under Maharashtra Stamps Act by providing for the same stamp duty on development agreements as leviable on transfer of land.

(d) That the general words "any other intangible asset" and "any other right" following the specific assets take colour from the specific assets and under the doctrine of '*ejusdem generis*' are to fall in the same class in which the specific assets are. FSI cannot be taken to be an asset falling within the same class as goodwill which is an independent asset whereas FSI derives its value from holding of land.

7. To conclude

S. 45(5A) is a welcome provision which provides for certainty and fairness in taxation of landowners under the joint development projects. It is, however, strange that it has application only when the owner is individual or H.U.F. The problem faced by every assessee is the same irrespective of status under the Act and, what was appreciated as hardship to individual/H.U.F. is also a hardship faced by other assesses. There being no ostensible reason for different treatment to persons with different status, the equity and fairness demand that the provision be extended to all assesses who enter into such joint development projects.

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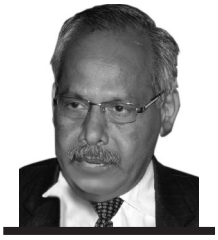

Keshav B. Bhujle
Advocate

DIRECT TAXES
Supreme Court

1 ***Principal CIT vs. Royal Western India Turf Club Ltd.; [2023] 453 ITR 460 (SC): Dated 11/11/2022***

Income or capital — Club — Entrance fees paid by member — High Court holding correct test applied by Tribunal to hold receipt of capital nature and no question of law arises — Supreme Court held no interference: S. 4 of ITA 1961: A. Y. 2009-10

The Tribunal held that entrance fees paid by a member of the assessee-club constituted a capital receipt in its hands. The Bombay High Court dismissing the Department's appeal, held that the facts and circumstances having been properly analysed and the correct test applied to decide the issue, no question of law arose.

On a petition for special leave to appeal by the Revenue the Supreme Court held as under:

"1. Delay condoned.

2. We are not inclined to entertain the special leave petition under article 136 of the Constitution.

3. The special leave petition is accordingly dismissed."

2 ***US Technologies International Pvt. Ltd. vs. CIT; [2023] 453 ITR 644 (SC): Dated 10/04/2023***

Penalty — TDS — Consequences of failure to deduct tax at source and failure or delay in remittance of tax deducted at source — Different provisions applicable — Failure to pay or belated remittance of tax deducted at source attracts interest u/s. 201(1A) and prosecution under section 276B — No provision for levy of penalty — Except to limited extent involving section 115-O(2) or second proviso to section 194B: Ss. 201(1A), 271C, 276B of ITA 1961; CBDT Circular No. 551 dated 23-1-1990: A. Ys. 2003-04, 2010-11 to 2012-13:

From April 1, 2002 to February, 2003, the assessee deducted tax at source in respect of salaries and contract payments totalling ₹ 1,10,41,898. The assessee remitted part of the tax deducted at source, ₹ 38,94,687, in March, and the balance of ₹ 71,47,211 later. The period of delay ranged from 5 days to 10 months. On the ground that tax deducted at source was not deposited within the dates prescribed under the Income-tax

Rules, 1962, the Income-tax Officer by an order u/s. 201(1A) of the Income-tax Act, 1961 levied penal interest of ₹ 4,97,920 for the delay in remittance of the tax deducted at source. The Additional Commissioner issued a show-cause notice proposing to levy penalty u/s. 271C of an amount equal to tax deducted at source. The assessee replied to the notice. The Additional Commissioner by an order u/s. 271C levied a penalty of ₹ 1,10,41,898 equivalent to the amount of TDS deducted. That order of the Additional Commissioner levying the penalty u/s. 271C was confirmed by the Tribunal and the High Court dismissed the assessee's appeal.

For the A. Ys. 2010-11, 2011-12 and 2012-13 penalty equivalent to the amount of TDS deducted was levied by way of orders u/s. 271C. The Commissioner (Appeals) dismissed the assessee's appeals but the Tribunal held that imposition of penalty u/s. 271C was unjustified and reasonable causes were established by the assessee for remitting the tax deducted at source belatedly. The High Court allowed the Department's appeals following its earlier order.

The Supreme Court allowed the appeals filed by the assessee and held as under:

"i) Section 271C(1)(a) of the Income-tax Act, 1961 shall be applicable in a case of failure on the part of the assessee to "deduct" the whole or any part of the tax as required by or under the provisions of Chapter XVII-B of the Act. The words used in section 271C(1)(a) are clear; the relevant words used are "fails to deduct". It does not speak about belated remittance of the tax deducted at source.

ii) The settled position of law is that penal provisions are required to be construed strictly and literally. And the cardinal principle of interpretation of statutes and more particularly, penal provisions, is that penal provisions are required to be read as they are. Nothing is to be added or nothing is to be taken out of the penal provision.

iii) Therefore, on a plain reading of section 271C of the Act, there shall not be penalty leviable on belated remittance of the tax deducted at source after it is deducted by the assessee. Section 271C of the Act is quite categoric. Its scope and extent of application are discernible from the provision itself, in unambiguous terms. When the non-deduction of the whole or any part of the tax, as required by or under the various instances provisions of Chapter XVII-B would invite penalty u/s. 271C(1)(a) ; only a limited text, involving sub-section (2) of section 115-O or covered by the second proviso to section 194B would constitute an instance where penalty can be imposed in terms of section 271C(1)(b) of the Act, namely, on non-payment. It is not for the court to read something more into it, contrary to the intent and legislative wisdom.

iv) Wherever Parliament intended consequences for non-payment or belated remittance of the tax deducted at source, Parliament has provided for it, such as in section 201(1A) and section 276B of the Act. Section 201(1A) provides that in case a tax has been deducted at source but is subsequently remitted may be belatedly or after some days, such a person is liable to pay interest as provided u/s. 201(1A) of the Act. The consequences of non-payment or belated remittance/payment of the tax deducted at source are specifically provided u/s. 201(1A). Similarly, section 276B talks about prosecution on failure to pay the tax deducted at source after

deducting it. Section 271C was amended subsequently in the year 1997 providing sub-sections (1)(a) and (b). Failure to pay the whole or any part of the tax would fall u/s. 271C(1)(b) and the word used between 271C(1)(a) and (b) is "or". Section 276B provides for prosecution in case of failure to "pay" tax to the credit of Central Government. The word "pay" is missing in section 271C(1)(a).

v) The CBDT Circular No. 551 dated January 23, 1990 ([1990] 183 ITR (St.) 7) deals with the circumstances under which section 271C was introduced in the statute, for levy of penalty. Paragraph 16.5 of the circular talks about the levy of penalty for failure to deduct tax at source. It also takes note of the fact that if there is any delay in remitting the tax, it will attract payment of interest u/s. 201(1A) of the Act and because of the gravity of the mischief involved, it may involve prosecution proceedings as well, u/s. 276B of the Act. Any omission to deduct the tax at source may lead to loss to the Department and hence remedial measures have been provided by incorporating the provision to ensure that tax liability to that extent would stand shifted to the shoulders of the party who failed to effect deduction, in the form of penalty. On deduction of tax, if there is delay in remitting the amount to Department, it had to be satisfied with interest as payable u/s. 201(1A) of the Act, besides the liability to face prosecution proceedings, if launched in appropriate cases, in terms of section 276B of the Act. Even the Board has taken note of the fact that no penalty is envisaged u/s. 271C of the Act for non-deduction tax at source and no penalty is envisaged u/s. 271C for belated remittance/payment/deposit of the tax deducted at source.

vi) Even otherwise, the words "fails to deduct" occurring in section 271C(1)(a) cannot be read into "failure to deposit/ pay the tax deducted." Therefore, on true interpretation of section 271C, there shall not be any penalty leviable u/s. 271C on mere delay in remittance of the tax deducted at source after deducting it.

vii) All these cases were with respect to the belated remittance of the tax deducted at source by the assessee and not a case of non-deduction of tax at source at all and therefore, section 271C(1)(a) shall be applicable. As the respective assessees had remitted the tax deducted at source though belatedly and these were not cases of non-deduction of tax at source at all they were not liable to penalty u/s. 271C of the Act. Any question of applicability of section 273B of the Act did not arise. The present appeals are accordingly allowed."

3 *CIT vs. S. Goyanka Lime and Chemical Ltd.; [2023] 453 ITR 242 (SC): Dated 08/07/2015:*

Reassessment — Notice u/s. 148 — Sanction of Commissioner — Sanction given mechanically — High Court holding sanction not sustainable — SLP dismissed by Supreme Court: Ss. 148, 151of ITA 1961: B. P. 01/04/1998 to 12/12/2002

A search was conducted at the residential and business premises of the assessee on December 12, 2002. Thereafter, notice for block assessment u/s. 158BC of the Income-tax Act, 1961 was issued for the block period April 1, 1998 to December 12, 2002 and for each of the assessment years, returns

were filed which were processed u/s. 143(1). However, notice u/s. 148 was issued by the Assessing Officer on December 31, 2004, on the basis of certain reasons recorded. The assessee objected to the same before the Assessing Officer, this was rejected by the Assessing Officer and he completed the assessment u/s. 143(3) read with section 147 of the Act.

The Commissioner (Appeals) found that the reasons recorded by the Joint Commissioner of Income-tax, for according sanction, it only stated that 'I am satisfied'. As this action for sanction was without application of mind and as this was done in a mechanical manner, following the law laid down in the case of ***Arjun Singh vs. Asst. DIT (Investigation); [2000] 246 ITR 363 (MP),*** the Commissioner(Appeals) quashed the notice u/s. 148 of the Act. The Appellate Tribunal upheld the decision of the Commissioner (Appeals).

The Madhya Pradesh High Court dismissed the appeal filed by the Revenue and held as under:

"i) We have considered the rival contentions and we find that while according sanction, the Joint Commissioner of Income-tax has only recorded so 'Yes, I am satisfied'. In the case of ***Arjun Singh (supra)***, the same question has been considered by a co-ordinate Bench of this court and the following principles are laid down (page 407 of 246 ITR):

'The Commissioner acted, of course, mechanically in order to dis- charge his statutory obligation properly in the matter of recording sanction as he merely wrote on the format "Yes, I am satisfied" which indicates as if he was to sign only on the dotted line. Even otherwise also, the exercise is shown to have been performed in less than 24 hours of time which also goes to indicate that the Commissioner did not apply his mind at all while granting sanction. The satisfaction has to be with objectivity on objective material.'

ii) If the case in hand is analysed on the basis of the aforesaid principle, the mechanical way of recording satisfaction by the Joint Commissioner, which accords sanction for issuing notice u/s. 148, is clearly unsustainable and we find that on such consideration both the appellate authorities have interfered into the matter. In doing so, no error has been committed warranting reconsideration.

iii) As far as Explanation to section 151, brought into force by the Finance Act, 2008 is concerned, the same only pertains to issuance of notice and not with regard to the manner of recording satisfaction. That being so, the said amended provision does not help the Revenue.

iv) In view of the concurrent findings recorded by the learned appellate authorities and the law laid down in the case of ***Arjun Singh (supra)***, we see no question of law involved in the matter, warranting reconsideration. The appeals are, therefore, dismissed."

On special leave petition by the Department the Supreme Court passed the following order:

"1. Delay condoned.

2. The special leave petition is dismissed."

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Jitendra Singh
Advocate

Radha Halbe
Advocate

Harsh Shah
Advocate

DIRECT TAXES

High Court

Power to transfer cases - Section 127 of Income Tax Act, 1961 – Transfer of jurisdiction from one city to another outside the state – In the absence of any cogent material, connecting the Assessee with the entities searched, jurisdiction cannot be transferred to from one city to another outside the state

Facts

1. The Assessee was filing his returns in Mumbai for the last 22 years, the last of which was filed electronically from Mumbai on 31 December 2021 for AY 2021-22.

2. A show-cause-notice dated 24 June 2022 was issued by the Principal Commissioner of Income Tax-19, Mumbai proposing transfer of assessment jurisdiction from the Deputy Commissioner of Income Tax-19(3), Mumbai to the Deputy Commissioner of Income Tax Central Circle-3, Jaipur. The notice stated that the Principal Commissioner of Income Tax (Central), Rajasthan had proposed for centralization of the case of the Assessee with Veto Group at Jaipur. The reason provided was to enable a proper and coordinated assessment along with the assessment in the case of Veto Group, Jaipur on whom search proceedings were conducted under Section 132 of the Act.

3. The Assessee objected to the said transfer as neither was there any material found during the search operation (on Veto group), which was connected to the Assessee, nor a search was conducted in terms of Section 132 of the Act on the premises of the Assessee.

4. Though, a survey under Section 133A of the Act was conducted in the case of M/s Landmark Hospitality Pvt. Ltd. in Mumbai in which the Assessee was a Director, wherein statement of the Assessee had been duly recorded and there was no incriminating material found during the survey proceeding so conducted, which would connect either the Assessee or even M/s Landmark Hospitality Pvt. Ltd. with the Veto Group of Jaipur in whose case the search action had been conducted.

5. The show-cause-notice dated 24 June 2022 did not mention any material collected by the revenue against the Assessee, on the basis of which, the

transfer of the jurisdiction could be contemplated.

Arguments of the Assessee

6. The Assessee contended before the Hon'ble High Court that if there was any material, the same ought to have been reflected in the show-cause-notice, which would have then enabled filing of an effective reply.

7. In addition to this, it was stated that according to the records of survey proceeding prepared by the revenue, during the survey conducted on M/s Landmark Hospitality Pvt Ltd, nothing incriminating was found, and no inventory prepared.

Arguments of the Revenue

8. The revenue relied upon the points mentioned in the Section 127 order which were as under:

   - a search and seizure under Section 132 was carried out by the Investigation Wing of Jaipur on 22.12.2021 in the Assessee's case and other entities of "Veto Group"
   - During the search at various entitles of Veto Group, incriminating documents and data were found and seized which may have related to the Assessee and other Assessees of this group.
   - Once a search under Section 132A takes place, then as per the binding instruction of CBDT (Instruction number 286/22/2008-IT (Inv.II) dated 17 September 2008), it is mandatory for the investigation authorities who have carried out the search to get all the searched cases and connected to the search to centralize with an assessing officer of a central charge at the earliest.
   - The instruction of the CBDT was binding on the officers of the Income Tax department.

Findings of the Hon'ble High Court

9. The Hon'ble Court observed that no specific averment was made that there was anything incriminating found either during the survey proceeding conducted on M/s Landmark Hospitality Pvt. Ltd., of which the Assessee was a director or during the search proceedings conducted on the Veto Group, which would connect either M/s Landmark Hospitality Pvt. Ltd. or the Assessee to the Veto Group of Jaipur.

10. The survey report and records prepared concerning that proceedings on M/s Landmark Hospitality Pvt. Ltd. does reflect that there was no inventory prepared during the survey proceeding, suggesting that there was nothing incriminating found. Further, if there had at all been any material found, the same would have been relied upon by the Revenue.

11. The reply filed by the Revenue seemed to only speculate that the incriminating documents and data found and seized/ impounded may relate to the Assessee as well as other assesses of this group.

12. Concerning the instruction dated 17 September 2008 (supra), the Hon'ble High Court observed that the instruction made it clear that while sending a proposal for centralization, reasons had to be reflected including the relationship

of the Assessee with the main persons of the group. However, no such reasons were forthcoming in the present case. Accordingly, the Deputy Commissioner of Income tax-19(3), Mumbai ought to have refused to accede to the request for centralization because there were no cogent material or reasons, which would have formed a basis for the transfer of the case to the Deputy Commissioner of Income Tax Central Circle-3, Jaipur.

13. The Hon'ble High Court also observed that transfer of assessment jurisdiction from Mumbai to Jaipur would certainly cause inconvenience and hardship to the Assessee both in terms of money, time and resources, and therefore, the order impugned in the absence of the requisite material/reasons as the basis would be nothing but an arbitrary exercise of power and therefore liable to be set aside.

14. The Hon'ble High Court observed that the Assessing officer appeared to have acted very mechanically treating the request from DCIT Central Circle-3, Jaipur, as if it was binding upon him. In the Court's opinion, the said request was not at all binding inasmuch as if it was so, then the agreement envisaged under Section 127(1)(a) would be rendered superfluous. The agreement envisaged in terms of aforesaid section is not in the context of showing deference to a request made by a colleague or higher officer, but an agreement based upon an independent assessment of the request in the light of the reasons recorded seeking transfer of the jurisdiction. In fact, section 127(1)(b) contemplates a situation where in the event of a disagreement, the matter is referred to an officer as the Board may, by notification in the Official Gazette, authorize in that behalf. If a request for transfer of jurisdiction was to be treated as binding, then it would have rendered otiose Section 127 to the extent the same envisages an opportunity of being heard to be provided to an Assessee.

15. Accordingly, the Hon'ble High Court held that the impugned transfer order was unsustainable in law and is, accordingly, set aside.

16. However, the Hon'ble Court also held that the Principal Commissioner, Mumbai shall have liberty to pass orders afresh if the concerned Principal Commissioner or any other officer authorized in that behalf from the Jaipur Jurisdiction communicates to him within four weeks and not beyond, cogent material and reasons justifying a transfer of jurisdiction to Jaipur. The Assessee would be given an opportunity of being heard. Requisite order, if any, would have to be passed, not later than eight weeks from the date of order.

(Kamal Galani vs. PCIT-19 & Ors. Bom HC WPL 38534 of 2022, order dated 20th April 2023)

Reassessment – section 148 of the Income Tax Act, 1961 - Scope of Writ Petition against order under Section 148A(d) is limited to availability of information as per Explanation 1 to Section 148 – detailed defence against such information not to be gone into at Section 148A stage but under Section 148 assessment stage

Facts

1. The Assessee is an individual who is engaged in the business of trading of Arecanut (Supari), Chopped Betal

Nut and Sweet Betal Nut. His books of accounts were being audited in terms of Section 44AB. Also, he regularly filed his return of income and

2. For AY 2019-20, the Assessee filed his return under Section 139(1) of the Act on 26.08.2019 declaring a total income of ₹ 6,81,630/-. It was stated that the turnover during the year from his proprietary concern aggregated to ₹ 5,87,26,116/- and the aggregate purchases were of ₹ 5,81,61,860/-.

3. It was also stated that in AY 2019-20 the return was processed under Section 143(1) and no notice was issued under Section 143(2) of the Act.

4. A notice under Section 148A(b) was issued to the Assessee suggesting that income of ₹ 6,89,93,750 had escaped assessment based on the following information:

- Purchases of ₹ 96,43,750 Mr. Kuhoje K Achumi who was involved in providing accommodation entries
- Purchases of ₹ 83,25,000 Mr. Jasbir Singh Chatwal who was involved in providing accommodation entries
- Cash withdrawal of ₹ 23,85,000 from Punjab National Bank
- Purchase of Car of ₹ 16,00,000
- Cash Deposits of ₹ 4,70,40,000 in Punjab National Bank

5. The Assessee filed a detailed response denying the allegation and also requested an opportunity of cross examination of the suppliers.

6. An order under Section 148A(d) was passed rejecting the objections and a notice under Section 148 was issued.

Arguments of the Assessee

7. The Assessee urged before the High Court that the order under Section 148A(d) was passed in a routine and a mechanical manner without conducting any enquiry. Accordingly, the object of issuing a notice under Section 148A was rendered nugatory.

Arguments of the revenue

8. The revenue urged before the High Court that at the stage of Section 148A only point is to ascertain existence of information which suggests that income has escaped assessment. In the facts of this case such information did exist on record.

9. The Assessee could raise all factual issues/objections at the appropriate stage of the proceedings, and as no prejudice otherwise is caused to him, the Hon'ble High Court ought not to embark upon the correctness of the information available with the Assessing Officer while taking decision under Section 148A(d) of the Act.

Ruling of the Hon'ble Court

10. After perusing the amended reassessment provisions, the Hon'ble High Court opined that the provisions do not contemplate any detailed adjudication on the merits of information available with the Assessing Officer at the stage of passing order under section 148A(d). This is for the reason that a detailed procedure has been provided under Section 148

for issuance of notice whereafter the assessing authority has to determine, in the manner specified, whether income has escaped assessment and the defense of Assessee, on all permissible grounds, remains open to be pressed at such stage including by way of preferring appeals.

11. Accordingly, the scope of decision under Section 148A(d) is limited to the existence or otherwise of information which suggests that income chargeable to tax has escaped assessment.

12. In the facts of the present case, the Hon'ble Court observed that the Petitioner had shown purchases of arecanut (supari) from Kuhoje K Achumi and Om Traders. The order under clause (d) of Section 148A recorded that investigating wing of DGGI and GST have informed the Income Tax Authorities that Kuhoje K Achumi and Om Traders were found availing and utilizing fraudulent ITC on the basis of fake tax invoices without receipt of goods. It was also found that the said sellers did not exist at all at the declared principal place of business. Given such doubtful sellers, the Assessee claimed to have made purchases amounting to ₹ 1,79,68,750/- and that his books of account truly reflected these transactions and that the goods were received by way of e-challan, etc. However, according to the Hon'ble Court such defence on merits of the information was not expected to be authoritatively determined by the assessing authority at the stage of decision under section 148A(d). The forum for determining correctness or otherwise of the information on the basis of defence setup by the Assessee would be the assessment proceedings under Section 148 of the Act.

13. The Hon'ble Court observed that Scope of Section 148A was only to the extent of availability or otherwise of information suggesting that income has escaped assessment.

14. According to the Hon'ble Court, based on the materials which were referred to in the order Section 148A(d), it cannot be doubted that information did exist suggesting that the income chargeable to tax has escaped assessment. The formation of opinion, therefore, cannot be questioned based on the detailed defence setup by the Assessee on the merits of the information, including opportunity of cross-examining the seller or by demanding the documents relating to such information.

15. Further, the Hon'ble Court also observed that it was not the case of the Assessee the information did not fall under the definition provided in Explanation 1 to Section 148. Further, none of the provisions as amended by the Finance Act, 2021 were under challenge. Accordingly, the Hon'ble Court did not find any merit in the challenge laid to the order under Section 148A(d) as well as the notice issued under Section 148.

Deepak Kumar Yadav vs. PCIT & Ors. (All HC Writ Tax No. 561 of 2023, order dated 5 May 2023)

Reopening of assessment – section 148 of the Act Income Tax Act, 1961 – order passed under section 148A(d) of the Act holding the case of the assessee fit for issuing the notice under section 148 of the Act on the identical ground on which reopening proceedings for subsequent Assessment Year dropped - unjustified

Facts

1. The Petitioner filed its return of income for the assessment year 2015-16 declaring taxable income at ₹ 19,94,970/-. The AO issued notice dated 07.04.2021 under Section 148 of the Act, which was set aside by the Hon'ble Delhi High Court in terms of decision in the case of ***Mon Mohan Kohli vs. CIT, (2021) 441 ITR 207 (Delhi).***

2. The AO issued fresh notice dated 26.05.2022 under section 148A(b) of the Act relying on the decision of the Hon'ble Supreme Court in the case of ***Union of India vs Ashish Aggarwal [2022] 444 ITR 1 (SC).*** In the said notice the AO had alleged that on 26.11.2016 a search had been conducted in the premises of an entry operator, namely Shri Mohit Garg and during that search, in his statement Shri Rajeev Khushwaha admitted having provided bogus sale/purchase bills in exchange for cash; and that during the year relevant to the assessment year 2015-16, the assessee was one of the beneficiaries of such accommodation entries to the tune of ₹ 13,71,00,000/-.

3. The AO had issued an identical notice dated 25.07.2022 to the assessee for the Assessment Year 2016-17 as well.

4. The assessee submitted replies dated 10.06.2022 and 21.07.2022 to the said show cause notice and denied any transaction with M/s Divya International and Shri Rajeev Khushwaha. Along with the replies, the assessee also submitted all relevant documents.

5. The AO passed an order dated 28.07.2022 under section 148A(d) of the Act accepting the contention of the assessee and dropped the proceedings pertaining to the assessment year 2016-17 by observing that there is no entry of transaction of sale or purchase by the bogus entity M/s Divya International, controlled by the entry operator Shri Rajeev Khushwaha to or from the assessee.

6. However, for the impugned assessment year 2015-16, the AO had passed an order dated 31.07.2022 under section 148A(d) of the Act rejecting the contention of the assessee by observing that there is escapement of income during the assessment year 2015-16, and accordingly held that it is a fit case for issuance of notice under Section 148 of the Act.

7. The assessee being aggrieved by the said order passed under section 148A(d) of the Act for Assessment Year 2015-16 preferred a writ petition before the Hon'ble Delhi High Court.

Arguments of the assessee

8. The assessee contended that the above mentioned two contradictory final outcomes pertaining to assessment years 2015-16 and 2016-17 clearly shows not just non-application of mind but even extreme arbitrariness, more so, because the officer serving as the decision making authority of Assistant Commissioner Income Tax is

the same officer. The Petitioner further submitted that as the impugned order dated 31.07.2022 fails to deal with the documentary records submitted by the petitioner, the order is not sustainable, being a non- speaking order.

Arguments of the revenue

9. On the other hand, the department contended that the sanctioning authorities for the two assessment years in question were two different authorities, who took two different stands, thereby directing the AO to act differently in the interest of revenue. Hence, there is no illegality in the impugned order. It was further argued that if one of the sanctioning authorities has to be bound by the decision of the other sanctioning authority, the idea of providing for different sanctioning authorities for different assessment years would be rendered useless. It was also argued by the revenue that doctrine of res judicata does not apply to income tax proceedings, so dropping of assessment proceedings in one year would not impact the proceedings of any other year.

Ruling of the Hon'ble Court

10. Hon'ble Delhi High Court was pleased to allow the writ petition filed by the assessee by observing that the issue before us is the consistency (or lack thereof) in the decision making. There is nothing wrong if in the impugned order dated 31.07.2022 the ACIT concerned had taken a view different from the view taken in order dated 28.07.2022, provided the diversion was supported by way of cogent reasoning. As mentioned above, consistency does not mean putting iron fetters on the subsequent decision making; it only means expecting that a deviation from the previous decision in similar set of circumstances is explained by way of cogent and rational reasons. In the present case, the decision taken first in point of time (order dated 28.07.2022) was a reasoned decision, based on the analysis of material on record, but the decision taken subsequently (order dated 31.07.2022) not just took a view completely inconsistent with the previous view but even without an iota of reason.

11. As far as revenue's argument of two different sanctioning authorities is concerned, no doubt order dated 28.07.2022 was issued with the approval of Principal Commissioner Income Tax-10 and order dated 31.07.2022 was issued with the approval of Principal Chief Commissioner of Income Tax, but the satisfaction recorded in both orders was of same Assistant Commissioner of Income Tax. There is nothing on record to suggest even feebly that the latter sanctioning authority was apprised of the earlier view taken in order dated 28.07.2022. An assessee, deals with the income tax department as a whole, like a body and not its individual organs, especially where left hand does not know what right had sanctioned. (Assessment Year 2015-16)

Prem Kumar Chopra vs. Assistant CIT & Ors. [W.P.(C) 12104/2022 order dated May 25, 2023] (Delhi High Court)

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Tanmay Phadke
Advocate


CA Viraj Mehta


CA Kinjal Bhuta

DIRECT TAXES

Tribunal

1 ***DCIT vs. Ramani Exports [ITA No. 609/Mum/2023 dt. 16/05/2023 (Mum) (Trib.) (AY 2013-2014)***

Section 41/28(iv) – Waiver of Loan – Loan taken was neither an expenditure nor trading liability – cannot be held taxable u/s 41 or 28(iv)

Facts

Assessee had taken loan from banks for working capital requirements. These loans were post shipment credit loan and was reflected in the balance sheet under the head "secured loan". Interest paid on this loan was debited to the profit and loss account. Due to financial crisis and huge business losses and non-realization of exports proceeds from oversees clients, assessee approached banks for one time settlement waiver of certain parts of principle loan. The said waiver amount of loan was exclusive of interest amount and was credited to the capital account of the partners. In assessment, Ld.AO invoked section 41(1), holding it to be benefit out of cessation of trading liability, that is, the benefit would be deemed to be from "profits and gains of business of profession". CIT(A) allowed the appeal and hence, department being aggrieved with the same, has filed appeal before ITAT.

Held

In the year under consideration, loan was never part of profit & loss account in any of the previous year and was capital in nature. Further, Hon. ITAT also relied on Apex Court decision of ***Mahindra & Mahindra Ltd. (93 taxmann 32)***. Hon'ble Supreme Court held that for invoking the provision of section 41(1), it is sine-qua-non that allowance of deduction should be claimed by the Assessee in any assessment for any year, in respect of loss, expenditure or trading liability incurred by the Assessee and then subsequently, if the creditor remits or waives any such liability then assessee liable to pay tax u/s. 41 of the Act. Objective behind this section is to ensure that assessee does not get way with the double benefit. In this case the loan taken by the assessee was neither an expenditure nor trading liability and therefore waiver of such loan which otherwise was capital in nature, the provision of section 41(1) cannot be invoked. Further, as held by the Hon'ble by the Supreme Court, section 28(iv) also does not apply, as benefit on waiver of loan was

not in the kind of money, i.e., cash receipt. Ld. CIT (A) has rightly followed the principle laid down by the Hon'ble Apex Court and thereby department appeal was dismissed.

2 *M/s. Vivek Bhole Architects Pvt Ltd. vs. DCIT [ITA No. 1981/Mum/2022]*

Section 40(a)(ia) & condonation of delay in filing appeal

Facts

The appeal was filed with a delay of 1862 days which included 807 days of Covid period. The reason of delay given in the affidavit was that the order was uploaded on the portal and no communication was given to the assessee. No physical copy was also given and only after appointing another Chartered Accountant, the assessee was advised that the order is available on the income tax portal. Assessee had during the year, claimed interest expenditure on EMI paid on vehicle loans and other loans from NBFC companies like Tata capital, Kotak Mahindra P Ltd, Reliance capital etc and no tax was deducted at source from such interest. The AO disallowed interest u/s. 40(a)(ia) and the CIT(A) also dismissed the appeal

Held

i. ***On condonation of delay***- The assessee should have intimated the change in address to the Income tax office, however as per section 253(3), appeal needs to be filed within 60 days from receipt and since the order was actually received when the same was seen on portal, the condonation was granted considering the request reasonable and that assessee did not benefit by filing the appeal late. It was held that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred.

ii. ***On Section 40(a)(ia)*** – Second proviso to section 40(a)(ia) inserted with Finance Act, 2013, provides that when assessee fails to deduct whole or part of tax as required under Chapter XVII-B but is not deemed to be assessee in default as per first provision of section 201(1), then it shall be deemed that assessee has paid and deducted tax on the date of furnishing return of income. The assessee filed form 26A – issued by a Chartered Accountant certifying that sum received as interest by one of the NBFCs has been offered to tax and filed in return of income by the NBFC. This form was produced as additional evidence before the ITAT for the first time. Admitting the additional evidence, the ITAT remanded the case back to the AO for de-novo adjudication after verification of additional evidences. Further, even if the assessee is able to submit similar details for other NBFCs, the same was also directed to be verified by the AO at assessment stage.

3 *Benudhar Biswal vs. National E assessment Centre - [ITA No. 202/ Mum/2023 dt. 29.05.2023 (Mum)(Trib.)*

Section 56(2)(x) - Since the agreement was entered into on 13.07.2009 and registered on 14.07.2017 (i.e. after the incorporation of Section 56(2)(x)), the difference between the stamp valuation and sale consideration cannot be taxed despite the fact that the first

payment was not made on or before entering into the agreement. Second proviso cannot be pressed into service to tax the difference u/s 56(2)(x) when the section itself was not on the statute book

Facts

The assessee along with his brother entered into an agreement for purchase of immovable property on 13.07.2009. The substantial payments were made. However, there was an inordinate delay in completion of project. Finally, the agreement was registered on 14.07.2017 and the possession was handed over. The AO observed that there was a difference between the agreement value and stamp duty valuation and made the addition u/s 56(2)(x) of the Act. The AO did not grant the benefit of the second proviso on the reason that the payment was not made by the Assessee on or before entering into the agreement but made subsequently. Being aggrieved, the assessee filed an appeal before the CIT(A) but did not succeed. Thereafter, the Assessee filed appeal before the ITAT. After hearing both the sides, the ITAT held as under:

Held

The ITAT observed that even though the registration was done subsequently after the introduction of section 56(2)(x), the agreement was entered into prior to the incorporation of section 56(2)(x) in the Act. The ITAT observed that Sec 56(2)(x) was introduced with a prospective application and cannot be applied to the transactions entered before. The ITAT observed that merely the payment was not made on or before the date of agreement, the second proviso could not be pressed into service to make the addition when the section itself was not applicable. On the above observations, the ITAT allowed the appeal of the Assessee and deleted the addition.

4 *Ramchandra Mendadkar vs. CIT [ITA No. 163/Mum/2023 dt. 12/05/2023 (Mum)(Trib.) (AY 2019-2020)*

Section 69A – Unexplained Money – Cash deposits made in Bank – Duly Accounted in Books – Cannot be termed as unexplained – Addition cannot be sustained

Facts

Assessee was travelling by Air from Mumbai to Delhi to attend two matters in Hon'ble Supreme Court. At the airport, assessee was intercepted and was searched. During the search proceedings the Officer found cash of ₹ 16,00,000/- and thereby panchanama was recorded. Summons u/s 131 of the Act was issued to the assessee for recording the statement in respect of seizure of cash of ₹ 16,00,000/-. It was submitted that on instruction from his clients was to engage the senior counsel with the help of Advocate on records of the Hon'ble Supreme Court Mr. Sudhanshu Choudhari. There was a requirement by above mentioned Advocate on record that the assessee shall pay a fees of ₹ 16,00,000/- in cash to him to engage the Senior Counsel to argue the cases of the assessee client. ₹ 16,00,000/- included fees of ₹ 10,00,000/- paid by his client through various cheques from time to time and ₹ 6,00,000/- fees were paid by Shri Sagun Naik of which ₹ 25,000/- is through cheque and ₹ 5,75,000/- by cash. Assessee submitted before the authorities that all these transactions were properly recorded in his books of accounts regularly maintained which are subject to statutory audited u/s 44AB of the Act. It was further submitted that the

amounts were received during the course of his profession. AO, in assessment, denied the explanation of assessee and added the same u/s 69A. CIT (A) further upheld the addition on the basis that the statement of the assessee is dissatisfactory as in this digital world no one would transact such a huge amount in cash. Aggrieved, the assessee is before this Tribunal.

Held

Assessee has carried a cash balance of ₹ 16,00,000/- in order to pay the Senior Counsel in Delhi where the case of his clients are listed before the Hon'ble Supreme Court. Source for the cash is from the professional fees which have been counted in the books of accounts. Cash book, bank statement and ledger copy of professional fees etc. are submitted before the lower authorities. Also the date wise breakup of fee received in cash have been submitted. From the plain reading of the above provisions it is clear that the addition under section 69A could be made if the assessee is found to be the owner of money that is not recorded in the books of account and the assessee is not offering explanation about the source of money. In this case, assessee has recorded the impugned amount in the books of account and has also offered the same to tax by including the it as professional fees. Thereby amount cannot be treated as unexplained and addition u/s 69A of the Act is deleted.

5 *Late Hiraben Kantial Shah vs. DCIT CC-6(3) and others (ITA Nos: 904-905- 573/Mum/2023 & C.O. No. 107-108/Mum/2022)*

Section 153A – No addition can be made in case of completed or abated assessments in absence of incriminating material

Facts

Assessee was one of the parties of the group which was searched u/s. 132. The AO assessed sale proceeds of capital asset sold as bogus and the same were added u/s. 68 as unexplained cash credit. All the assessment years involved were unabated, therefore the assessee contended that in absence of any incriminating material as required u/s. 153A, there could be no addition. However, the CIT(A) dismissed the appeal on the grounds that books of account of the assessee itself shall constitute incriminating materials.

Held

The Hon'ble ITAT on the legal grounds on incriminating material, relied upon the Bombay High Court decision in case of ***Continental Warehousing Corporation Ltd. (374 ITR 645) and Gurinder Singh Bawa (70 taxmann.com 398)*** where in it was categorically held that when the assessments are abated (concluded) as on the date of search, the addition in such assessments has to be restricted only to the incriminating material found during the search proceedings. In the case of the assessee, the time limit to issue notice u/s. 143(2) was passed as on the date of search and therefore the assessments were considered to be abated. The ITAT also referred and relied upon the recent decision of Supreme Court in case of ***PCIT vs. Abhisar***

Buildwell P Ltd. (Civil Appeal No. 6580 of 2021 dated 24th April, 2023) wherein the Apex Court held that it is in complete agreement with the decision of various High courts taking the view that no addition can be made in respect of completed assessments in absence of incriminating material.

6 *Kanta Govind Singh vs. ACIT, CPC TDS [ITA No. 127/Ahd/2022]*

Section 234E – If the TDS is paid within the time limits prescribed, interest u/s. 234E should not be levied merely for delay in the filing of TDS return

Facts

The assessee was a senior citizen and had purchased a house property from two non-resident co-owners. Since the sellers were non-residents, TDS on the sale consideration was deducted and paid as per section 195 of the Act. Tax was deducted on the same day when the sale consideration was paid and the same was also deposited to the Central Government on same day without any delay. However, the assessee failed to file the TDS return in Form 27Q subsequently within the time limits. Later when assessee realised that return was supposed to be filed, the same was filed however with delay of almost 1.5 years. The TDS -CPC processed the return with levying late filing fees u/s. 234E. The CIT(A) also dismissed the appeal, and the assessee filed appeal before ITAT to waive the interest.

Held

Before ITAT, it was argued on behalf of the assessee, that assessee was a senior citizen and due to old age, forgot to file the return of TDS by error and that is a procedural error with no *malafide* intention of being non cooperative to income tax compliances whereas the dept. representative argued that since section 234E provides for mandatory filing of TDS statement, the levy of fees is correct and should be levied. It was held by the Hon'ble ITAT that, assessee being a senior citizen has deposited amount immediately after sale consideration was received and there was no lapse in payment. Merely on the ground that assesee could not file form 27Q within the time frame, cannot be the criteria for levying fees u/s. 234E and seeing the circumstances, the levy of fee was deleted.

7 *Pankaj Marothi vs. ITO [ITA No. 164/Ahd/2022 dt. 26/05/2023 (Ahd)(Trib.) (AY 2010-2011)*

Section 254 – Condonation of Delay – Delay in filing appeal by 1976 days – Reason for Condonation of Delay explained – Appeal be condoned

Facts

Appeal was time barred by 1976 days. In the application for condonation of delay, the assessee submitted that for A.Y. 2010-11, an addition of Rs. 4.44 lakhs was made on account of excess stock under Section 69B of the Act. Assessee did not prefer appeal before CIT(Appeals). Subsequently, penalty order under Section 271(1)(c) of the Act was passed, against which the assessee filed appeal before CIT(Appeals). However, CIT(Appeals) dismissed the appeal of the assessee on the ground that there was a delay of 5 days in filing of appeal before CIT(Appeals). Department launched prosecution case against the assessee by filing a criminal case against the assessee and the Hon'ble Additional Chief Metropolitan Magistrate, Ahmedabad passed an order on the assessee under Section 279(1). The fact of Department having launched

prosecution against the assessee came to the notice of the assessee only on the month of May/June 2021 on receipt of order of Hon'ble Additional Chief Metropolitan Magistrate, Ahmedabad. The assessee was advised by his consultant to file compounding application, which was filed before Principal CCIT on 03.12.2021. However, the Principal CCIT rejected the compounding application vide order dated 12.01.2022. It was owing to the aforesaid circumstances that there was a delay of 1976 days in filing of the present appeal before ITAT.

Held

ITAT considering the facts of the case and relying on judicial precedents condoned the appeal by 1976 days.

8 *Pushpa Jadhav vs. ITO [ITA No. 201/Mum/2023 dt. 15/05/2023 (Mum)(Trib.)*

Section 271(1)(C) – Penalty– once the return filed in response to section 148 of the Act is accepted, no penalty can be levied. Observation of the AO must be specific and penalty cannot be levied for non-filing of original return u/s 139(1)

Facts

The assessee failed to file an original return u/s 139(1) of the Act. However, on the realisation of the mistake, the assessee voluntarily computed the income, paid the tax along with interest and intimated the same to the AO by filing a letter. Subsequently, the AO issued a notice u/s 148 of the Act. In response, the assessee filed a return of income showing the same income which was disclosed by her in the letter voluntarily filed. The AO accepted the return but levied the penalty u/s 271(1)(c) of the Act. Being aggrieved, the assessee filed an appeal before the CIT(A) but did not succeed. Thereafter, an appeal was filed before the ITAT. After perusing the facts and listening to the parties, the ITAT observed as under:

Held:

The ITAT observed that the AO did not make any addition but accepted the returned income of assessee and held that in the absence of any addition/disallowance resulting in enhancement of taxable income, no penalty u/s 271(1)(c) of the Act is leviable. The ITAT further observed that the AO initiated penalty u/s 271(1)(c) on the reason that the assessee had not filed return of income u/s 139(1) of the Act and held that the penalty u/s 271(1)(c) could be levied either for furnishing inaccurate particulars of income or concealing the income. The ITAT observed that the penalty u/s 271(1)(c) cannot be invoked for not filing the original return u/s 139(1). On the aforesaid observations, the ITAT deleted the penalty and allowed the appeal of the assessee.

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"Do one thing at a Time, and while doing it put your whole Soul into it to the exclusion of all else."

— *Swami Vivekananda*

Dr. CA Sunil Moti Lala
Advocate

INTERNATIONAL TAXATION
Case Law Update

A. SUPREME COURT

1 *Sap Labs India (P.) Ltd vs. ITO (with others) - [(2023) 149 taxmann.com 327 (SC)]*

Determination of Arm's Length Price by the Tribunal can be subject to scrutiny by the High Court in an appeal under Section 260A. Hence, the contrary view taken by the Karnataka High Court in the case of Soft brands India (P.) Ltd. was held to be not acceptable

Facts

i. The assessee along with many others had filed civil appeals against the judgements and orders passed by the various High Courts, more particularly the Hon'ble High Court of Karnataka.

ii. The Hon'ble High Court of Karnataka had dismissed the appeals preferred by the Revenue and some assessees' by relying upon its earlier judgement in the case of ***PCIT vs. Softbrands India (P.) Ltd. [406 ITR 513 (Kar) (2018)].***

iii. Before the Hon'ble Supreme Court it was submitted that the Hon'ble High Court of Karnataka in the case of Softbrands India (P.) Ltd had erroneously held that the Tribunal was the final fact finding authority on determining the arm's length price and therefore once the Tribunal had determined the arm's length price the same could not be subject to judicial scrutiny in an appeal under Section 260A of the IT Act.

iv. The Learned Additional Solicitor General of India ('LSG') further submitted that there could not be any absolute proposition of law that against the decision of the Tribunal determining the arm's length price, there should not be any interference by the High Court in an appeal under Section 260A of the IT Act.

v. It was further submitted that the primary issues raised in all the above-mentioned appeals filed by the Revenue/ assessee pertained to inclusion and exclusion of a few comparables and selection of filters.

vi. The LSG further relied on the respective sections and rules of Transfer Pricing and accordingly submitted that it was

always open for the High Court to consider and/or examine, whether the guidelines stipulated under the Act and the Rules, while determining the arm's length price have been followed by the Tribunal or not.

Decision

i. The Hon'ble Supreme Court after considering the facts and the arguments held that the short question which was posed for the consideration of this Court was, whether in every case where the Tribunal determined the arm's length price, the same should attain finality and whether the High Court was precluded from considering the determination of the arm's length price determined by the Tribunal, in exercise of powers under Section 260A of the Act.

ii. The Hon'ble Supreme Court while determining the said issue quoted Section 92C of the Act (extract reproduced below) -

"92C. (1) The arm's length price in relation to an international transaction [or specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely : ……."

It further noted that Rule 10B of the Rules prescribes the determination of arm's length price under Section 92C and concluded that while determining the arm's length price, the Tribunal has to follow the guidelines stipulated under Chapter X of the Act, namely, Sections 92, 92A to 92CA, 92D, 92E and 92F of the Act and Rules 10A to 10E of the Rules.

iii. The Hon'ble Supreme Court further held that any determination of the arm's length price under Chapter X dehors (beyond) the relevant provisions of the aforesaid guidelines, could be considered as perverse and it might be considered as a substantial question of law as perversity itself could be said to be a substantial question of law.

iv. It further concluded that there could not be any absolute proposition of law that in all cases where the Tribunal had determined the arm's length price the same was final and could not be the subject matter of scrutiny by the High Court in an appeal under Section 260A of the Act.

v. The Hon'ble Supreme Court further added that when the determination of arm's length or question of comparability of two companies or selection of filters was challenged before the High Court, it was always open for the High Court to consider and examine whether the arm's length price has been determined while taking into consideration the relevant guidelines under the Act and the Rules and in case of comparables and filters whether the same was done judiciously and on the basis of the relevant material/evidence on record. It further added that the High Court could also examine whether the comparable transactions have been taken into consideration properly or not.

vi. The Hon'ble Supreme Court concluded that the view taken by the Hon'ble Karnataka High Court in the case of Softbrands India (P) Ltd. that in the transfer pricing matters, the determination of the arm's length price by the Tribunal was final and cannot be subject matter of scrutiny under Section 260A of the Act could not be accepted.

vii. The Hon'ble Supreme Court further added that in each case, the High Court should examine whether the guidelines laid down in the Act and the Rules were followed while determining the arm's length price

viii. Accordingly, all the appeals were allowed and the Hon'ble Supreme Court quashed and set aside the judgements and orders passed by the respective High Courts. The appeals were remanded back to the respective High Courts to decide the matters according to the guidelines provided in the Act and the Rules.

2 ***Van Oord ACZ India (P.) Ltd. vs. CIT [(2023) 149 taxmann.com 38 (SC)] (Also see Van Oord ACZ India (P.) Ltd. vs. CIT [(2010) 189 Taxman 232 (HC - Delhi)])***

Assessee could not be treated as assessee-in-default merely due to subsequent taxability of the foreign company wherein initially the assessee was held not to be liable to deduct tax at source for reimbursement made to the said foreign company [since the plea of non-taxability was accepted in the foreign company's return of income processed u/s 143(1)(a)]

Facts

i. Assessee-Company ('Assessee'), a wholly owned subsidiary of a non-resident company Van Oard ACZ Marine Contractors BV 'VOAMC', was engaged in the business of dredging, contracting, reclamation and marine activities.

ii. During the relevant previous year, it executed a dredging contract and in terms of the completed contract method, it debited to its profit and loss account mobilization and demobilization cost reimbursed to VOAMC. According to the assessee, the said cost related essentially to transportation of dredger, survey equipment and other plant and machinery from countries outside India to the site in India and re-transportation of the same on completion of the contract, including fuel cost incurred on transportation.

iii. The assessee had reimbursed the cost relating to mobilization and demobilization incurred by VOAMC on the basis of invoices received by VOAMC from the non-resident service providers.

iv. Accordingly, the assessee filed an application with the Dy. Commissioner, International Taxation, for issuing nil tax withholding certificate in respect of such reimbursement on the ground that the amount represented pure reimbursement of expenses and, thus, there was no income liable to tax in India in the hands of VOAMC. However, the Dy. Commissioner held that the reimbursement of costs to VOAMC was liable to tax in India and determined 11 percent of the reimbursement amount as the profit arising to VOAMC in India

and directed the assessee to deduct tax at source on the above basis.

v. The assessee in accordance with the aforesaid order had deducted the tax at source as per the instructions of the Dy Commissioner. However, during the assessment proceedings, the AO disallowed the amount reimbursed to VOAMC by invoking provisions of section 40(a)(i) on the ground that the assessee had short deducted tax at source under section 195 while making payments to VOAMC.

vi. On further appeal, the CIT(A) as well as the Hon'ble Tribunal upheld the order of the AO. The appeal was then filed before the Hon'ble High Court.

vii. The Hon'ble High Court concluded that the assessee was not liable to deduct tax at source under section 195(1) in respect of the mobilization and demobilization costs reimbursed by it to VOAMC as the plea of VOAMC that it was not liable to pay to tax in India was accepted in its return processed u/s 143(1)(a) and the TDS had also been refunded. However, it also mentioned that the assessment proceedings in case of VOAMC were reopened and if the final view taken was that the VOAMC was assessable to tax, the assessee would also be treated as the assessee in default, which would attract the consequences provided under section 40(a)(i).

viii. Aggrieved, both the assessee and the Revenue filed cross appeals before the Hon'ble Supreme Court.

Decision

i. As regards the Revenue's appeal, the Hon'ble Supreme Court held that as it had been specifically found (by the Hon'ble High Court) that the assessee in the present case (company in India) was held to be not liable to deduct the tax at source, no interference of this Court was called for against the impugned judgment of the High Court. However, the question of law, if any, on interpretation of section 195 was kept open.

ii. As regards the assessee's appeal, the Hon'ble Supreme Court noted that the assessee was aggrieved by that part of the observation made by the High Court in the impugned judgment by which the High Court had observed that as the assessment proceedings in the case of VOAMC were reopened and therefore if the final view taken was that the VOAMC was assessable to tax, the assessee herein would also be treated as assessee in default, which would attract the consequences provided under Section 40(a)(i) of the Act. The Hon'ble Supreme Court held that once the assessee herein was held to be not liable to deduct the tax at source at all, merely because subsequently VOAMC was held liable to be taxed in India, the assessee herein could not be treated as assessee in default.

iii. Further, the Hon'ble Supreme Court held that the impugned decision was based on surmises and conjectures and therefore the aforesaid part of the order of the Hon'ble High Court was not right and hence was liable to be set aside and quashed.

B. HIGH COURT

3 *CIT vs. Ad2pro Media Solutions (P.) Ltd. [(2023) 148 taxmann.com 226 (Karnataka)]*

Where assessee-company made payments to US Company for marketing services and scope of work was to generate customer leads using/subscribing customer data base, market research, analysis, and online research data, payments so made could not be considered as royalty or FTS and hence, no TDS was required to be deducted since admittedly the services were utilised in USA and also the service provider had not made available any technical knowledge, experience, know-how, process to develop and transfer technical plan or technical design

Facts

i. The assessee, a private company, was engaged in the business of providing graphic design solutions for advertising and marketing communications. On verification of 15 CA data, it was observed that the company had remitted huge amounts to US based company for marketing services without deduction of TDS.

ii. The Assessing Officer had passed an order under section 201(1) and 201(1A), holding that the payments made by the assessee for marketing services to the US Company was taxable in India as FTS. He was of the opinion that the assessee utilized the services of the US Company even in the negotiations with customers and in finalizing contracts, and the same could not be done without sharing technical knowledge, know-how, processes or experience, thus making available technical knowledge.

iii. The CIT(A) held that the payments received by the US Company were both Royalty and Consultancy Services and were taxable under the Act as well as the DTAA.

iv. The Hon'ble Tribunal held that the payments made could not be considered either as Royalty nor as FTS and hence no TDS was deductible.

v. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Decision

i. The Hon'ble High Court noted that the assessee had made payments to the US Company which had no permanent establishment in India.

ii. The Hon'ble High Court further noted that according to the Revenue the payments made to the US Company for marketing services take the character of FTS and was chargeable to tax in India as per Article 12 of the DTAA, as according to the Revenue the royalties and fees for included services might also be taxed in the Contracting State.

iii. It noted that as per the order of the AO, the following services were provided/ rendered by the US Company:

   a) Assistance in arranging and facilitating rendering of advertisement design services of Ad2pro India in USA

   b) Assistance in developing market for services rendered by Ad2pro India in USA

c) Assistance in providing customer leads and procurement of orders for Ad2pro India

d) Assistance in negotiations with customers and in finalizing contracts between customers andAd2pro India

e) Assistance in collection of payment on behalf of Ad2pro India and repatriating at a collection fee of 1.5% of the collections made.

iv. The Hon'ble High Court noted that as per the AO's order, the assessee utilized the services of the US Company even in the negotiations with customers and in finalizing contracts, and the same could not be done without sharing technical knowledge, know-how, processes or experience.

v. However, the Hon'ble High Court observed that the language employed in the FTS clause of DTAA was unambiguous and held that the services rendered by the US Company did not make available its technical knowledge, skill, know-how, process or transfer of technical plan or design. Therefore, the view taken by the AO that negotiation with customers to finalize the contract could not be done without sharing the technical knowledge or know-how was perverse.

vi. The Hon'ble High Court held that the Hon'ble Tribunal had noted in para 14 of its order that the scope of the work was to generate customer leads using/subscribing customer data base, market research, analysis, and online research data and rightly held that the service provider had not made available any technical knowledge, experience, know-how, process or developed and transferred technical plan or technical design.

vii. The Hon'ble High Court held that the case of ***GVK Industries Ltd vs ITO [(2015) 54 taxmann.com 347/231 Taxman 18 (SC)]*** relied by the Revenue was distinguished as the advice of a Company called NRC was taken by GVK Industries Ltd for financial structure and with its advice GVK Industries had approached Indian Financial Institutions with IDBI Bank acting as lead financier for its Rupee loan requirement and for a part of its foreign currency, whereas in the instant case the services were rendered and utilised in USA.

viii. The Hon'ble High Court relied on the case of ***DIT vs. Lufthansa's Cargo India [(2015) 60 taxmann.com 187/233 Taxman 218/375 ITR 85 (Delhi)]*** wherein it was held that "The exception carved out in the latter part of clause (b) [to s. 9(1)(vi) and 9(1)(vii)] applies to a situation when fee is payable in respect of services utilized for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income form a source outside India. On a studied scrutiny of the said Clause, it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The clause further

mandates and requires that the services should be utilized in India."

ix. Thus, the Hon'ble High Court upheld the order of the Hon'ble Tribunal and dismissed the appeal filed by the Revenue.

C. TRIBUNAL

4 *DCIT vs. Total Oil India (P.) Ltd. [(2023) 149 taxmann.com 332 (ITAT - Mumbai (SB))]*

Dividend declared by a domestic company to a non-resident should be taxed at the rate given under section 115-O and not the beneficial rates given under DTAA for non-residents unless the Contracting State to the treaty intends to extend the treaty protection to the domestic company (AY 2016-17)

Facts

i. The assessee, M/s Total Oil India Private Limited, an Indian Company, declared/ paid dividend for AY 2016-17. One of the shareholders to whom dividend was to be paid was a Non-resident (Tax resident of France). [It may be noted that there were more than one assessee in the matter before the Hon'ble SB].

ii. Under Section 115-O of the Act a domestic company (the assessee is a domestic company), is required to pay additional income tax on any amount declared, distributed or paid by way of dividend.

iii. However, as one shareholder was a non-resident, the assessee raised a plea that the rate at which tax u/s. 115-O had to be paid could not be more than the rate at which dividend could be taxed in the hands of the Non-resident shareholder in India under the DTAA between India and France as the rate of tax prescribed in the DTAA is generally less than the rate prescribed in Section 115-O.

iv. The assessee placed reliance on the decision of the Hon'ble Delhi Tribunal in the case of ***Giesecke & Devrient India Pvt Ltd vs. ACIT [120 taxmann.com 338 (Del)]*** wherein it was held that the rate of tax prescribed in the DTAA has to be applied in preference to the higher rate of tax prescribed in Sec.115-O.

v. The line of reasoning adopted in the case of ***Giesecke & Devrient India Pvt. Ltd. (supra)*** was that a) DDT is a levy on the dividend distributed by the payer company and the same being an additional tax, falls within the definition of 'Tax' as defined u/s 2(43) of the Act, which is subject to the charging section 4 of the Act and charging section itself is subject to the provisions of the Act thereby bringing it within the sweep of section 90 of the Act b) payment of dividend distribution tax u/s 115-O by the Domestic Company was for and on behalf of the shareholder and in discharge of shareholders liability to pay tax on dividend distributed. Reliance was also placed on the decision of Kolkata Bench in the case of ***DCIT vs. Indian Oil Petronas Pvt Ltd. [127 taxmann.com 389],*** wherein similar view was taken.

vi. Revenue also made an application for reference of a similar issue in the case of Maruti Suzuki Private Limited and also in the case of Gujarat Gas Co. Ltd.

vii. Hence, in the backdrop of the above, a Special Bench was constituted by the Hon'ble President for considering the said issue.

Decision

i. The Hon'ble Tribunal noted that the word "Dividend" has its origin from the Latin word "Dividendum". It means a thing to be divided. Dividend means the portion of the profit received by the shareholders from the company's net profit, which is legally available for distribution among the members. Therefore, dividend is a return on the share capital subscribed for and paid to its shareholders by a company. Dividend defined under section 2(35) of the Companies Act, 2013, includes any interim dividend. It is defined under section 2(22) of the Act. It further noted that Dividend is share of profits declared as distributable among the shareholders, it does not mean that the character of the profits distributed by the company as dividend retain the same character when it reaches the hands of the shareholders.

ii. It held that though dividend is income in the hands of the shareholder, its taxability need not necessarily be in the hands of the shareholder. The sovereign has the prerogative to tax dividend, either in the hands of the recipient of the dividend or otherwise. It further held that there are two ways of taxing dividend i.e. Classical/Progressive System or Simplistic System. The provisions of Sec. 115-O shows that it creates a charge to additional income tax on any amount declared, distributed or paid by domestic company by way of dividend for any assessment year. The tax so charged is in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year.

iii. The Hon'ble Tribunal after considering few judgements (viz ***Godrej & Boyce Mfg. Co. Ltd vs. DCIT [394 ITR 449 (SC)], Small Industries Development Bank of India vs. CBDT [133 taxmann.com 158(Bom HC)], B.M Amin Umma vs. ITO [26 ITR 137 (Mad HC)], Balaji vs. ITO [1962 AIR 123 (SC)]*** concluded that DDT was a tax on the distributed profits of a domestic company and was a tax on profits of the domestic company and not on the shareholder and that the shareholder did not enter the domain of DDT at all.

iv. The Hon'ble Tribunal further held that the purpose of DTAA was to avoid double taxation/allocation of taxing rights between two Sovereign nations and DDT was a tax not on the shareholder but on the amount declared, distributed, paid as the case may be, by way of dividend and being a tax on income of the company, there was no double taxation of the same income. Hence, domestic company u/s.115-O did not enter the domain of DTAA at all.

v. Also, it further added that if domestic company has to enter the domain of DTAA, the countries should have agreed specifically in the DTAA to that effect. For eg. in the DTAA of India-Hungary, the treaty protection was extended to the dividend distribution tax. It has also been specifically provided in the protocol to the Indo-Hungarian Tax Treaty that, when the company paying

the dividends was a resident of India, the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend.

vi. Thus, the Hon'ble Tribunal on basis of the above discussion concluded that where dividend was declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracted Additional Income Tax (Tax on Distributed Profits) referred to in Sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in Section 115 O of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income.

vii. It also added that wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any.

5 *Shangri-La International Hotel Management Pte. Ltd vs. ACIT [(2023)148 taxmann.com 3(ITAT - Delhi)]*

Reimbursement of cost received by the assessee (Singapore entity) could not be treated as FTS under article 12(4) of the India-Singapore DTAA. Also, Management consultancy and other related services provided by the Singapore entity to Indian hotels could not be treated as FTS as they did not make available any technology, experience etc. which inter alia was evident from the fact these services were rendered on a continuous basis year on year which showed that the service recipient was not capable of independently performing such services without the help of the assessee.

Facts

i. The assessee, a non-resident corporate entity, incorporated under the laws of Singapore and a tax resident of Singapore, was engaged in the business of rendering management consultancy and other related services to hotels.

ii. Further, it was the authorized licensee of the 'Shangri-La' brand and related intellectual property for India. It had entered into three separate agreements with third party Indian hotels and earned revenue towards management fee and license fee. In return of income filed for impugned assessment years, assessee offered management fee as FTS and license fee as royalty in terms of article 12 of India-Singapore DTAA, on gross basis.

iii. During the course of assessment proceedings, the Assessing Officer noticed that in addition to management fee and license fee, the assessee had receipts from Indian hotels on account of marketing and reservation receipts and reimbursement receipts. However, the assessee had not offered them as income. The assessee submitted that marketing and reservation receipts were for service provided from outside India and were in the nature of business receipts. Therefore, in absence of a Permanent Establishment (PE) in India, they were not taxable.

iv. The Assessing Officer however observed that the receipts were for services ancillary and subsidiary to the trade mark license agreement for use of trade mark and brand name, which was in the nature of royalty, hence, it would fall within the ambit of FTS under article 12(4)(a) of the India-Singapore DTAA. He thus, brought the entire receipts to tax by treating it as FTS.

v. The Assessee raised objections before the DRP. However, the same were rejected.

vi. Further, in the draft assessment order the AO alleged that the assessee did not provide the breakup of reimbursement and copy of bank statement and hence the AO treated the reimbursement of expenses also as FTS.

vii. The Assessee raised the objection before the DRP. However, without giving any independent finding the DRP rejected the objection raised by the assessee.

viii. Aggrieved, the assessee filed an appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal noted that under the Hotel Marketing and Reservation Services agreement, the assessee had receipts like Marketing receipts, frequent guest program receipts, joint advertising co-ordination fund contribution and reservation fee.

ii. It further noted that the marketing receipts were for marketing and promotional services undertaken by the assessee for the promotion of Shangri-La hotel, including, third party Indian Hotels. The services included development of marketing plan and budget and marketing consultancy services rendered outside India.

iii. It noted that the expenditure incurred towards marketing and promotional activities were primarily aimed at public recognition, promotion of the hotels in source markets outside India to bring international business to Shangri-La Hotels across the world including India. The marketing receipts were utilized for common benefit of all hotels and were expended on general advertising, marketing activities including market intelligence, communication and publicity, production of promotional literature and other sales program.

iv. It further noted that there was a Frequent Guest program operated by Shangri-La group on a no loss/no profit basis and receipts from participating hotels on account of Frequent Guest program were utilized for making payment to hotels, which provide rooms pursuant to points redeemed by hotel guests who were Frequent Guests program members, recruiting staff members to manage and promote the program and on-going administrative expenses.

v. It also noted that the assessee collected reservation fee from hotel owners towards services provided by CRS and reservation fee was charged from hotels on a per transaction basis. The centralized reservation allowed a customer or a third party travel intermediary anywhere in the world to access the availability status, the room rates to make booking easily.

vi. The Hon'ble Tribunal concluded that the marketing and reservation activities performed by the assessee were not only distinct and different from the license fee but they were done under two distinct and separate agreements. Therefore, the marketing and reservation receipts could not be treated to be ancillary and subsidiary to the license fee. Hence, such fee would not fall under article 12(4)(a) of the treaty.

vii. The Hon'ble Tribunal added that the nature of services rendered did not demonstrate that they were in the nature of managerial, technical or consultancy services. Even if, to some extent they might involve consultancy services, however, there was nothing on record to demonstrate that while rendering the services, the assessee had made available technical knowledge, experience, skill, know-how or processing etc. to bring it within the ambit of FTS under article 12(4)(b) of the treaty.

viii. The Hon'ble Tribunal also relied on the decision of the co-ordinate bench in the case of ***Starwood Hotels & Resorts Worldwide Inc vs. ACIT (International Taxation) [(2022) 140 taxmann.com 231(ITAT - Delhi)*** and noted that in the said case the appeal filed by the Revenue against the decision of the Hon'ble Tribunal was dismissed by the Hon'ble Delhi High Court.

ix. It further observed that the recipients were receiving such services on a continuous basis from year to year, which showed that the recipients were not capable of independently performing such services without the aid and assistance of the assessee.

x. Thus, the Hon'ble Tribunal directed the AO to delete the addition made and allowed the appeal of the assessee.

xi. Further, w.r.t reimbursement of cost, the Hon'ble Tribunal noted that reimbursement of cost included cost like frequent flyer program and other miscellaneous expenses, such as, courier charges, media monitoring charges, e-mail campaign charges and translation of web site to local language of hotels etc.

xii. It further added that these services were routine services in nature without involving any technical or strategic expertise or involvement of any advisory services. Further, these services were neither ancillary and subsidiary to royalty nor there was anything on record to demonstrate that while rendering such services, the assessee had made available any technical knowledge, know-how, skill etc. to the third party Indian hotels.

xiii. It thus concluded that the reimbursement of cost received by the assessee, could not be treated as FTS under Article 12(4) of the India-Singapore DTAA, at least, based on the facts involved in the impugned assessment years and directed the AO to delete the said addition.

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CA Naresh Sheth CA Jinesh Shah

INDIRECT TAXES
GST – Recent Judgments and Advance Rulings

A. RULINGS BY AUTHORITY OF ADVANCE RULING

1 *White Gold Bullion Private Limited – Karnataka AAR [KAR ADRG 20/2023]*

Facts and issue involved

Applicant is engaged in the business of buying and selling used gold, i.e. secondhand goods. Applicant purchases used old gold jewellery from the unregistered persons and sells the same after cleaning and polishing it.

Further, applicant also melts the unsold old used jewellery/parts, because of being outdated design/model or being damaged, and further sells such lumps/irregular shapes of gold. Applicant does not change the nature but rather changes the form of gold by melting it. Applicant does not undertake any further process on such melted lumps.

Applicant was discharging GST only on margin value of used jewellery/melted gold as provided under Rule 32(5) of the CGST Rules.

Applicant sought an advance ruling in respect of the following questions:

1. Whether applicant can discharge of GST on margin i.e. difference between sale price and purchase price as provided in Rule 32(5) of CGST Rules, if he purchases secondhand gold in form of jewellery/part of jewellery from unregistered individuals and sells to registered/unregistered dealers, after melting and forming lumps/irregular shapes of such gold without changing its nature?
2. Whether the HSN Code for sale of melted lumps of gold is 7113 or not?

Applicant's submissions

Rule 32(5) of CGST Rules provides that the value of taxable supply, provided by a person dealing in buying and selling of second-hand goods i.e., used goods as such or after such minor processing which does not change the nature of the goods and where no input tax credit has been availed on the purchase of such goods, shall be the difference between the selling price and the purchase price. If the value of such supply is negative, then it shall be ignored.

Applicant submitted that they are only dealing in second hand goods and not claiming any ITC on procurement of such second-hand goods. On the old jewellery which is marketable, they only clean and polish them and sell it to customers. On the old jewellery, which is non-marketable, applicant undertakes minor processing and melts the same into lumps. The nature of gold does not change as such. This lump/ irregular shape is further processed by the other party i.e., buyer and is made into jewellery which is sold by them after charging GST.

Discussions by and observations of AAR

Rule 32(5) of CGST Rules stipulates that value of supply of second-hand goods shall be the margin value only if following conditions are satisfied:

- Supply made by supplier is a taxable supply;
- Supplier shall be person dealing in buying and selling of second-hand goods i.e. used goods as such or after minor processing which does not change nature of such goods; and
- No ITC has been availed on purchase of such goods.

Applicant is into supply of gold which is a taxable supply. Tariff Heading 7113 pertains to jewellery and parts thereof of precious metals which includes gold jewellery whereas tariff heading 7108 pertains to gold in unwrought or semi-manufactured form such as gold lumps or irregular shapes of gold.

Gold jewellery is distinct category of article having distinct characteristics and is not same as gold lumps or irregular shapes of gold. When the applicant melts the gold jewellery into gold lumps, the nature of goods changes in as much as characteristics and classification changes. Since the processing done by the applicant changes the nature of goods, they do not satisfy the second condition of Rule 32(5) of CGST Rules and hence, are not eligible to avail the benefits thereof.

Ruling of AAR

Applicant cannot pay GST on the Margin value representing difference between the sale price and purchase price as stipulated in rule 32(5) of CGST Rules, 2017.

Relevant HSN Code for Old Gold Jewellery is 7113 whereas for gold lumps or irregular shapes of gold is 7108.

2 *Uttarakhand Public Financial Strengthening Project – Uttarakhand AAR [2023-TIOL-79-AAR-GST]*

Facts and issue involved

Applicant is in receipt of motor vehicle hire service including fuel charges from service providers M/s Baba Tour & Travel having GSTIN 05AHJPR7888K1ZE and M/s Rajeshwari Travel having GSTIN 05AHLPR6966L1ZH.

Agreements executed with both the parties provide that GST and diesel cost will be reimbursed by applicant separately.

However, both the parties are using different methodologies to raise invoice:

- M/s Baba Tour & Travel is charging 5% GST on rental + night charges + fuel charges; and
- M/s Rajeshwari Travel is charging 5% GST only on rental charges. No GST is levied on fuel charges.

Applicant has sought an advance ruling as to whether the service provider is required to charge GST on whole bill amount (monthly rental + night charges + fuel on mileage basis) or only on monthly rental (excluding night charges + fuel on mileage basis)?

Discussions by and Observations of AAR

The issue involved pertains to valuation of supply. Section 15(2) of CGST Act clearly provides that the value of supply shall include among other things, any other amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both.

The provisions of Section 15 are very clear and unambiguous. The use of words "supplier is liable to pay in relation to such supply" brings out the intent of the legislature and leaves no room for any doubt.

Term "consideration" has been defined in Section 2(31) of the CGST Act which mandates that consideration includes any payment whether in money or otherwise made or to be made or monetary value of any act or forbearance for the inducement of the supply of goods. The usage of the terms "or otherwise" and "or forbearance for the inducement of the supply of goods or services or both, whether by the recipient", in the statute leaves no doubt about the spirit and essence of the Act.

Without fuel, motor vehicle does not operate (run) and without running i.e. moving from one place to another, the act of motor vehicle hire services does not happen. The motor vehicle hires services have the integral component of running/operating the vehicle to one place to another for transportation. In order to claim to provide the said services, actual transportation has to take place and without fuel this cannot happen.

Hence, reimbursement of expenses for providing motor hiring services, under any head is nothing but the additional consideration for the provision of said services and attracts GST on the total value.

Ruling of AAR

Service provider has to charge GST on the whole amount of bill i.e. monthly rental + night charges + fuel on mileage basis.

3 *Profisolutions Pvt Ltd – Tamil Nadu AAR [2023-TIOL-68-AAR-GST]*

Facts and issue involved

Applicant has its registered office in Bengaluru and a branch office in Chennai, both of which are separately registered under GST legislation. The branch office provides support services like engineering services, design services, accounting services, etc. to the registered office in Bangalore.

Applicant had sought a ruling as to whether services provided by branch office in one State to head office in another state through common of the company constitute a supply of service in terms of Section 7 the Act and thereby liable to GST?

Applicant's submissions

Common employees, through which services are provided by the branch office to its head office, are appointed and work for the company as whole and not for a particular branch office.

Though head office and branch office are treated as distinct person, services provided by employees to its employer is covered under Schedule III to CGST Act and hence, not liable to GST.

Discussions by and Observations of AAR

Applicant from branch office has supplied, apart from accounting services, various technical services to head office in other state where their factory is located, to fulfil the product design requirement of the customers.

Applicant stated that employees are appointed and working for company as whole and not employed for head office or branch specifically, while recognizing the legal position that head office and branch office are distinct person under GST legislation. It is obvious that service of an employee working in a branch flow only through the branch to the head office or customer. If the employee is deployed in a branch of an entity, his services that are rendered directly to head office will be in his representative capacity as an employee of the branch.

Entry 2 to Schedule I of CGST Act specifically provides that supply of goods or services or both between related persons or between distinct persons as specified in section 25 shall be treated as supply even if made without consideration.

Section 25(4) of CGST Act provides that person who has obtained GST registration in more than one State shall, in respect of each such registration, be treated as distinct persons. Hence, the branch office and the head office will be treated as distinct persons for GST legislation.

Any supply of service between two registrations of the same person in the same state or in different States attract the provisions of Section 25(4) and Section 7 read with Schedule I entry 2.

Even the services of employees deployed in a registered place of business to another registered premises of the same person will attract the provisions discussed above, as the employees are treated as related person in terms of explanation to Section 15 and treated as supply by virtue of entry 2 of Schedule I to CGST Act, 2017.

Ruling of AAR

Services, including the services of common employees of a person, provided by branch office to head office and vice versa, each having separate GST registration, will attract GST liability.

4 *Godrej Properties Limited – Karnatka AAR [2023-TIOL-77-AAR-GST]*

Facts and issue involved

Applicant owns non-agricultural undeveloped immovable property and is now developing the Property III to be registered as "Godrej Woodland-Phase III" which shall comprise of 266 residential plots.

Sale consideration of the plots includes consideration towards plot of land, development of basic infrastructure prescribed by authorities in the approved plan as well as cost for providing all other specified common facilities and amenities in the project.

Further, the cost of electrical connectivity to the common amenities, water line and plumbing till the plot, etc. is included in the sale consideration.

Upon receipt of release certificate from the competent authority, applicant shall offer the purchasers to take the possession of the plot within two months from the date of issue of such release certificate.

Applicant has sought advance ruling in respect of the following questions:

1. Whether applicant is liable to discharge GST liability on sale of plot; development charges; and amenities charges in case where the booking of plot, receipt of consideration and agreement for sale is -
   - o entered as well as sale deed is executed after the release certificate; and
   - o entered prior to release certificate and sale deed is executed after receipt of release certificate.
2. What is the applicability of GST if the sale price is a consolidated price towards land cost, basic infra development charges and other common amenities and facilities charges?

Applicant's submissions

Applicant contended that sale of land is neither a supply of goods nor supply of service as per Entry 5 of Schedule III to CGST Act. Since sale of land is neither a supply of goods nor supply of service, it would not matter whether the land is developed or undeveloped. Both kinds of land would neither be a supply of goods nor services.

Where booking of plot, agreement of sale and sale deed are entered into after receipt of release certificate from the competent authorities, then the entire consideration would be towards sale of developed land and hence, would not be liable to GST due to Entry 5 of Schedule III to CGST Act. Accordingly, consideration received towards plot of land, basic infrastructure development and other common amenities and facilities received after release certificate would not be liable to GST.

Further, para 14 of Circular No. 177/09/2022 TRU dated 03.08.2022, clarifies that sale of developed land is covered by Entry 5 of Schedule III of CGST Act and hence, not liable to GST.

Thus, based on the above analysis, applicant was of the view that sale of plot, basic infrastructure development charges and other common amenities & facilities charges is not liable for GST.

Further, where booking of plots and/or agreement of sale is entered and/or advances from customers are received prior to receipt of release certificate by applicant from competent authority, then the amount attributable to transfer of title in land would not be liable to GST being covered under Entry 5 of Schedule III of CGST Act.

Applicant relied on the decision of the Advance Ruling No. KAR ADRG 31/2022 in the case of M/s. Rabia Khanum wherein it was ruled that advances received sale of plot was not liable to GST.

In case where single price is charged for sale of plot, basic infrastructure development charges and other common amenities and facilities charges in the agreement for sale, it is not liable for GST considering the above-mentioned ruling in case of M/s. Rabia Khanum and Circular No. 177/09/2022-TRU dated 03.08.2022.

Discussions by and Observations of AAR

Applicant is launching the project first by calling for application and also booking the plots collecting advance money and then taking up the development activities.

Further, the development project involves three activities

- Sale/Transfer of plots to the prospective plot owners
- Transfer of basic infrastructure to the local authorities by relinquishment of title of roads, drains, park, etc.
- Transfer of other common amenities and facilities like club house etc. to the common association or apex body, as the case may be.

AAR verified various clauses of draft agreement of sale as produced by the applicant and stated that applicant has separately collected consideration towards the following:

- Plot area;
- Basic infrastructure development charges; and
- Other common amenities and facilities.

AAR opined that as far as consideration towards the plot area is concerned, it is clear that the same is covered under entry 5 of Schedule III, and hence the transaction shall be treated neither as a supply of goods nor a supply of services.

Basic infrastructure charges are collected to provide the basic infrastructure facilities like electricity access up to the plot, water and sewerage access up to the plot and roads, etc. These are mandatory requirement for release of plots and the plots become the saleable plots only after the provision of these basic infrastructure and facilities. They are a part and parcel of the consideration for the plot though collected and shown separately. Hence, consideration collected towards basic infrastructure development is part of the consideration towards the plot and is not a consideration for a separate supply.

Club house and other common amenities/ facilities are provided as a service with no transfer of title to land or buildings and hence would not be covered under entry 5 of Schedule III of the CGST Act. What is provided is only a service of access to the service facilities and hence is liable to tax and does not form part of the consideration for the land or building.

These are also not mandatory facilities to be provided as per any law. The ownership rights on the above facilities are found to be still remaining with the promoter and the promoter can assign these facilities to anyone of his choice and the purchaser is only provided with access rights.

Hence, this provision of access rights for a separate consideration would definitely form a separate supply under the provisions of Section 7(1) of the CGST Act, 2017

In case of consolidated amount charged for land cost, basic infrastructure development charges and other common amenities and facilities charges, there is only service of access to club house and common amenities which is considered as a supply as explained above and hence, the value proportionate to club house and common amenities will be liable to GST.

Ruling of AAR

Applicant is not liable to charge GST on plot of land.

Applicant is not liable to charge GST on Basic Infrastructure Development

Applicant is liable to charge GST on other common amenities and facilities charges.

If the sale price is a consolidated price, then charges proportionate to common amenities and facilities charges are applicable to GST.

5 *Ajit Babubhai Jariwala – Gujarat AAR [2023-TIOL-64-AAR-GST]*

Facts and issue involved

Applicant is engaged in providing professional consulting services like architecture, engineering (MEPF), planning, building design, interior design, surveying, etc.

Applicant has been granted work to provide architectural consultancy service to Surat Municipal Corporation ['SMC'] for the project SMIMER Hospital & College Campus ['SMIMER']. The applicant is also required to prepare architectural and working drawings as required for construction of the project.

SMC (recipient of service) contended that:

- SMIMER project is covered under the 12th Schedule of Article 243W of the Constitution of India
- Service provided by applicant is pure service.
- Thus, it is exempt as stated in Entry No. 3 of Notification No.12/2017-Central (Rate) dated 28 June 2017.

However, applicant was of the view that their supply would be covered under Entry No. 21 of Notification No. 11/2017-Central (Rate) dated 28th June 2017 and is liable to GST at the rate of 18%.

Applicant has sought advance ruling on whether service provided by applicant to SMC for construction of SMIMER is covered under Entry No. 3 of Notification No.12/2017 Central (Rate) and thus exempt?

Applicant's submissions

Applicant contends that the work allotted is a comprehensive work which comprised of all-inclusive consultancy fee for architectural & structural designing and area development & landscaping.

The work order does not appear to be a supply of pure service but also includes supply of goods along with supply of services in the form of providing various physical models and samples of hardware material, sanitary items, electrical items, etc. Hence, it is very difficult to conclude that it pertains purely to services only.

Discussions by and Observations of AAR

A careful reading of the said entry no. 3 of Notification No. 12/2017-Central Tax (Rate) clearly shows that three conditions need to be satisfied for a service to be covered under this entry of the notification:

- It must be a pure service not involving any supply of goods.
- It must be provided to the Central Government, State Government or Union Territory or Local authority.
- It must be an activity in relation to any function entrusted to a
  - o Panchayat under Article 243G of the Constitution of India; or
  - o Municipality under Article 243W of the Constitution of India.

On going through the work orders, the authority find that the task entrusted as enumerated therein clearly depicts that it is a pure service that the applicant is supposed to render. The scope of work as mentioned in the work orders belies applicant's contention that providing various physical models and samples be termed as supply of goods.

SMC being a Municipal Corporation falls within the definition of Local Authority as defined u/s 2(69) of the CGST Act, 2017. Further, Municipalities have been entrusted the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the 12th Schedule of Article 243W of the Constitution of India.

SMC has awarded the work order to the applicant and the work so awarded i.e., providing consultancy services as campus architect for various works at SMIMER Hospital & College Campus for SMC clearly falls within the ambit of 12th Schedule, thus satisfying all the conditions state above.

Accordingly, authority ruled that supply by applicant to SMC qualify for exemption as per Entry No. 3 of Notification No. 12/2017 – Central Tax (Rate) dated 28th June 2017.

Ruling of AAR

Supply of drawings, samples, physical models, etc. cannot be termed as supply of goods and hence, service rendered is a 'pure service' not involving supply of goods. Such supply is exempt from GST.

6 *Colourband Dyestaff Pvt Ltd – Gujarat AAR [GUJ/GAAR/R/2023/19]*

Facts and Issues involved

Applicant is engaged in the activity of manufacturing of dyes. The applicant procures raw material in crude form which is chemically processed and through Hot Air Generation (HAG) machineries. The liquid raw material is being converted into powder form finished product which is popular known as dyes. Dyes are then applied to textile products.

In order to manufacture dyes, applicant requires various plant and machinery primary being sand mill; spray dyer; and HAG machine. These machines are required to be fixed on earth by foundation or various structural supports which are of MS steel/ foundation structure.

Applicant has sought a ruling on the following questions:

1. Whether applicant can claim ITC on works contract services taken for structure on which machineries are fixed to earth by foundation and services taken for setting up plant i.e. MS steel structure along with roof which has been created mainly to protect machineries?

2. Whether applicant can claim ITC on Steel [TMT bars] being procured company and used while taking works contract services for making the said foundation to fix machineries to earth?

Applicant's Submissions

Applicants' primary contention for eligibility of ITC in respect of above mentioned works

contract services and material is as under:

- The structure and building are independent and separate;
- The foundation is being built to support the plant and machinery and other equipment;
- Plant and machinery are required to be installed on deep foundation;
- The foundation is to make the plant immovable and hence the foundation does not amount to immovable property; and
- For making outward supply of dyes [their finished product], raw material has to pass through different chemical process from one civil structure to another.

Further, applicant, with respect to each machinery, submitted as under:

Sand Mill and Spray Dryer

- *This machine is huge and heavy. Thus, it needs a customized structure to hold it.*
- The machinery and equipment cannot stand alone and cannot be operated without horizontal as well as vertical civil and steel structural support.

HAG machineries

- This machine is huge and heavy. It cannot stand independently.
- Entire structure has no walls, no separate office arrangement, no washroom, etc.
- For maintaining temperature at consistent level & to protect the machine from weather, fabricated roof is required.

Effluent Treatment Plant (ETP)

- ETP is a mandatory requirement as per Pollution Control Board.
- It comprises of various tanks made of civil structure which is the plant itself.

Transformer/DG Set

- DG set is independently and separately appearing on structure fixed to earth by foundation.

Discussions by and Observations of AAR

On a bare reading of section 17(5) of the CGST Act, 2017, authority observed as under:

- It explicitly states that ITC shall not be available in respect of works contract services when supplied for construction of an immovable property (other than plant and machinery) with an exception;
- In terms of sub-clause (d), ITC shall not be available for goods or services or both received for construction of an immovable property (other than plant or machinery) even when used in the course or furtherance of business;
- The first of the two explanations, states that "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property;
- The second explanation states that for the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural

supports but excludes- (i) land, building or any other civil structures; (ii) telecommunication towers; and (iii) pipelines laid outside the factory premises.

Further, authority made observations in respect of each of the machinery as under:

Sand Mill and Spray Dryer

As per section 17(5), ITC is available only in respect of foundation and structural support. However, the images shared by the applicant reveal structure/shed erected on the left side of the Sand Mill and Spray Dryer. Since such structure/shed squarely falls under the ambit of 'civil structures' which have been excluded from the exception of plant and machinery and hence, ITC shall not be available for the same.

HAG Machine

ITC is only available in respect of the foundation and structural support relating to the HAG. The images clearly show a roof over the machine. The roof and its supports squarely fall under the ambit of 'civil structures' which have been excluded from the exception of plant and machinery and hence, ITC will not be available for the same.

ETP

Advance Ruling Authorities in case of ***Synergy Global Steel Pvt. Ltd. [reported at 2021 (48) G.S.T.L. 286 (A.A.R. - GST Haryana)]*** and ***Tarun Realtors Pvt. Ltd. [2020 (35) GSTL 438]*** have ruled that Water Treatment Plant and Sewage Treatment Plant form part of the civil structure and hence ITC is disallowed for the same. Based on said rulings, authority was of the view that similar analogy applies to ETP.

Transformer/DG Set

Advance Ruling Authorities in case of ***Tarun Realtors Pvt. Ltd. [2020 (35) GSTL 438]*** ruled that ITC on works contract services taken for making foundation structure on which DG set is fixed to earth by foundation is not eligible.

Ruling of AAR

ITC of works contract services taken for structure on which machineries are fixed to earth by foundation and services taken for setting up plant is eligible. ITC will not be available in respect of:

- Structure/shed erected near the Sand mill and spray dryer;
- Roof and supports for HAG;
- Foundation and support structure in respect of ETP and Transformer.

Further, Steel [TMT bar] procured by applicant and used while taking works contract services for making the said foundation to fix machineries to earth is eligible for ITC.

■●■

"In a day, when you don't come across any problems - you can be sure that you are travelling in a wrong path"

— Swami Vivekananda

CA Rajiv Luthia

CA Keval Shah

INDIRECT TAXES

Service Tax – Case Law Update

1 *Commissioner of CGST and Central Excise vs. M/S Edelweiss Financial Services Ltd. 2023-TIOL-26-SC-ST*

Background and Facts of the Case

- The appellant i.e the Revenue filed present appeal against the order passed by the Adjudicating Authority dropping entire service tax liability on provision of 'Corporate Guarantee' on behalf of subsidiaries located within and outside India.
- The respondent i.e M/s Edelweiss Financial Services Ltd is an entity engaged in the business of rendering financial services. Respondent provided 'corporate guarantee' on behalf its subsidiaries located within and outside India and did not discharged service tax liability thereon as provider of 'banking and other financial services' for the period up to 30th June 2012 and even thereafter.
- The SCN proposed recovery of 97,95,62,947/- comprising ₹ 3,22,01,255/- towards provision of guarantee to overseas companies for which consideration had been received and of Rs. 94,73,61,692/- towards guarantees provided free of charge to their Indian subsidiaries, for rendering taxable service under section 65(105)(zm) of Finance Act, 1994 till 30th June 2012 and 'service' defined in section 65B(44) for the period thereafter till March 2015.
- The adjudicating authority had concluded that receipt of commission from overseas companies, being consideration for export of services, was not taxable. Further, the definition in section 65(12) of Finance Act, 1994. did not extend to 'corporate guarantee' which, unlike 'bank guarantee', finds no specific enumeration as 'other financial services' therein, till 30th June 2012. For the period thereafter, in absence of 'consideration' for facilitating 'corporate guarantee' excluded such activity from coverage within the definition of 'service' in section 65B(44) of Finance Act, 1994.

- Hon'ble CESTAT held that any activity for the purpose of taxability under Finance Act, 1994, not only, in relation to another, reveal a 'provider', but also the flow of 'consideration' for rendering of the service. In the absence of any of these two elements, taxability under section 66B of Finance Act, 1994 will not arise.

Arguments put forth

The Appellants submitted as under:

- The appellants stated that this case is similar to Civil Appeal No. 428/2020 @ Diary No.42703/2019 (Commissioner of Service Tax Audit II Delhi IV Vs. M/S DLF Cyber City Developers Ltd.) and therefore the matter should be admitted and tagged with the pending case.

The Respondents Submitted as under:

- Learned counsel for the respondent on caveat would read Section 65(12) of the Finance Act, 1994 to point out that issuance of corporate guarantee to a group company without consideration would not fall within banking and other financial services and is therefore not taxable service. Section 65B (44) defining term "service" would indicate that it relates to only such service which is rendered for valuable consideration.
- In the present case, the Assessee has argued that they have not received any consideration while providing corporate guarantee to its group companies.
- It is observed that nowhere in the Show Cause Notice, attempt has been made to prove that the Assessee received either monetary or non-monetary consideration in any form. No effort was made on behalf of the Revenue to assail the above finding or to demonstrate that issuance of corporate guarantee to group companies without consideration would be a taxable service.
- The reliance placed by Learned AR on the 'non-monetary benefits' which may, if at all, be of relevance for determination of assessable value under section 67 of Finance Act, 1994 does not extend to ascertainment of 'service' as defined in section 65B(44) of Finance Act, 1994. 'Consideration' is the recompense for the 'contractual' undertaking that authorizes levy while 'assessable value' is a determination for computing the measure of the levy and the latter must follow the former."

Decision

- In view of such conclusive finding of both forums, and the arguments of the respondents, the hon'ble SC did not admit this case. Consequently, the Appeal filled by department stands dismissed.

2 ***Commissioner of Customs, Central Excise & Service Tax vs. M/s. Suzlon Energy Ltd. CIVIL APPEAL NOS.11400-11401/2018***

IN THE SUPREME COURT OF INDIA. CIVIL APPELLATE JURISDICTION.

Background and Facts of the Case

- The respondent was providing various taxable services and was also in the manufacture of Wind Turbine Generator (hereinafter referred to as 'WTG'). It has three subsidiary companies situated in

Germany and Netherlands with whom product development and purchase agreement had been entered into.

- The respondent had entered into an agreement dated 01.04.2007 with M/s Suzlon Energy GmbH, Germany, a sister concern for the product development and purchase agreement to be used exclusively for manufacturing of WTG in the territory of India. The products were exclusively defined in para 1.10 of the said agreement.
- The respondent, while importing these designs filed Bill of Entry with the Custom authorities and classified the same as "Paper" under Chapter Sub-heading No. 49119920 of the Customs Tariff and claimed benefit of 'Nil' rate of customs duty under Notification No. 021/2002 for BCD and Notification No. 020/2006 for CVD. That respondent claimed that since the designs and drawings received by it via customs route by filing the Bill of Entry were "goods" and not "services", it was not required to pay the service tax.
- Thereafter, the Commissioner of Customs, Central Excise and Service Tax, Pune issued a show cause notice dated 15.12.2001 to the respondent calling upon it to show cause as to why the service tax to the tune of ₹ 18,42,99,652/- on the value of taxable services provided by it under the provisions of Section 73 of Chapter V of the Finance Act and cess under Section 85 of Chapter VI of the Finance Act be not demanded and the same should not be classified under "Design Services" for the period from June 2007 to September, 2010.
- For the subsequent period, i.e., October 2010 to September, 2011, another show cause notice was issued on 20.04.2012 demanding service tax of ₹ 3,36,28,515/- on the value of "design service" from M/s SEG and M/s Suzlon Blade Technology, Netherlands.
- Further, vide Order-in-original dated 25.03.2012, the Commissioner – appellant herein confirmed the demands made in the show cause notices as provider of "design services" taxable under Section 65(105)(zzzzd) and in accordance with the definition of the services in Section 65(35b) of the Finance Act, 1994. The Commissioner also levied interest as well as the penalty.
- Being aggrieved with the Order-in-original, the respondent preferred to file an Appeal before the CESTAT. By the impugned common order, the CESTAT allowed the said appeals, relying upon its earlier decision in the case of Sojitz Corporation v. Commissioner of Service Tax, New Delhi, reported in 2009 (14) STR 642 (Tri. Delhi) and has held that the said design and drawings are 'goods' and not 'service'. The CESTAT has also observed and held that the taxation of goods and that of services are mutually and explicitly conceived levies, and therefore the same activity cannot be taxed as goods and as services.
- Being aggrieved with the Oder passed by the CESTAT, the Revenue preferred to file an Appeal. Hence, the present appeal.

Arguments put forth

The Appellants submitted as under:

a. The learned Additional Solicitor General of India appearing on behalf of the Revenue submitted that merely because the intellectual property put in a media, it would not per se make them goods. It would depend on whether the contracting parties have understood it as a transfer or a sale of goods. It is submitted that importation of a set of tailor made or readymade drawings will constitute a sale of goods, whereas if a person engages a painter to draw a picture of his choice and to his specifications and the delivery of the painting, even though on a canvas duly framed, may only constitute to a service, since the painter has engaged his entire intellectual effort in drawing the painting for a particular customer and to his specifications and as he progresses with the painting, the same is for a specific customer.

b. The learned Additional Solicitor General of India also relied on the case of BSNL v. Union of India, reported in (2006) 3 SCC 1 (paras 44 & 45), in support of his submission on the distinction between sale of goods and a contract of service. Various illustrations were submitted in support of the claim that the "Engineering Design & Drawings" of various models imported by the respondent for the purpose of manufacture of WTG are leviable to service tax and cannot be taxed as goods. Hence the demand needs to be confirmed and the appeal shall be allowed.

The Respondents submitted as under:

a. The learned senior counsel appearing on behalf of the respondent submitted that as per the settled position of law, supply of goods as per specifications given by the customer is also treated as sale of goods.

b. Reliance was placed on the case of Hindustan Shipyard Ltd. v. State of A.P., reported in (2000) 6 SCC 579, wherein it was held that if the thing to be delivered has any individual existence before the delivery as the sole property of the party who is to deliver it, then it is a sale. Further, if the bulk of material used in construction belongs to the manufacturer who sells the end product for a price, then it is a strong pointer to the conclusion that the contract is in substance one for the sale of goods and not one for labour.

c. Learned senior counsel also submitted that in the case of Associated Cement Companies Ltd. v. Commissioner of Customs, reported in (2001) 4SCC 593, this Court had held that any media which contain drawings or designs would be regarded as goods under the provisions of the Customs Act. It is observed that these items are movable goods and would be covered by Section 2(22)(e) of the Customs Act. It is observed and held that the fact that the technology or ideas is tailormade would not make any difference.

d. It was further submitted that the intent of service tax legislation is not to levy service tax on sale of goods. The sales tax is levied on sale of goods whereas the service tax is levied on provision of service. It was submitted that therefore a transfer of goods for a price cannot be subject to service tax.

e. The Learned senior counsel also raised below mentioned Grounds –

i. Services (if any) rendered by a foreign entity will not fall within the purview of "design services".

ii. extended period of limitation cannot be invoked.

Decision

a. In the present case, the respondent was engaged in manufacture of Wind Turbine Generator (WTG). It entered into 'product development and purchase agreement' with three of its sister companies. The said designs were to be exclusively used by the respondent in the territory of India and it was a tailormade design. The respondent engaged the sister concern M/s SEG for the activity of "Engineering Design & Drawings" used in manufacturing of WTG, that was reduced as blueprint on paper and delivered to the respondent on the same medium. Such "designs" were subjected to the service tax even as per the clarification by the Board dated 18.03.2011 on the issue of applicability of indirect taxes on packaged software. Therefore, as such, the respondent was liable to pay service tax on the "design services" received from abroad under reverse charge.

b. Despite the above, M/s SEG raised the invoice/bill on the assessee treating it as 'paper'. However, when the said bill of entry was presented treating the same as 'paper' for which the duty payable was 'Nil'. Therefore, neither any custom duty was paid due to exemption from payment of duty treating it as 'paper' nor the service tax was paid.

c. CESTAT's decision, that the respondent is not liable to pay the service tax under "design services" under the Finance Act, 1994 mainly on the ground that the custom authority considered the same as 'goods' and therefore the same activity cannot be taxed as 'goods' and 'services' is absolutely erroneous. As observed and held by this Court in the case of BSNL (supra), there can be two different taxes/ levies under different heads by applying the aspect theory. As per the settled position of law now, the same activity can be taxed as 'goods' and 'services' provided the contract is indivisible and on the aspect of services there may be levy of service tax.

d. Therefore, CESTAT's Order was quashed and set aside. At the same time, the 2 grounds, that is, Services (if any) rendered by a foreign entity will not fall within the purview of "design services" and the invocation on extended period of limitation were not considered by the CESTAT and therefore the matter was remanded to CESTAT to decide the aforesaid two grounds.

■●■

"Learn Everything that is Good from Others, but bring it in, and in your own way absorb it; do not become others."

— *Swami Vivekananda*

CS Makarand Joshi

CORPORATE LAWS
Case Law Update

Companies Act – 1st Case

Order of the ROC, Gujarat, Dadra & Nagar Haveli dated April 28, 2023

In the matter of M/s. Sun Pharmaceutical Industries Limited

Facts of the case

- M/s. SRBC & Co. LLP, Chartered Accountants ('Statutory Auditor') were Statutory Auditors of Sun Pharmaceutical Industries Limited ('SPIL/the Company') for financial years 2017-18 to 2021-22.
- An Inquiry was conducted into the affairs of SPIL under Section 206(4) of the Companies Act 2013 ('the Act'). Inquiry was conducted for investigation of affairs for financial years 2014-15 to 2017-18.
- In connection to this inquiry, the inquiry officer had issued Show Cause Notice ('SCN') to the Statutory Auditor of the Company for financial year 2017-2018 on November 10, 2022 in respect of non-disclosure of **material** 'related parties transaction' (hereinafter referred to as 'RPT') details as required under Indian Accounting standard 24 with M/s. Aditya Medisales ltd (hereinafter referred to as AML).

Charges levied

- Accordingly, it was alleged that Statutory Auditor have violated provisions of Section 143(3) of the Act which states that auditor's report shall state whether, in his opinion, the financial statements comply with the accounting standards?

Submissions by Statutory Auditor

- Statutory Auditor submitted that they had audited the financial statements of the Company with utmost diligence adhering to the requirements of the Act, Standards of auditing and other applicable audit requirements.
- AML was disclosed as related party in Note no. 52 and Note no.75 of the standalone and consolidated financial statements of the Company for the financial year ended March 31, 2018.
- AML was disclosed as related party under the applicable accounting standards during financial year 2017-2018.

- Transaction with AML were disclosed as part of related party transaction in annual report for financial year 2017-18 under category 'others'. Hence Statutory Auditors were of the view that they are in compliance with requirement of Indian accounting standard 24 and submitted that there was no element of fraud as per provision of the Act.
- Statutory Auditors have lastly submitted that they have complied with requirements of provisions of the Act, Indian accounting standard 24 and SEBI(LODR) 2015 and no penalty ought to be levied against them.

Submissions by Presenting Officer of ROC

- Presenting Officer submitted that Statutory Auditor had made omission of the adequate facts while reporting the related party transactions and thus they were negligent in compliance with their duty as per provisions of Section 143 (3) of the Act.
- Pursuant to clause(h) of sub section (3) of section 134 of the Act and rule 8(2) of the Companies (Accounts) Rules, 2014 the Company need to disclose material RPT in AOC-2. Hence transaction defined under rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014 are called Material RPT. Therefore, as per the said rule, sale, purchase, supply of any goods or materials, directly or through appointment of agent, amounting to 10% or more of the turnover of the company or rupees one hundred crore, whichever is lower, is called **material** related party transactions.
- Hence, transaction made by the Company exceeded 10% of annual consolidated turnover for financial year 2016-2017 (10% of ₹ 8308.28 crore i.e., ₹ 830 crore) or ₹ 100 crore whichever is lower is called as **material** transaction.
- Presenting Officer further submitted that Statutory Auditor had not reported and quantified any Material RPT as per the requirement of Para 24A of IND AS 24. Instead of reporting material transaction separately, the Company had merged the same with others.
- Para 24 and 24A of IND AS 24 reads as follows: -

  "24. Items of a similar nature may be disclosed in aggregate except when separate disclosure is necessary for an understanding of the effects of related party transactions on the financial statements of the entity.

  24A. Disclosure of details of particular transactions with individual related parties would frequently be too voluminous to be easily understood. Accordingly, items of a similar nature may be disclosed in aggregate by type of related party. However, this is not done in such a way as to obscure the importance of significant transactions. Hence, ***purchases or sales of goods are not aggregated with purchases or sales of fixed assets. Nor a material related party transaction with an individual party is clubbed in an aggregated disclosure."***

- Para 24 and 24A of IND AS 24 does not mean that transactions are shown in such a way that importance of significant transaction is lost. Hence as per para 24A of Indian accounting standard 24, Statutory Auditor should

have disclosed Material RPT separately as per para 18, 19, 20 of IND AS 24.

- It was observed that ledger submitted by the Company in respect of transaction for financial year 2017-2018 with AML shows cumulative sales transaction exceeding above ₹ 900 crore. Hence transaction falls under material related party transaction and same was not shown by Statutory Auditor.
- Apart from AML, SPIL had entered into material related party transactions with Sun Pharma Laboratories Limited, Sun Pharma Medisales Private Limited, Be-Tabs Pharmaceutical Ltd, Sun Pharma Global, Sun Pharmaceuticals Industries Inc., and Sun Pharmaceuticals Industries (Europe)B.V. and Statutory Auditor had failed to report said material transactions in its reports for the financial year ended 2017-2018 as per Para 24A of IND AS 24.
- Merely stating name of RPTs is not adequate in disclosing the related party transactions. It is equally important that material related party transactions to be pointed out and quantified separately considering the special significance attached to quantum of shareholders money involved. Hence Statutory Auditors have been negligent on this part.
- From the record of the Company, it was found that Statutory Auditor had made non-compliance of said provision for financial years 2018-2019, 2019-2020, 2020-2021, and 2021-2022 also.
- Hence Presenting Officer concluded that Statutory auditors have been negligent of their duty as defined in of Section 143(3) the Act and therefore liable to be penalised under section 450 of the companies Act, 2013.

Penalty As Per Section 450 of The Companies Act 2013

Name of the auditor's firm	*Penalty as per Section 450 of the Companies Act, 2013 (In Rs.) for F.Y 2017-2018 (In Rs.)*	*Maximum penalty*	*Penalty imposed (Rs.)*
SRBC & CO. LLP, Chartered Accountants	10,000+ 1000 per day	50,000	50,000

Companies Act – 2nd Case

Order of the ROC, Gujarat, Dadra & Nagar Haveli dated April 28, 2023

In the matter of M/s. Sun Pharmaceutical Industries Limited

Facts of the case

- M/s. C.J. Goswami & Associates, Practicing Company Secretaries was appointed as Secretarial Auditor ['Secretarial Auditor'] for the financial year 2014-2015, 2015-2016, 2016-2017, 2017-2018 respectively by Board of Directors of M/s. Sun Pharmaceutical Industries limited which is a Company registered under Companies Act ,2013 in the state of Gujarat and having its registered office at SPARC, Tandalja, Vadodara
- An inquiry was conducted of Sun Pharmaceutical Industries limited (hereinafter referred to as 'SPIL/the Company') under Section 206(4) of the Companies Act 2013 ['the Act'] as ordered by Ministry of Corporate Affairs ('MCA') in the affairs of the Company covering the financial years from 2014-15 to 2017-2018.

- In connection to this inquiry, the inquiry officer had issued Show Cause Notice ('SCN') to the Secretarial Auditor on November 10, 2022 in respect of not reporting Aditya Medisales Ltd (hereinafter referred to as 'AML') as related party as per Indian Accounting Standard 24 and Accounting Standard 18 in financial statements of the Company for financial year 2014-2015, 2015-2016, 2016-2017.

Charges levied

- Secretarial Auditor of the Company was alleged to have not reported Aditya Medisales Ltd as related parties as per the requirement of IND-AS 24/AS-18 in the financial statement of the Company of FY 2014-15, 2015-16 and 2016-17.

Submissions by Secretarial Auditor

- Mr. Chintan Goswami, Proprietor of M/s. C.J. Goswami & Associates, Practicing Company Secretaries submitted that the format of MR-3 i.e., Secretarial Audit report was already prescribed under Section 204 of the Act. As per the scope of secretarial audit as decided by Central Council of Institute of Company Secretaries of India ['ICSI'] at its 226th Central Council meeting, the provisions relating to audit of accounts and financial statement of the company is dealt in the statutory audit and Secretarial Auditor may rely on the reports given by statutory auditor or another designated professional. Therefore, relying on the reports given by M/s SRBC & Co. LLP, Statutory Auditor of SPIL for financial year 2014-15 to 2016-17 ['Reporting Period'] they believed that the Company complied with the provisions of section 133 of the Act regarding compliance with accounting standards.
- Secretarial Auditor further submitted that none of the secretarial audit report issued for Reporting Period stated that financial statements comply with the accounting standards.
- Secretarial Auditor further brought to the kind attention of the Presenting Officer a statement mentioned by Secretarial Auditor in the secretarial audit reports issued for Reporting Period at sr. no. 2 of Annexure 1 of the said reports that, "We have not verified the correctness and appropriateness of financial records and books of accounts of the company".
- Secretarial Auditor further drew attention of the Presenting Officer to the extract of guidance note on undertaking secretarial audit assignments issued by ICSI on May 14, 2018 from (Chapter 1 of Guidance Note on Secretarial Audit) which states that,

  "The term Secretarial Audit is a mechanism which is connected with the audit of the non-financial aspects of the company.

  The object of the Secretarial audit is evaluation and form an opinion and to report to the shareholders whether, the company has complied with applicable laws comprising various statues, rules, regulations, guidelines, followed the board processes and report on the existence of compliance management system.

  Third party support and evidences: It would always be helpful to cross verification of the fillings made by the company at MCA, SEBI & other authorities independently. Verification of record and enquiries can also be made with the other statutory auditor and

internal auditors and consultants and Independent directors of the company"

- Secretarial Auditor further submitted that duty cast upon secretarial auditor under relevant standards of auditing and reporting framework had been duly and fully complied. Secretarial Auditor further brought to the kind attention of Presenting Officer, observations/views in the secretarial audit report for the financial year ended March 31, 2016 and March 31, 2017.
- Secretarial Auditor further stated that as per their limited understanding on basis of documents available in public domain in relation to the non-disclosure of transaction with AML the Company had already settled this matter with SEBI. Secretarial Auditor hence sought the details of as to on what grounds this SCN was issued to them? Secretarial Auditor hence prayed for dismissing the allegations of non-compliance/ violation of the provision of the act and no penalty ought to be levied.

Submissions by Presenting officer

- The Presenting Officer submitted that inquiry on SPIL was based on a whistle blower complaint in respect of related party transactions, money diversions from SPIL to AML and other group companies of SPIL. As per Section 204 of the Act, the secretarial auditor plays a crucial role in laws for effective compliances. The object of secretarial audit is to evaluate and form an opinion and to report to the shareholders whether company has complied with applicable laws comprising various statues, rules, regulations, guidelines, followed the board processes and report on the existence of compliance management system.
- Practicing Company Secretaries ('PCS') has the professional duty to provide an unbiased view on compliance status of the company. A PCS should be independent from company being audited. The Secretarial auditor is also expected to ensure that activities of the client company are in accordance with the applicable procedure and that supporting evidence is maintained by company and same is genuine. Presenting Officer further stated that PCS should have examined transactions during the Reporting Period to identify whether any fraud element is present or not?
- Presenting Officer further elaborated in detail the group structure of SPIL. He then stated that Mr. Dilip Sanghvi, Managing Director of SPIL has control over AML. Further highlighting the group structure of SPIL, Presenting Officer highlighted that companies were created between SPIL and AML to hide the director control of Mr. Dilip Sanghvi and their relatives in AML.
- Thus, he stated that it has been established that MD of SPIL, Mr. Dilip Sanghvi had control on AML and all other private body corporates were created between SPIL and AML to hide direct control of MD of SPIL. SPIL's RPT with AML exceeded Rs.100 crores which formed material and significant transaction.
- It was further stated that although the shareholder of AML is body corporate, but the main control person of all the body corporates was MD of SPIL, i.e., Mr. Dilip Sanghvi and their family members.

- Further highlighting on business of AML, Presenting Officer stated that AML was the sole distributor of the SPIL since long time in India. All the goods manufactured by SPIL were sold within India through AML. AML was also promoter company of SPIL since year 2001. Also, the promoters of SPIL were the shareholders of AML.
- SPIL and AML were Related party even before the merger of Sanghvi Finance Ltd because as per the scheme of merger filed by the Company before NCLT, the Company itself confirmed that all 22 transferor companies and Sanghvi Finance Pvt ltd are connected with Mr. Dilip Sanghvi who is MD of SPIL.
- Mr. Dilip Sanghvi who is MD of SPIL and also holds more than 2% of AML (directly/indirectly), is therefore related party of AML as per Section 2(76) (v) and (vi) of the Act read with Accounting Standard 18.
- The Presenting Officer further stated that instead of complying his duties as per Guidance notes Secretarial auditor merely relied on Statutory auditor reports. Further replying to the submission of Secretarial Auditor about scope of secretarial audit as per ICSI 226th meeting, Presenting Officer stated that identification of related party under Section 2(76) and Section 188 of the Act fall under the purview of secretarial auditor of the company and non-reporting of AML as related party for Reporting Period falls under the purview of duty of secretarial auditor as per guidance note of Secretarial audit issued by ICSI. Hence Presenting Officer found Secretarial Auditor of SPIL guilty for violation of section 143(14) read with section 188 & 204 of the Companies Act, 2013.

Penalty as per Section 450 of the Companies Act 2013

For the Financial year	*Name of the auditor's firm*	*Penalty (In Rs.)*	*Maximum Penalty (In ₹)*	*Penalty Imposed (In ₹)*
2014-2015	C.J Goswami & Associates, Practicing Company Secretary	10,000+1000/- per day	50,000/-	50,000/-
2015-2016		10,000+1000/- per day	50,000/-	50,000/-
2016-2017		10,000+1000/- per day	50,000/-	50,000/-

SEBI

In the matter of CG Power and Industrial Solutions Limited - Adjudication order dated April 20, 2023

Facts of The Case

- CG Power and Industrial Solutions Ltd (hereinafter referred to as CG Power/the Company) filed a corporate announcement with Bombay Stock Exchange (hereinafter referred to as BSE) and National Stock Exchange (hereinafter referred to as NSE) on August 20, 2019, which **disclosed the outcome of its Board meeting held on August 19, 2019**. From the said disclosure, Securities and Exchange Board of India (hereinafter referred to as

SEBI) noted that the **total liabilities** of the Company and the CG Power Group might have been **potentially understated** by approximately ₹ 1053.54 Crore and ₹ 1,608.17 Crore respectively, as on March 31, 2018 and by ₹ 601.83 Crore and ₹ 401.83 Crore, respectively as on April 1, 2017. SEBI also noted that **advances to related and unrelated parties** of the Company and the CG Power Group might have been **potentially understated** by ₹ 1,990.36 Crore and ₹ 2,806.63 Crore respectively, as on March 31, 2018 and by ₹ 1,479.34 Crore and ₹ 1,331.47 Crore respectively, as on April 1, 2017.

- With this observation SEBI sought information in this matter from the Company in order to examine as to whether there were any violations of the provisions of securities and other applicable laws by the Company and its Directors/Promoters, during the period **2016-2019.** SEBI also had sought responses from the Chairman (Gautam Thapar), past Directors (Madhav Acharya, B. Hariharan) and CFO (V. R. Venkatesh) of CG Power. CG Power then appointed M/s Vaish Associates, an independent law firm to investigate on certain transactions and submitted preliminary Investigation report.
- Subsequently, **SEBI, vide an Interim Order dated September 17, 2019, debarred Gautam Thapar – Chairman, VR Venkatesh - CFO, Madhav Acharya - former director and B Hariharan – former director from buying, selling or otherwise dealing in securities in any manner, either directly or indirectly, till further orders.**
- SEBI further appointed MSA Probe Consulting Private Limited ('hereinafter referred to as MSA/Forensic Auditor') for conducting the forensic audit of the books of accounts of CG Power. Further SEBI confirmed its interim order by passing a final order dt: March 11, 2020, pending receipt of the forensic audit report from MSA.
- MSA vide its forensic audit report suggested to **examine the role** of MD & CEO, Risk and Audit Committee (RAC), Board and other employees of CG Power as well as that of Mr. Ashwin Mankeshwar i.e., Managing Partner of **M/s K. K. Mankeshwar and Co**. (hereinafter referred to as **KKM**/ **Noticee No. 2**) who was the Statutory Auditor of the Company appointed in 81st Annual General Meeting of the Company dated September 28, 2018, till January 25, 2020. SEBI further conducted investigation in the matter and observed that M/s **Chaturvedi & Shah** (hereinafter referred to as **CAS**/ **Noticee No. 1**) was the joint statutory auditor of CG Power along with M/s Sharp & Tannan for the FY 2016-17 and subsequent to its resignation, on April 27, 2018, KKM was appointed as the statutory auditor of CG Power on April 28, 2018 to fill the casual vacancy, who completed the statutory audit of CG Power for the FY 2017-18.
- With regards to Noticee No. 2, SEBI noted from the Investigation Report (IR) that the statutory audit of CG Power for the FY 2018-19 was completed by KKM jointly with SRBC & Co. LLP after CG Power made an announcement in respect of various irregularities in the nature of fraud on August 20, 2019. While reviewing payments made in the past years, the Company came across certain unexplained payments from the Company and its subsidiaries made to KKM as well as association

of Mr.Ashwin Mankeshwar, Managing Partner of KKM, as a Director of Blue Garden Estate Private limited ('Blue Garden') and Acton Global Private limited ('Acton'). In this regard, the RAC of CG Power issued a show cause notice to KKM under Section 140(1) of the Companies Act, 2013 and provided KKM with an opportunity of being heard. However, no submissions were made by KKM in respect of the aforesaid show cause notice. SEBI Investigation further observed and alleged that CAS and KKM had been acting against the fiduciary capacity, and that instead of working in the interest of shareholders of CG Power, they facilitated the scheme of cleaning up the books of accounts of CG Power, despite being aware of the irregularities and misstatements in the financial statements of CG Power

Charges Levied

- Violation of the provisions of section 12A(a), (b) and (c) of the SEBI Act, 1992 and Regulations 3(b), (c) and (d), 4(1) and 4(2)(f) of the Prohibition of Fraudulent Trade Practices (PFUTP) Regulations, 2003.

Contentions by the Noticees

Noticee 1

1. **Sale of Nashik property and Kanjurmarg Property not known to Noticee:** Noticee 1 was questioned by the Forensic Auditor viz. MSA about the transactions with Blue Garden and Acton. In this regard Noticee 1 submitted that they were unaware of the transactions. Noticee 1 further submitted that transactions of Nashik & Kanjurmarg property were never disclosed to Board of Directors of the Company, filing of charge form pertaining to same was also not done respective Registrar of Companies, guarantees and the undertakings were never routed through meeting of board of directors of the Company. Noticee 1 further stated that management representations provided to them for the financial year 2016- 17 were false and misleading.

2. **Netting off amount between two different entities not checked with each journal entry:** On the allegation of netting off amount, Noticee 1 submitted that they had only seen the net amount appearing in the final books of accounts for financial year 2016-2017 and not each individual entry.

3. **CG Power's advanced of ₹ 28 crore to Blue Garden was checked:** Noticee 1 stated that they were aware that CG Power had advanced a sum of ₹28 Crore to Blue Garden during the FY 2016-17, so they sought an explanation from CG Power for such advance. CG Power informed that they had made such payment towards consultancy services from Blue Garden. Noticee 1 further stated that they were provided with balance confirmation from Blue Garden and a copy of the agreement dated March 27, 2017 entered by CG Power with Blue Garden for provision of consultancy services. Noticee 1 further submitted that on furnishing of these documents they did not suspect any non-genuineness in this transaction between CG Power and Blue Garden.

Noticee 2

1. **Reinstatement of financials and audit opinion**

   Noticee 2 vide their Independent Auditor's Report dt: August 30, 2019

highlighted that they were informed by the Board of directors of the company that financial statements of earlier financial year 2016-2017 and 2017-2018 have been adjusted due to independent investigation carried out in the Company and that pending outcome of the investigation, the financial statements of 2016-2017 and 2017-2018 and of the year ended March 31,2019 might get revised/restated. Therefore Noticee 2 in their Independent Auditor's Report dt: August 30, 2019 under the heading — **'Basis for disclaimer of opinion'** mentioned that in view of the proposed voluntary revision/restatement of the financial statements of prior years, which may result in revision/ restatement of financial statements for the year ended March 31, 2019 and also considering the significance of certain transactions/specific matters described herein below, Noticee 2 were unable to determine the consequential impact of the proposed revisions/restatements and the impact of certain transactions/ specific matters on the Standalone Financial Statements as at March 31, 2019.

2. **Concerns on appointment of Mr. Ashwin Mankeshwar, Managing Partner of KKM, as additional director in Blue Garden and Acton**

Noticee 2 vide reply dated January 15, 2023 stated that Mr. Ashwin Mankeshwar was inducted as an additional director in the Blue Garden and Acton on January 25, 2017 and he resigned from the said companies on March 14, 2017. During this period, he did not attend any meeting of both the companies nor was he privy to any transaction entered into by these companies. No remuneration was drawn by him during the period he was appointed as a director in these companies. Mr. Ashwin Mankeshwar further submitted that his previous directorship was not in conflict with any other laws. Also, no payments were received by him other than in the course of his statutory audit. Hence Noticee 2 submitted that it cannot be stated that they did not act in their fiduciary capacity.

Arguments by SEBI on Contentions made by Noticee 1

1. **Sale of Nashik property and Kanjurmarg Property not known to Noticee**

SEBI noted that during the audit period i.e., during 2016-17, the transactions relating to a Nashik Property and a Kanjurmarg Property involving receipts of ₹ 390 crore by CG Power from Blue Garden and lending of ₹ 245 crore and ₹ 145 crore by CG Power to Acton and Avantha Holdings Ltd (hereinafter referred to as AHL) respectively were executed, which were not reflected in the audited financial statements of CG Power. Further said transactions were done without any agreement between CG Power, Blue Garden and Acton. SEBI noted that no approval/consent of Maharashtra Industries Development Corporation was obtained before sale of the Nashik property. Further, the land at Nashik was not a barren unused piece of land but home to a huge and fully operational factory owned by CG Power, which is a major contributor to CG Powers business and provides employment to a large number of people. It was further observed by SEBI that no approval was obtained from the Board of CG Power for the execution

of Memorandum Of Understanding between CG power and Blue Garden for transfer of Kanjurmarg property for a consideration amount of ₹ 498 Crore to which SEBI noted that the aforesaid factors were also not considered by Noticee No.1 in its audit report. SEBI hence stated that arguments of Noticee 1 cannot be sustained. SEBI thereafter stated that fraud done by CG Power involved multiple transactions each amounting to hundreds of crores. Further, the said transactions were done through the banking channel. At the time of preparation of the audit report, Noticee No.1 had access to the bank statements and books of accounts of CG power and also had the right to seek and obtain information and explanations from CG Power to their satisfaction but did not act upon. Rather, Noticee No.1 allowed the said irregularities in above mentioned transactions in its audit report for the FY 2016-17 which shows the involvement of Noticee No. 1 with the company for facilitating it in showing true and fair picture of the financials. Hence SEBI stated that contentions of Noticee 1 cannot be accepted.

2. Netting off amount between two different entities

SEBI noted that advances against sale of properties received from Blue Garden to the extent of ₹ 388 Crore were adjusted by netting off against the amount transferred as loans to Acton and AHL by passing journal entries on March 30, 2017 and March 31, 2017. Also, all the entries of the transactions were made in such a way to net off the assets and liabilities of different entities i.e., debit balance of one entity netted off with credit balance of other entity in the books of account of CG Power which might not show the correct financial position of CG Power. SEBI further stated that in accounting norms, generally the netting of balance i.e., debit and credit of the same entity is permitted and not between the different entities. But in the present matter, the auditor did not raise question on the same and instead certified the same as true and fair in the auditor's report for the year 2016-17, which indicates the auditor's direct involvement on making such entries in the books of accounts of the company. SEBI hence stated that arguments of Noticee 1 cannot be sustained.

3. CG Power had advanced sum of ₹ 28 crore to Blue Garden

SEBI highlighted that the balance confirmation as on March 31, 2017 was signed on behalf of CG power by Mr. Madhav Acharya and on behalf of Blue Garden was signed by Mr. Bhimrao Venkataramana Rao. SEBI further noted that with regard to agreement dated March 27, 2017 which was signed by Mr. Bhimrao Venkataramana Rao on behalf of Blue Garden and Mr. V. R. Venkatesh on behalf of CG Power, Mr.V.R. Venkatesh had never been a director of CG Power. Further, he had taken charge as Chief Financial Officer of CG Power from Mr. Madhav Acharya only on August 11, 2017 i.e., subsequent to the aforesaid agreement stated to have been executed on March 27, 2017. Even Mr. Bhimrao Venkataramana, who had signed the agreement was appointed as a Director of Blue Garden only on April 15, 2017. SEBI therefore observed that the aforesaid facts clearly indicated that the agreement dated March 27, 2017 between CG Power and Blue Garden was created merely to provide some basis to the transactions between CG Power

and Blue Garden. SEBI further observed that the agreement was dated only 4 days prior to the end of the FY 2016-17 while the transactions between CG Power and Blue Garden had begun since May 2016. Therefore, SEBI noted that CAS, though admitted to have examined the said transaction, had not examined the aforesaid irregularities, and did not bring out in the audit report for the FY 2016-17. This all clearly indicated that CAS facilitated the company to make such entries in the books of account and hence were aware of the transactions relating to Nashik Property and Kanjurmarg Property involving Blue Garden to facilitate the scheme of cleaning up the books of accounts of CG Power. SEBI hence stated that arguments of Noticee 1 cannot be sustained.

Arguments by SEBI on Contentions made by Noticee 2

1. **Reinstatement of financials and audit opinion**

SEBI stated that Noticee 2 had raised various points with respect to the audit report of 2018-19 submitted by it on August 30, 2019. However no fraudulent transaction were reported in the audit report of 2017-18 during which all the aforesaid fraudulent transactions were carried out by the company. Further SEBI noted that the said audit report was submitted only on August 30, 2019 i.e., after CG Power made an announcement in respect of various irregularities in the nature of fraud on August 20, 2019. SEBI further noted that KKM was appointed by CG Power, immediately after resignation of CAS and without holding any Board Meeting. Further, after its appointment on April 28, 2018, KKM submitted audit report for 2017-18 on May 30, 2018 i.e., almost in a month. In view of the aforesaid facts, SEBI stated that there is no merit in the submissions made by Noticee No. 2 that it highlighted certain points w.r.t. the irregularities in its audit report of 2018-19.

2. **Concerns on appointment of Mr. Ashwin Mankeshwar, Managing Partner of KKM, as additional director in Blue Garden and Acton**

SEBI mentioned that Memorandum of Understanding between Blue Garden and CG Power for assigning, sale and transfer of rights of Kanjurmarg Property was entered into on February 1, 2017 and the funds amounting to ₹ 190 Crore received by Blue Garden as loan from ABFL in this regard were transferred to CG Power on February 16 and 17, 2017. From the same it was clear that it happened during the tenure of Mr. Ashwin Mankeshwar as director in Blue Garden and just after his appointment. Forensic auditor also stated that Blue Garden and Acton were Special Purpose Vehicles, which were incorporated for effecting the transactions relating to Nashik Property and Kanjurmarg Property. SEBI further noted from Forensic audit report that KKM provided multiple services to Avantha Group and received substantial remuneration from them and were quickly appointed as the statutory auditor of CG Power upon resignation of CAS. This indicated KKM's close ties with Avantha Group entities who had been the beneficiaries of the fraudulent transfers from CG Power. SEBI further noted the fact that Mr. Ashwin Mankeshwar did not receive any remuneration from Blue Garden and Acton during the period of January 25, 2017 to March 14, 2017 while he was holding the position of Director in these companies, as also stated by Noticee No.

2 in its contention, actually shows his close proximity with these companies and the nature of transactions in which these companies were involved. SEBI therefore concluded that all above facts clearly establish that Noticee No. 2 was aware of the irregularities and misstatements in the financial statements of CG Power, while issuing the audit report for the FY 2017-18.

Penalty

Sr. No.	*Name of the Noticee*	*Violation*	*Penalty amount*
1	M/s Chaturvedi & Shah	Sections 12A(a), (b) and (c) of the SEBI Act, 1992; and Regulations 3(b), (c) and (d), 4(1) and 4(2)(f) of the PFUTP Regulations, 2003	₹ 5,00,000/-
2	M/s. K. K. Mankeshwar & Co.	Sections 12A(a), (b) and (c) of the SEBI Act, 1992; and Regulations 3(b), (c) and (d), 4(1) and 4(2)(f) of the PFUTP Regulations, 2003	₹ 5,00,000/-

IBC

In the matter of M. Suresh Kumar Reddy (Appellant) vs. Canara Bank & Ors (Respondent) at Supreme Court dated 11 May, 2023

- The Canara bank – a financial creditor and respondent (Respondent) filed an application u/s 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) before the National Company Law Tribunal (NCLT) Hyderabad, Telangana. The said application was filed against M/s Kranthi Edifice Pvt. Ltd - Corporate Debtor (CD).
- NCLT by an order dated 27th June 2022, admitted the application filed by the respondent and declared a moratorium for the purposes referred in section 14 of the IBC. The appellant who was the suspended director of the CD claimed to be an aggrieved person and preferred an appeal against the said order before the National Company Law Appellate Tribunal (NCLAT). However, NCLAT dismissed the appeal by an order dated 5 August, 2022.
- The respondent - Canara bank is the successor of Syndicate bank, which made an application u/s 7 of the IBC to NCLT. Syndicate bank was merged into the respondent-Canara bank. A letter of sanction dated 2 April, 2016 was issued by Syndicate bank by which credit facilities were sanctioned to the CD for one-year which were valid up to 28 February, 2017.
- The facilities granted by the Syndicate bank to the CD were fund-based - Secured Overdraft Facility of ₹ 12 crores and non-fund-based bank guarantees of ₹ 110 crores.
- In the application u/s 7 of the IBC, the Syndicate bank stated that as on 30 November 2019, the liability of the CD under the Secured Overdraft Facility was to the tune of approx. ₹ 7.5 crores and the liability of the CD towards outstanding bank guarantees were approx. ₹ 19.16 crores.
- On 21 October, 2022, Supreme Court issued notice and recorded a statement

of the appellant that a proposal for settlement under a One-Time Settlement Scheme was submitted to the respondent-Canara bank and a sum of ₹ 6 crores was deposited with them. However, the said proposal was turned down. Therefore, the appeal was taken up for hearing.

Arguments of the Appellant

- It was submitted that repeated efforts were made to have one-time settlement of the dues payable to the respondent. But the said request was not acceded to.
- Reliance was placed on the decision of SC in the case of ***Vidarbha Industries Power Limited vs. Axis Bank Limited*** wherein it was submitted that even assuming that the existence of financial debt and **default on the part of the CD was established, the NCLT was not under an obligation to admit the** application u/s 7. For good reasons, NCLT could have refused to admit the application u/s 7 of the IBC. Further the appellant fairly pointed out the order dated 22 September, 2022 passed by SC in a review petition seeking a review of the decision in the case of Vidarbha Industries.
- Correspondences between the Government of Telangana and the Syndicate bank were referred where in contracts granted by the Telangana Government to the CD. Similarly, by a letter dated 7 August, 2019, the Government of Telangana requested the Syndicate bank to extend 29 bank guarantees mentioned in the said letter. Further, the CD addressed a letter to the bank on 9 January, 2020 by which a request was made to extend the bank guarantees.
- Attention of the SC was also drawn to a letter dated 8 January, 2020 addressed by the Government of Telangana to the bank requesting the bank to extend the seven bank guarantees mentioned therein. Notwithstanding the requests made by the State Government, Syndicate bank did not extend the bank guarantees. Thus, in a sense, the failure of the bank to extend the bank guarantees forced the CD to commit default. It was submitted that the bank is responsible for triggering the default.
- Attention was also drawn to the interim order dated 24 April, 2020 passed by the learned Single Judge of the Telangana High Court by which the respondent was restrained from taking coercive steps pursuant to letters of invocation of bank guarantees including handing over of Demand Drafts to the State Government. Hence, NCLT ought not to have admitted the application u/s 7 of the IBC.

Arguments of the Respondent

- Reliance was placed on the decision of the SC in the case of ***E.S. Krishnamurthy and others vs. Bharath HiTecch Builders Private Limited*** and it was stated that it still holds the field. It was submitted that once NCLT is satisfied that there is a financial debt and a default has occurred, it is bound to admit an application u/s 7 of the IBC.
- Also, highlighted that the decision in case of ***Vidarbha Industries (Supra)*** was peculiar to the facts of the case.
- Further, requested was made by the CD for extension of the bank guarantees was specifically rejected as communicated by the respondent by a letter dated 18 January, 2021 addressed to the CD. And

therefore, it was submitted that there was no error committed by NCLT in admitting application u/s 7 of the IBC.

Held

- In the case of ***Innoventive Industries Limited vs. ICICI Bank and Another,*** the scope of section 7 of IBC had been explained. The view taken in the case of Innoventive Industries has been followed by SC in the case of ***E S Krishnamurthy & Ors. vs. M/s Bharath Hi Tech Builders Pvt Ltd.***

- Once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application u/s 7 of IBC. Default is defined under Section 3(12) of the IBC. Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on the part of a CD. In such a case, an order of admission u/s 7 of the IBC must follow. If the NCLT finds that there is a debt, but it has not become due and payable, the application u/s 7 can be rejected. Otherwise, there is no ground available to reject the application.

- Reliance was placed on the decision in the case of ***Vidarbha Industries and in particular a review petition was filed by the Axis Bank Limited*** seeking a review of the decision of ***Vidarbha Industries*** on the ground that the attention of the Court was not invited to the case of ***E.S. Krishnamurthy***. While disposing of review petition by Order dated 22 September, 2022, reported SC held thus:

  "The elucidation in paragraph 90 and other paragraphs were made in the context of the case at hand. It is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case.

  To interpret words and provisions of a statute, it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes."

- Thus, it was clarified by the order in review that the decision in the case of ***Vidarbha Industries*** was in the setting of facts of the case before SC. Hence, the decision in the case of ***Vidarbha Industries*** cannot be read and understood as taking a view which is contrary to the view taken in the cases of ***Innoventive Industries and E.S. Krishnamurthy***. The view taken in the case of ***Innoventive Industries*** currently also holds good.

- There were many guarantees issued by the bank. The interim order of the Telangana High Court does not relate to all bank guarantees. Moreover, there is no finding recorded in the interim order that the CD was not liable to pay the dues. The interim order only prevents coercive action against the CD.

- Even if NCLT has the power to reject the application u/s 7 if there were no good reasons to do so, in the facts of the case, the conduct of the appellant is such that no such good reason existed based on which NCLT could have denied admission of the application u/s 7 of the IBC.

- Hence, the application was dismissed.

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CA Hardik Mehta CA Tanvi Vora

OTHER LAWS

FEMA – Update and Analysis

In this article, we have discussed recent amendments made in FEMA through Notifications, Circulars and Press Notes & Press Releases.

A. Update through A.P. (DIR Series) Circulars

1. Levy of charges on forex prepaid cards/ store value cards/travel cards, etc.

The RBI has brought to notice that few Authroised Persons are levying certain fees/ charges, which are payable in India on such instruments, in foreign currency. RBI provided that such fees/charges payable in India have to be denominated and settled in Rupees only.

(Comments: The use of International Debit Cards/Store Value Cards/Charge Cards/Smart Cards or any other instrument can be used to create a financial liability, as 'currency'. Accordingly, the RBI clarified that fees/ charges payable for acquiring such currency should be in INR. It can be interpreted that charges on International Debit Cards/Store Value Cards/Charge Cards/Smart Cards or other cards such as forex cards would be of various types such as ATM withdrawal charges, loading charges, processing fees, redemption charges or other similar charges for the utilization of the cards. All such charges going forward should be charged in INR and not in foreign currency.)

B. Amendment by Central Government through Notification of MoF

1. Amendment to Foreign Exchange Management (Current Account Transaction) Rules, 2000

The CG in consultation with RBI amended the Current Account Transaction Rules, 2000 to omit/delete Rule 7 of the said Rules.

Rule 7 prior to its omission excluded the use of International Credit Card for making payment by a person towards meeting expenses while such person is on a visit outside India from LRS limits as listed under Schedule III of Current Account Transactions Rules, 2000.

(Source: Notification No. G.S.R 369(E) [F. No. 1/5/2023-EM] dated 16th May 2023 by the Ministry of Finance in the Official Gazette)

(Comments: This well publicized amendment though may appear small but has far reaching effects under foreign exchange law and Income Tax Act, 1961 as well. The following should be noted with respect to LRS and the effect of the amendment:

1) *Use of ICC while outside India by a resident shall be included in the LRS limit of USD 250,000.*

2) *One of the main reasons for this amendment is bringing at par the use of ICCs and IDCs. HNWIs who had multiple credit cards and large credit limits on each of them, in many cases exceeded the LRS permissible limits.*

3) *Additionally, by way of this amendment, Tax Credited at Source (TCS) applicability under Section 206C(1G) would also apply to cases of credit card transactions. This would enable the Income Tax Department to track and scrutinize non-filers/high spenders and/or cases where the incomes reported were not commensurate with the LRS transactions undertaken by such persons.*

4) *Use of ICC while in India for any Current or Capital Account Transactions covered under LRS was always included in the LRS limit of USD 250,000*

5) *In the past, use of International Debit Card (IDC) was not exempted under Rule 7 and was therefore always included in the LRS limit of USD 250,000 whether used while in India or abroad any Current or Capital Account Transactions covered under LRS.*

6) *Similar to IDCs, authorized persons were also permitted to issue store Value Cards/Charge Cards/Smart Cards etc. such as Forex Cards which are also subject to LRS permissibility and limits.*

TCS has been introduced on remittances out of India under LRS w.e.f. from 1st October 2020 which has been amended vide Finance Act, 2023 w.e.f. to be applicable to remittances under LRS. Different rates and threshold have been provided under the section.

In the wake of the amendment, the Ministry of Finance also issued FAQs of LRS and TCS on its twitter handle on 18th May 2023 wherein it was clarified that the amendment does not affect any changes in the use of international credit cards by residents while in India (as it was already covered under LRS) and provided background and reasoning behind the need for the amendment and applicability of TCS on LRS transactions undertaken with the use of IDCs while outside India.

The hue and cry caused by the amendment was placated by the issuance of Press Release on 19th May 2023 by the MoF with the reasoning of procedural ambiguity stating that "Payments by resident individuals using ICC & IDC upto ₹ 7,00,000/- shall be excluded from LRS limits and therefore TCS will not be attracted".

It should be noted that the 7 Lakh threshold is only applicable to ICC and IDC transactions(which was not available pre amendment to Rule 7, therefore bringing ICC and IDC at par) and other LRS transactions would not enjoy any threshold (beneficial treatment for education and medical not affected). The necessary changes to the Foreign Exchange Management (Current Account Transactions Rules), 2000 will be issued separately to implement the change under the press release. It is not clear if only payments outside India or also from India will be affected by the threshold for which clarity will be available after requisite amendment to FEM (CAT) Rules are issued.)

■●■

Rahul Hakani
Advocate

Niyati Mankad
Advocate

Best of The Rest

M/S B AND T AG VS. MINISTRY OF DEFENCE – JUDGMENT DT 18/05/2023 PASSED IN ARBITRATION PETITION © NO. 13 OF 2023 [SUPREME COURT]

*Section 11(6) of the Arbitration and Conciliation Act, 1996 (**"the Act"**) - Limitation period for arbitration – Article 137 of the Schedule to the Limitation Act, 1963 – three years from the date when the right to apply accrues - Cause of action to appoint arbitrator commences from the breaking point at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration.*

Facts

In this case, the Court was concerned with a petition under Section 11(6) of the Act filed at the instance of a company based in Switzerland and engaged in the business of manufacturing of arms etc., praying for appointment of an arbitrator for the adjudication of disputes and claims arising out of the Contract dated 27.03.2012 executed with the Respondent - Government of India in its Ministry of Defence for procurement/supply of quantity 568 9MM SMG Model MP9 Sub Machine Gun with Accessories (**"Contract"**). Brief facts of the case are as under:

27.03.2012	Contract was executed between the Petitioner and Respondent.
16.02.2016	Disputes arose between the parties in relation to alleged wrongful encashment of warranty bond by Respondent vide letter dated 16.02.2016 for Euro 201,793.75 ("BG") which was also informed to the Petitioner.
26.09.2016	Liquidated damages were finally deducted and the amount was credited in government account. As per the Respondent, the cause of action arose on occurring of this event.
25.09.2019	The limitation period of 3 years expired on this day as per the Respondent (i.e. 3 years from 26.09.2016).
2016-2021	Various negotiations, deliberations and meetings took place between the parties for resolving the disputes between them.
08.11.2021:	Advocate for the Claimant sent 'Notice for invoking of Arbitration under Article 21 of the Contract'.
16.11.2021:	Respondent received the Notice invoking arbitration.
03.02.2023:	The Petitioner filed present Arbitration Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 for Constitution of Arbitral Tribunal.

Issue

Whether time-barred claims or claims which are barred by limitation, can be said to be live claims, which can be referred to arbitration?

Held

The Court while deciding the issue at hand considered the following:

- On plain reading of Section 11(6) of the Act, it indicates that no time limit has been prescribed for filing application thereof for appointment of an arbitrator. However, Section 43 of the Act provides that the Limitation Act, 1963 would apply to arbitrations as it applies to the proceedings in Court. Accordingly, residuary Article i.e., Article 137 of the Schedule to the Limitation Act shall be applicable which is three years and the said period would begin to run when the right to apply accrues.
- Reference was made to the decision of ***Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and Others, [(2008) 7 SCC 169*** wherein it was contended on behalf of the appellant therein that Section 43 of the Act 1996 makes the provisions of the Act 1963 applicable only to arbitrations and not to any proceedings relating to arbitration in a Court.
- The Court also referred to the case of ***Major (Retd.) Inder Singh Rekhi vs. Delhi Development Authority reported in AIR 1988 SC 1887*** wherein discernible three principles of law were laid
    - o First, ordinarily on the completion of the work, the right to receive the payment begins.
    - o Secondly, a dispute arises when there is a claim on one side and its denial/repudiation by the other and
    - o thirdly, a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders.

    In other words, 'bilateral discussions' for an indefinite period of time would not save the situation so far as the accrual of cause of action and the right to apply for appointment of arbitrator is concerned.
- Reference was also made to the case of ***Union of India and Another vs. M/s L. K. Ahuja and Co., [(1988) 3 SCC 76]*** wherein the Court with reference to the limitation aspect found that the assertion of claim and denial of the same was a necessary ingredient and then went on to say that it would be wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act 1940 and whether the claim to be adjudicated by the Arbitrator was barred by lapse of time.
- On the aspect whether the decision on the issue of limitation should be decided at the stage of passing of an order referring the disputes to the arbitrator, this Court in the case of ***J.C. Budhraja vs. Chairman, Orissa Mining Corporation Ltd. and Another, [(2008) 2 SCC 444]*** had drawn a fine distinction between the period of limitation for filing of a petition and as to the claims being barred by time.
- Further, reference was made to the case of ***SBP & Co. vs. Patel Engineering Ltd. and Another, [(2005) 8 SCC 618]*** wherein this Court held that dragging a party to an arbitration when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on

him a serious liability for meeting the expenses of the arbitration.

- The aforesaid observations made it clear that what is important for the Court is to find out what was the "Breaking Point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration.
- The Court held that ***Geo Miller and Company Private Limited vs. Chairman, Rajasthan Vidyut Utpadan Nigam Limited, reported in (2020) 14 SCC 643*** may be applicable in a given set of facts where there is subsisting/ continuing cause of action. However, in the present case, the Liquidated Damages were deducted by encashment of bank guarantee. This was a positive action on the part of the Respondent, crystalising the rights/cause of action and the same should not be interpreted as a continuing cause of action.
- Further, reference was made to the case of ***Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited, reported in (2021) 5 SCC 738,*** wherein this Court undertook a comprehensive analysis of the relevant provisions and held that in cases where claims are ex facie time barred, the Court may refuse to make reference under Section 11 of the Act 1996.
- Reference was also made to the case of ***Panchu Gopal Bose vs. Board of Trustees for Port of Calcutta [(1993) 4 SCC 338]***, wherein this Court had held that the provisions of the Limitation Act 1963 would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract.

On the basis of the above, the court held that when the bank guarantee came to be encashed in the year 2016 and the requisite amount stood transferred to the Government account that was the end of the matter. This "Breaking Point" should be treated as the date at which the cause of action arose for the purpose of limitation. Negotiations may continue even for a period of ten years or twenty years after the cause of action had arisen. Mere negotiations will not postpone the "cause of action" for the purpose of limitation. The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating. Accordingly, the court dismissed the Petition.

GOVERNMENT OF NCT OF DELHI VS. RAVINDER KUMAR JAIN & ORS, - ORDER DT 18/05/2023 PASSED IN CIVIL APPEAL NO.3621 OF 2023 [SUPREME COURT]

Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("the 2013 Act") - subsequent buyer of the property after issuance of the notification under Section 4 of Land Acquisition Act, 1894 ("the 1894 Act") has no locus to invoke Section 24(2) of the 2013 Act.

Facts

In the present case, the Court was concerned with the challenge to the Order passed by the Delhi High Court in W.P.(C) No.6912 of 2014 vide which the writ petition filed by the Respondent No.1 (Ravinder Kumar Jain) invoking Section 24(2) of the 2013 Act was allowed and it was held that the acquisition in question had lapsed for the reason that neither

the possession of the land was taken nor the compensation therefor was paid. Brief facts of the case are as under

25.11.1980:	The process of acquisition of land in question started with the issuance of Notification of Section 4 of the 1894 Act on 25.11.1980.
09.06.1981:	The Behl Brothers purchased the land in question from M/s. Ansal Housing and Estates (P) Ltd. vide sale deed dated 09.06.1981 (i.e. after the issuance of the said notification under Section 4 of the 1894 Act)
27.05.1985:	Subsequently, notification under Section 6 was issued.
1986:	The owner of the land (Behl Brothers) at that stage challenged the acquisition by filing W.P.(C) No.1229 of 1986.
05.06.1987:	Award under Section 11 of the 1894 Act was announced by the Land Acquisition Collector on 05.06.1987.
18.06.2003:	Ravinder K. Jain (Respondent No.1) had purchased the land in question from Behl Brothers vide registered sale deed dated 18.06.2003 in terms of the alleged no objection certificate granted to him under Section 8 of the Delhi Lands (Restrictions on Transfer) Act, 1972 (**"the 1972 Act"**).
09.12.2004:	The said W.P.(C) No.1229 of 1986 was dismissed for non-prosecution.
22.10.2008:	Respondent No.1 filed W.P.(C) No.3701 of 2008 challenging the acquisition proceedings. The same was dismissed as withdrawn on 22.10.2008 with liberty to petitioner therein to avail of the remedy of review/recall of the order dated 09.12.2004 vide which the writ petition filed by the predecessor in interest of the respondent no.1, challenging the acquisition, was dismissed for non-prosecution.
23.03.2015:	impugned Order passed by Delhi High Court rejecting the contention of the Government that subsequent purchaser had no locus to invoke Section 24(2) of the 2013 Act.

Issue

Whether the Delhi High Court was right in allowing the Writ Petition filed by a subsequent purchaser invoking Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013?

Held

The Court held that in view of the Judgment in the case of ***Shiv Kumar and Ors. vs. Union of India and Ors. [2019 (10) SCC 229]*** it was a settled position in law that that a subsequent buyer of the land after the process of acquisition is complete does not have any locus to invoke Section 24(2) of the 2013 Act, to claim that the acquisition in question has lapsed. This view was also reiterated by the Constitution Bench in the case of ***Indore Development Authority vs. Manoharlal and Others [2020 SCC OnLine SC 316]***. Therefore, in the present case it was an undisputed fact that the Respondent No.1 who purchased the land from Behl Brothers vide registered sale deed dated 18.06.2003, who had purchased the same from M/s. Ansal

Housing and Estates (P) Ltd. vide sale deed dated 09.06.1981, which itself was after the issuance of notification under Section 4 of the 1894 Act on 25.11.1980, had no locus to invoke Section 24(2) of the 2013 Act. Accordingly, the present Appeal was allowed.

GOVERNMENT OF TAMIL NADU & OTHERS VS. R. THAMARAISELVAM ETC. ETC. – ORDER DATED 04/05/2023 PASSED IN CIVIL APPEAL NOS.1580-1608 OF 2022 WITH CRIMINAL APPEAL NO. 275 OF 2022 [SUPREME COURT]

Article 14 – Constitution of India – in absence of any specific guideline and/or definition of "land grabbing cases," such powers can be abused or misused and such powers can be said to be exercised arbitrarily – liberty granted to state to Government to bring an appropriate legislation with the clear definition of "land grabber" and "land grabbing" or better legislations with a clear definition of "land grabbing", "land grabber" and "land grabbing cases" and the present order shall not come in their way to enact such legislation and/or better legislations

Facts

The State of Tamil Nadu had filed appeals against a judgment and order passed by the High Court of Judicature at Madras whereby the High Court had allowed certain writ petitions and quashed two government orders [i.e. G.O. (Ms.) No. 423, Home (Police XI) Department dated 28.07.2011 and G.O.(Ms.) No. 451, Home (Court III) Department dated 11.08.2011] related to land grabbing cases. The Appeals also included Criminal Appeal No. 275/2022, which challenged the High Court's order to transfer a specific case from the Court of Special Judicial Magistrate to the file of Judicial Magistrate-II in Erode.

The State of Tamil Nadu had sanctioned the formation of 36 Anti Land Grabbing Special Cells to deal with land grabbing cases in the state. However, the High Court set aside the government orders, stating that they lacked clear guidelines and definitions for identifying land grabbing cases, and therefore, gave arbitrary powers to the police personnel. The High Court suggested that the state government could enact appropriate legislation similar to the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982.

Issue

Whether the High Court of Judicature at Madras erred by quashing the Government Orders?

Held

After considering the arguments, the court concluded that the High Court's Judgment did not warrant interference and supported the High Court's decision to set aside the government orders, in view of the absence of clear guidelines that could lead to potential abuse and misuse of power. However, the court clarified that the state government is free to enact appropriate legislation defining "land grabber" and "land grabbing cases" or better legislation addressing the issue. It was observed by the Court that there was no Anti-Land Grabbing Act in the State of Tamil Nadu like A.P. Land Grabbing (Prohibition) Act, 1982 or Karnataka Land Grabbing Prohibition Act, 2011 or similar Land Grabbing Prohibition Acts in other States. The Court noted that in the other Land Grabbing Prohibition Acts applicable in the States of Andhra Pradesh, Karnataka, Gujarat and Assam, "Land Grabbing" is specifically defined. Even the term "Land Grabber" is defined.

Additionally, the court dismissed Criminal Appeal No. 275/2022, which pertained to a private dispute, as it had ordered the transfer of the case from the Special Court (Land Grabbing) to a regular court.

■●■

CA Vijay Bhatt
Hon. Jt. Secretary

CA Mehul Sheth
Hon. Jt. Secretary

THE CHAMBER NEWS

Important events and happenings that took place online/physical between **1st April, 2023 to 30th April, 2023** are being reported as under:

I. ADMISSION OF NEW MEMBERS

The details of new members who were admitted in the Managing Council Meeting held on 28th April, 2023 are as under:

Type of Memberships	No. of Members
Life Member	43
Ordinary Member	51
Student Member	26
Associate Member	01
Total	**121**

II. PAST PROGRAMMES

Sr. No.	*Date*	*Topic*	*Speaker*
		DELHI CHAPTER	
1.	09.05.2023	Recent Supreme Court judgements on Income Tax	*Chairman:* Hon'ble ITAT JM Shri Sudhanshu Srivastava, *Panellists:* Ruchesh Sinha, Advocate (CA) Prakash Sinha, Advocate

Sr. No.	*Date*	*Topic*	*Speaker*
		DIRECT TAXES	
1.	04.05.2023	Recent Important Decisions under Direct Tax	CA Piyush Bafna
2.	13.05.2023	Tax and Regulatory Issues in Relation to Self-Redevelopment and JDA	Shri Chandrashekhar Prabhu CA Jagdish Punjabi CA Naresh Sheth
3.	22.05.2023	Lecture Meeting on Old Tax Regime vs. New Tax Regime	CA Ronak Doshi
		HYDERABAD STUDY GROUP	
1.	27.05.2023	Discussion on Recent Judgments under GST	CA Lakshman Kumar
		INDIRECT TAXES	
1.	30.05.2023	GST Issues In Hospitality And Tourism Sector	*Chairman:* CA Manish Gadia *Group Leader:* CA Yatish Vernekar
		INTERNATIONAL TAXATION	
1.	19.05.2023	Applicability/ Interplay of MLI with Forms 15CA/15CB with Case Studies (Practical aspects)	CA Naman Shrimal
2.	23.05.2023	Panel Discussion on the practical issues faced by Professionals under FEMA	CA Rutvik Sanghvi CA Hardik Mehta CA Kartik Badiani
3.	26.05.2023	Pillar Two - GloBE Rules	CA Monika Wadhani
		PUNE STUDY GROUP	
1.	20.05.2023	Taxation of Shares & Securities	CA Abhitan Mehta
		MEMBERSHIP & PR	
1.	31.05.2023	Digital Well-being of Professionals	Dr. Jawahar Surisetti
		STUDY CIRCLE & STUDY GROUP	
1.	05.05.2023	Recent Judgement under I.T. Act	Kapil Goel, Advocate

■●■

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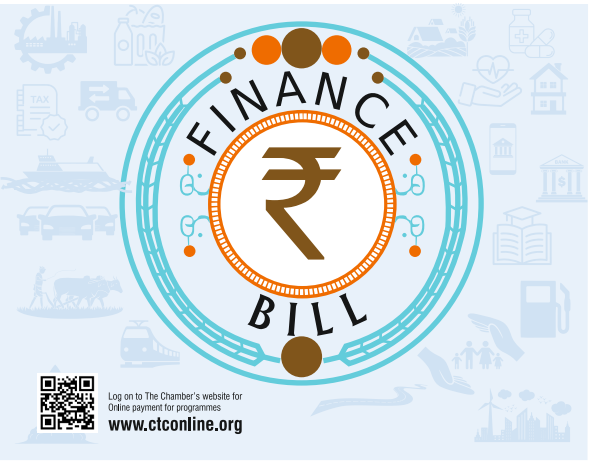

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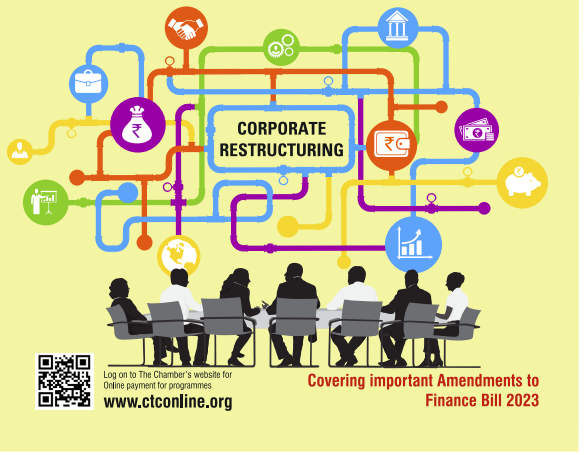

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