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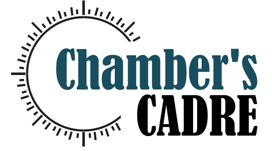
No. MCS/149/2022-24 / R.N.I. No. MAHENG/2012/47041 - Total Pages: 204

A Monthly Journal of
The Chamber of Tax Consultants



THE CHAMBER'S JOURNAL

Your Monthly Companion on Tax & Allied Subjects

Vol. XI | No. 11 | August 2023

Clause by Clause Legal Analysis of Tax Audit Report

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Editorial

Dear Readers,

On 24th July, the Income-tax Department celebrated the 164th Income-tax Day, also known as 'Aaykar Diwas', to mark the historic introduction of income-tax in our Country. In 2010, the Income-tax Department decided to observe July 24th by declaring it as the "income-tax Day" to celebrate 150 years of income-tax in India. Since then, every year, 24th July is celebrated as Income-tax Day. Let me share some background on how we come to the conclusion that Income-tax has completed 164 years in our Country !

It's a known fact that income tax is being collected in India since the ancient times and there is a mention of this in old scriptures and books such as Manu Smriti, Kautalya's Arthshastra etc. However formal concept of income tax got established in India in 1860. British rule in India got established during the 19th century. After the Mutiny of 1857, the British government faced an acute financial crisis. To fill the treasury, the first Income-tax Act was introduced in February 1860 by Sir James Wilson (British India's first finance minister). The act received the assent of the governor-general on 24 July 1860, and came into effect immediately.

In 1886, the British Indian government passed a new Income Tax Act. This version of income tax remained in effect until the early 20th century and in 1922, the British Indian government replaced the then existing income tax legislation with the Income Tax Act of 1922. This comprehensive act redefined provisions related to income tax, introducing separate taxation for individuals, Hindu Undivided Families (HUFs), and companies. After India gained independence in 1947, the Income Tax Act of 1922 continued to be in force with several amendments. The government made various changes in tax rates, slabs, and exemptions to adapt to the changing economic and social conditions of the country. The Income Tax Act of 1961 replaced the earlier legislation and has since been operational and is part of India's income tax system.

Transition of the Income Tax department into the computerized era, began in 2002 when nationwide implementation of computerized processing of returns was introduced and the National website of the Income Tax Department was launched in the same year to provide a vital interface between the department and taxpayers. In 2020, Faceless Assessment Scheme and Faceless Appeal Scheme were introduced. These good measures introduced by the CBDT over the last two decades, have been useful and successful.

One of the main objectives of the Income Tax Day celebration is to raise awareness about the significance of taxes and encourage citizens to contribute to the nation's development by

fulfilling their tax obligations. As 164th Income tax day is celebrated, we are haunted by some of the questions such as —

- Is the current Income Tax Act, 1961, after 62 years a stable law as numerous amendments keep coming every year disregarding representations by the professional bodies and is the law really simplified as claimed by the Law Makers?
- As per the News report, for F.Y. 2022-23, as on 31st July 2023, 6.77 crore income tax returns are filed out of which 4.65 crore income tax filers paid zero tax and only 1.69 showed income above ₹ 1 crore. One wonders whether this number is true reflection of income earned by individuals in a population of 1.5 billion !

This year's Independence Day will mark the end of the 75-week celebration of Azadi ka Amrit Mahtosav, which began on March 12, 2021. This initiative of the Government has been quite successful in awakening the nation, creating patriotic zeal as the Country has begun its journey towards 100th year of Independence. Its very heartening to see our Country developing at a reasonably rapid pace and being rated as one of the most stable country in the world today and different progressive countries of the world look at India to be their partners in the economic fields. Indeed, the Amritkal has begun!

After the professionally busy month of July, the busy season for tax audit has set in and will continue till 30th September 2023. Tax Audit became applicable for the first time from A.Y. 1985-86 and there have been changes from time to time in the turnover limit as well as the reporting requirements. ICAI has issued Guidance Note on the subject which is being revised from time to time and there are other materials also available. However there are clauses in the Tax Audit Report on which expert views are required. Considering this, the Journal Committee has conceptualized this issue which besides tax audit, covers other important reports under the Income Tax Act. This issue would not only give guidance on the subject but would also help the reader in using this issue as a reference material. The Journal committee needs to be complimented for bringing this issue on a very important and relevant subject at the most appropriate time.

I express my sincere gratitude and appreciation to the authors of the articles for sparing their valuable time and sharing their expert knowledge.

I wish you all a Happy Independence Day and Happy Raksha Bandhan which falls on 30th August.

I would like to end this communication with a thought provoking quote by the father of our nation, Mahatma Gandhi

> ***"I want for India complete independence in the full English sense of that English term".***

Jai Hind!

VIPUL K. CHOKSI
Editor

From the President

Dear Members

I am thrilled to announce the formation of 15 robust committees for the 2023-24 term, all set to propel the multifaceted endeavours of our Chamber. The steady commitment and the vibrant energy displayed by these fifteen leaders and their dedicated teams have truly been inspirational. Joining me in this exciting journey is an exceptional team of office bearers, bubbling with an infectious energy and steady excitement. Their zeal to contribute and bring change is commendable and I believe it's this spirit that will lead us to newer heights. As we embark on this transformative journey together, we remain confident that with the support of all our members, the invaluable guidance from our seniors and past presidents, we are poised for remarkable achievements. Our collective endeavour will undoubtedly drive us towards realizing our shared vision for the Chamber.

As the July 31 tax deadline approached, I've witnessed the intense dedication many of you bring to this annual challenge. Despite our best efforts, last-minute details can still create pressure. It's essential we foster a culture of punctuality among our clients for smoother processes. While the journey to timely filings is ongoing, every year gets us closer to that ideal.

In the midst of the busy tax season last month, our vibrant student committee successfully organized two online meetings. Their ability to pull in enthusiastic participation from student members, even amid the hectic schedule of the July ITR deadline, was truly commendable. Alongside this, our Accounts and Audit committee, also held an informative virtual session. Their discussion on "Audit Trail – Legal and Practical Aspect" lead by CA Narasimhan Elangovan shed light on key facets, such as legal requirements as per the Companies Act, auditors' reporting obligations, and the practicality of technology usage.

The International Tax Committee is launching a comprehensive virtual course on Transfer Pricing this August. Renowned experts will explore complex issues in Transfer Pricing using case studies and interactive Q&A sessions. This timely course, set right before the compliance season, welcomes all interested participants.

I realize many of you are currently bracing yourselves for the impending Tax Audit Season. Amid this demanding period, I urge you all not to lose sight of the numerous festivities lined up, as they provide the perfect opportunity to recharge and celebrate amidst the hard work. Let's balance our professional obligations with personal joys as we navigate through this busy yet enriching period.

It brings me immense relief to share that Mumbai has already been blessed with nearly 60% of the season's rain by the end of July. With two more months of the monsoon season ahead, we remain hopeful that other regions will receive ample rainfall to boost our robust economy further.

The government has brought the Goods and Services Tax Network (GSTN) under the ambit of the Prevention of Money Laundering Act (PMLA). This will allow probe agencies like the Enforcement Directorate (ED) to seek information from the GST authorities and prevent tax evasion through generation of fake tax invoices. As per a government notification, issued on July 7, the Goods and Services Tax Network (GSTN) has been added as the 26th entity to the list of agencies, which are required to share information with the Enforcement Directorate and the Financial Intelligence Unit (FIU) under the PMLA. Many Central agencies like the Securities and Exchange Board of India (SEBI), Insurance Regulatory and Development Authority of India (IRDAI), Competition Commission of India (CCI), Reserve Bank of India (RBI), Serious Fraud Investigation Office (SFO), and Director General of Foreign Trade (DGFT), among other have already been included to the list of government bodies, which as mandated to share data with ED and FIU as per PMLA. This change allows agencies like the ED and FIU to access GSTN information, aiding the detection of tax evasion and money laundering. This enhances business transparency and honesty in record-keeping. Ultimately, these steps could potentially increase GST revenue for the country, thus supporting the economy. This amendment could increase business costs due to higher compliance needs and potential audits. The expanded access to GSTN data might lead to

potential misuse of power by agencies, possibly troubling honest taxpayers. Furthermore, extensive data sharing could raise concerns about privacy, emphasizing the need for strong data protection measures. In summary, while the amendment can aid in curbing tax evasion and money laundering, it is crucial to address potential challenges such as higher compliance costs, misuse of power, and privacy concerns to ensure the initiative's effectiveness and fairness..

India's top companies are grappling with the new Environmental, Social, and Governance (ESG) rules established by the Securities and Exchange Board of India (SEBI). Implemented on July 12, 2023, these regulations mandate the auditing and disclosure of non-financial data, significantly increasing the complexity and burden of regulatory compliance. This data, crucial for gauging a company's ESG performance, is often spread across various internal systems, making its aggregation a formidable challenge. The new rules necessitate what SEBI terms as "reasonable assurances" on nine indicators of the Business Responsibility and Sustainability Report (BRSR) Core, based on National Guidelines of Responsible Business Guidelines. These guidelines require a high degree of auditing rigor, akin to statutory audits, testing the abilities of internal and external accounting personnel. This shift is to be phased in gradually, affecting the top 150 companies in financial year 2023-24, extending to the top 250 in 2024-25, the top 500 in 2025-26, and finally reaching the top 1000 companies in 2026-27. As a result, many businesses are seeking consultation to identify gaps in their ESG processes and formulate strategies that will meet regulatory standards. However, the main difficulties lie in data harmonization, privacy concerns, and the complexities associated with elaborate supply chains. Companies with operations in multiple countries are tasked with standardizing data that may follow different metrics and disclosure timelines due to diverse regional regulations. Moreover, the requirement to disclose sensitive governance issues like gender pay disparity, related party transactions, and data breaches may reveal operational weaknesses that companies would prefer to keep private.

Perhaps the greatest challenge is the stipulation that ESG parameters should include data from supply chains. This involves collecting and auditing information from thousands of suppliers, varying greatly in size and sophistication, which can be a logistically daunting task. In essence, while SEBI's ESG rules are a positive move towards transparency and responsible business conduct, they present significant practical challenges for businesses. Success will require meticulous planning, governance, engagement with value chain partners, and advanced technology for managing sustainability information. It's clear that Indian companies will need to significantly upgrade their data management and auditing systems, ensuring the flow of reliable and accurate information for ESG compliance.

Further, this new ESG assurance regulation by SEBI is raising questions among top professional services firms. This new rule stipulates that the assurance providers and their associates must refrain from selling their products or offering any non-audit/non-assurance services to the entities they audit, aiming to prevent any potential conflicts of interest. These firms argue that this ruling is overly restrictive, as they often provide non-conflicting non-audit services such as tax compliance and advisory services, which are permissible under Section 144 of the Companies Act, 2013. This debate calls attention to a broader issue, not only affecting India but also being discussed globally - should statutory auditors or specialized consultancy agencies be responsible for conducting such audits? As the ESG audit process is gradually implemented, starting with India's top 150 companies in the financial year 2023-2024, this topic is becoming increasingly critical. While the regulation's intention is to uphold the integrity of the auditing process, its scope requires clarification. Some professionals argue that the rule should restrict only ESG advisory services and not extend to all non-audit services. However, there is also a view that the new regulation might lead to a more equitable distribution of work, promoting specialization in different audit areas.

As we proceed through this transition, it's imperative that our members understand the implications of these new regulations. The need for clarification from SEBI is crucial for professional services firms to continue offering their comprehensive services without undermining audit integrity. As we adapt to these changes, we are committed to keeping our members informed and prepared for the evolving landscape of corporate governance in India.

I'm delighted to announce our latest Journal edition focusing on the crucial topic of “Clause by Clause Legal Analysis of Tax Audit Report”. Thanks to our Journal Committee Chairman, Shri Ameya Kunte, for creating an insightful narrative. The issue provides an in-depth understanding of Tax audit compliance, especially Section 44AB, vital for financial transparency. I'm confident our members will find this issue a helpful and comprehensive guide. My gratitude goes out to all contributors and our hardworking committee, making each issue a triumph in addressing key topics.

With best wishes,

HARESH KENIA
President

CA Nihar Jambusaria

Overview of Tax Audit, Fundamental Concepts-Turnover, Presumptive tax, Tax Audit and Risk Assessment, ICAI Tax Audit - Quality Issues

Scope

This article deals with the brief history of the provisions for Tax Audit, evolution of Tax Audit over the years, basic concepts like sales, turnover, gross receipts, presumptive tax and Tax Audit and tax issues that come up before the ICAI which will also indicate risk factors in tax audit.

Audit under The Income tax Act, 1961 was introduced by the Finance Minister while presenting the Union Budget for 1984-85. Section 44AB was inserted in the Income tax Act with the aim of ascertaining compliance of various provisions of the Income tax law and to ensure that books of account and other records are properly maintained, claims of deduction are correctly made and they reflect the income correctly. Report is required to be given in Form No. 3CA/3CB and financial information is to be given in Form No. 3CD to be certified by the assessee and the auditor.

The scope of the section was expanded by providing that if a person declares lower income than the income deemed under the following Sections as deemed income, he shall be liable for Tax Audit-

S. 44AD,44AE,44AF w.e.f. A.Y. 1998-99

S. 44BB, 44BBB w.e.f. A.Y. 2004-05

S. 44ADA w.e.f. A.Y. 2017-18

Form No. 3CD is very comprehensive and covers almost all the items included in Form No 6B prescribed u/s. 142(2A) for reporting for special audit.

Let us look at the provisions of S. 44AB in brief.

Every person carrying on business or profession shall get his accounts audited, if the following conditions are satisfied-

a) A person carrying on business, if his total sales, turnover or gross receipts exceed ₹ One crore.

   However, in the case of such a person, if aggregate of all amounts received including the amounts received for sales, turnover or gross receipts during the previous year, in cash does not exceed five per cent of the said amount and of all payments made for expenditure incurred during the

previous year, in cash does not exceed five per cent of the said amount, then if sales, turnover or gross receipts exceed Rs. Ten crores,

b) A person carrying on profession, if gross receipts in profession exceed Rs. Fifty lakhs,

c) A person carrying on business to which S. 44AE or S. 44BB or S. 44BBB applies and he claims his income from such business to be lower than the amount deemed to be profits and gains of his business under any of these sections in any previous year,

d) A person carrying on profession to which S. 44ADA applies and claims his income from such profession to be lower than the amount deemed to be the profits and gains of such profession in any previous year,

e) A person carrying on business to which S. 44AD(4) applies and his income exceeds the maximum amount which is not chargeable to income tax in any previous year.

This section shall not apply to the person who declares profits and gains for the previous year as per S. 44AD(1) and his total sales, turnover or gross receipts do not exceed ₹ Two crores in such previous year and to the person who derives income of the nature specified in S. 44B or S. 44BBA.

Where a person is required to get the accounts audited under any other law, he shall furnish report of audit under that other law and further report under this Section.

Report of audit is required to be furnished as prescribed under Rule 6G as under-

1) In the case of a person carrying on business or profession who is required to get his accounts audited under any other law, audit report shall be in Form No 3CA and in any other case, in Form 3CB.

2) The particulars required to be furnished under S. 44AB shall be in Form No. 3CD.

Where an assessee is required to furnish a separate audit report under certain Sections like S. 80IA or 80IB or 80 IC, etc., he shall furnish the separate audit report under those sections and Tax Audit Report under this Section.

Business and Profession

Business is defined in S. 2(13) as 'Business includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture'.

There are large number of judgements deciding whether an activity is business or not. The question is one of facts and whether an assessee is engaged in a business or not depends upon the facts and circumstances of the case.

Profession is defined in S. 2(36) as 'Profession includes vocation.'

Sales, Turnover, Gross Receipts

What is sales, turnover or gross receipts has been a matter of debate in the past. These terms are not defined in the Income tax Act. One needs to understand the meaning from the definitions given in other Acts and also in the Guidance Notes issued for different purposes by ICAI.

The relevant portion of the definition of Turnover in different enactments is given below-

The Central Sales tax Act, 1956

Turnover means the aggregate of the sales price received and receivable by a dealer in respect of sales of any goods in the course of inter state trade or commerce……..

The Central Goods and Services Act - S. 2(112)

Turnover in state or turnover in Union Territory means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis) and exempt supplies made within a state or Union Territory by a taxable person, export of goods or services or both……….

Companies Act, 2013 - S. 2(91)

Turnover means gross amount of revenue recognised in the profit and loss account from the sale, supply or distribution of goods or on account of services rendered or both, by a company during the financial year

The following publications of ICAI also provide guidance on the interpretation of sales, turnover-

Guidance Note on Terms used in Financial Statements

Guide to Company Audit

Statement on the Amendments to Schedule VI to The Companies Act, 1956

The Statement on the Companies (Auditors' Report) Order, 2003

Sales, Turnover and Gross Receipts are commercial terms. The method of accounting followed by the assessee is also relevant for the determination of sales, turnover and gross receipts. A few typical cases given in the Guidance Note on Tax Audit under Section 44AB of The Income tax Act, 1961 issued by ICAI are a very useful guide in understanding these terms and are reproduced below-

i) 'Discount allowed in the sales invoice will reduce the sale price and, therefore, the same can be deducted from the turnover.

ii) Cash discount otherwise than that allowed in a cash memo/sales invoice is in the nature of a financing charge and is not related to turnover. The same should not be deducted from the figure of turnover.

iii) Turnover discount is normally allowed to a customer if the sales made to him exceed a particular quantity. This being dependent on the turnover, as per trade practice, it is in the nature of trade discount and should be deducted from the figure of turnover even if the same is allowed at periodical intervals by separate credit notes.

iv) Special rebate allowed to a customer can be deducted from the sales if it is in the nature of trade discount. If it is in the nature of commission on sales, the same cannot be deducted from the figure of turnover.

v) Price of goods returned should be deducted from the figure of turnover even if the returns are from the sales made in the earlier year/s.

vi) Sales proceeds of fixed asset would not form part of turnover since these are not held for resale.

vii) Sales proceeds of property held as investment property will not form part of turnover.

viii) Sale proceeds of any shares, securities, debentures, etc., held as investment will not form part of turnover. However, if the shares, securities, debentures etc., are held as stock-in-trade, the sale proceeds will form part of turnover.'

The turnover or gross receipts in respect of certain transactions in shares, securities and derivatives may be determined as under.

i. Speculative Transactions.

In a speculative transaction, the contract for sale or purchase entered into is not completed by giving or receiving delivery to result in sale as per the value of contract note. The contract is settled otherwise and squared up by paying the difference which may be positive or negative. In such transactions the amount of difference is turnover. Accordingly, the aggregate of the positive and negative differences is considered as turnover of such transactions.

ii. Derivative, Futures and Options.

These transactions are completed without actual delivery of shares, securities, commodities. They are squared up by receipts or payments of differences although the contract notes are issued for the full value of the underlying shares, securities, commodities. The turnover of such transactions is determined as under.

A) The Total of positive and negative difference

B) Premium received on sale of options

C) In respect of any reversed trade, the difference thereon will form part of the turnover.

iii. Delivery based transactions.

Total value of sales is considered as turnover.

In respect of transactions of purchase and sale of shares, question may arise whether the transactions of purchase and sale of shares result into business or capital account transactions. The following judgements are relevant to decide whether the transactions are in the nature of business or they are of investments.

CIT vs. P.K.N. and Co Ltd (1966) 60 ITR 65 (SC)

Saroj Kumar Mazumdar vs. CIT (1959) 37 ITR 242 (SC)

CIT vs. Sutlej Cotton Mills Supply Agency Ltd. (1975) 100 ITR 706 (SC)

G. Venkataswami Naidu & Co. vs. CIT (1959) 351TR 594 (SC)

The following circulars of CBDT are also useful guides for this issue.

CBDT Circular No. 4/2007 dated 15.06.2007,

CBDT Circular No. 6/2016 dated 29.02.2016 and

Letter F. No. 225/12/2016/ITA.II dated 02.05.2016

If the above transactions are for the purpose of investment and the profit or loss arising from these transactions is taxable under the head Capital gains, the value of such transactions is not to be included in sales or turnover to decide the applicability of audit under section 44AB.

The term gross receipts, is also not defined in the Income-tax Act. It includes all receipts in cash or in kind arising from business which will be assessable as business income under the Act. An illustrative list of items of income

and receipts that would be covered by gross receipts is given in the guidance note on tax audit issued by ICAI and is reproduced below.

(i) Cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India;

(ii) Any duty of customs or excise or service tax re-paid or repayable as drawback to any person against exports under the Customs and Central Excise Duties and Service tax Drawback Rules, 1995;

(iii) The aggregate of gross income by way of interest received by the money lender;

(iv) Commission, brokerage, service and other incidental charges received in the business of chit funds;

(v) Reimbursement of expenses incurred (e.g. packing, forwarding, freight, insurance, travelling etc.). If the same is credited to a separate account in the books, only the net surplus on this account should be added to the turnover for the purposes of Section 44AB;

(vi) The net exchange rate difference on export sales during the year on the basis of the principle explained in (v) above will have to be added;

(vii) Hire charges of cold storage;

(viii) Liquidated damages;

(ix) Insurance claims - except for fixed assets;

(x) Sale proceeds of scrap, wastage etc. unless treated as part of sale or turnover, whether or not credited to miscellaneous income account;

(xi) Gross receipts including lease rent in the business of operating lease;

(xii) Finance income to reimburse and reward the lessor for his investment and services;

(xiii) Hire charges and instalments received in the course of hire purchase;

(xiv) Advance received and forfeited from customers.

(xv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession

The following items would not form part of "gross receipts in business" for purposes of section 44AB.

(i) Sale proceeds of fixed assets including advance forfeited, if any;

(ii) Sale proceeds of assets held as investments;

(iii) Rental income unless the same is assessable as business income;

(iv) Dividends on shares except in the case of an assessee dealing in shares;

(v) Income by way of interest unless assessable as business income;

(vi) Reimbursement of customs duty and other charges collected by a clearing agent;

(vii) In the case of a recruiting agent, the advertisement charges received by him by way of reimbursement of expenses incurred by him;

(viii) In the case of a travelling agent, the amount received from the clients for payment to the airlines, railways etc. where such amounts are received by way of reimbursement of expenses incurred on behalf of the client. If,

however, the travel agent is conducting a package tour and charges a consolidated sum for transportation, boarding and lodging and other facilities, then the amount received from the members of group tour should form part of gross receipts;

(ix) In the case of an advertising agent, the amount of advertising charges recovered by him from his clients provided these are by way of reimbursement. But if the advertising agent books the advertisement space in bulk and recovers the charges from different clients, the amount received by him from the clients will not be the same as the charges paid by him and in such a case the amount recovered by him will form part of his gross receipts;

(x) Share of profit of a partner of a firm in the total income of the firm excluded from his total income under section 10(2A) of the Income-tax Act;

(xi) Interest, remuneration received by Partner from partnership firm (***Perizad Zorabian Irani vs. PCIT, Mumbai-WP No. 1333/2021-Bombay High Court-dated 09.03.2022***)

(xii) Write back of amounts payable to creditors and/or provisions for expenses or taxes no longer required."

In the case of professionals like Solicitor, Advocate, Chartered Accountant, if out of pocket expenses are reimbursed by the client and they are credited to separate clients account and utilized for making payments of stamp duty, registration fees or other expenses on behalf of the client, this will not be included in the gross receipts. However, if out of pocket expenses are collected by way of a consolidated fee by raising bill for professional services, it will be included in gross receipts.

In the case of Partner of a firm, any interest, any salary, any bonus, any commission, or remuneration, due to or received by a partner of a firm is chargeable under the head Profits and Gains of business or profession. However, as the partner carries on business of the firm, remuneration received from the firm cannot be regarded as gross receipt or turnover as held by the Bombay High Court in (***Perizad Zorabian Irani vs. PCIT, Mumbai-WP No. 1333/2021-Bombay High Court-dated 09.03.2022***).

Quality issues in Tax Audit

ICAI has constituted Tax Audit Quality Review Board (TAQRB). TAQRB suo moto selects the cases to be reviewed based upon its terms of reference. IT Department too can refer the cases where they believe that tax audit is not done appropriately. Such reports are reviewed by 3 level approach. 1st review is done by Individual Technical Reviewer, which at second stage is reviewed by a group constituted as TAQRG. The group gives its remarks and observations. The reports of the reviewer and the group are discussed and presented to the QRB at a meeting of TAQRB. The TAQRB takes the following steps.

i. If it is of the view that there were minor quality lapses, the board issues advisory to the member with an advice to take care in the future.

ii. If it is of the view that quality issues are of severe nature and are material, the case is referred to the Disciplinary Committee.

CA Milin Mehta CA Akshay Dave CA Sandip Chandrana

3CA, Part A of 3CD, Part B - Basic information, method of accounting, inventory valuation and ICDS, ICDS is very critical part here

Form No. 3CA

Applicability of Form

As per section 44AB of the Income Tax Act, 1961 ("the Act") every person carrying on business or profession is required to carry out an audit under the Act, if he fulfills the requisite criteria as provided in section 44AB(a) to section 44AB(e) of the Act. In order to reduce the burden to get books of account audited again (where books of accounts are already audited under other law e.g. Companies Act, 1956), third proviso to section 44AB provides that in case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance under section 44AB of the Act if such person gets the account of such business or profession audited under such other law and provides a report thereof along with a further report in the prescribed form. In this context, Form No. 3CA has been notified vide Rule 6G(1)(a) for issuance of tax audit report in such case.

Form No. 3CA, first part refers to the fact that the statutory audit of the entity has been carried out under applicable law by giving name of statutory auditor, date of audit report along with copy of audit report, audited balance sheet and profit and loss account and other documents annexed to audited balance sheet and profit and loss account. Guidance Note on Tax Audit u/s. 44AB of the Act – 2022-23 ("Guidance Note on Tax Audit") also prescribes that where the tax auditor carrying out the audit under section 44AB is different from the statutory auditor, a reference should be made to the name of such statutory auditor. Para No. 2 provides that Form No. 3CD is annexed to Form No. 3CA and details as required therein are furnished.

Para 3 of the Form No. 3CA requires the auditor to provide that in his opinion and to the best of his information and according to examination of books of account along with other relevant documents, the various particulars given in Form No. 3CD are true and correct subject to any observation or qualification if any. Guidance Note on Tax Audit provides that if the tax audit of a branch has been conducted by the same person doing branch audit, he should submit his report of tax audit in Form No. 3CA to the management or the principal tax auditor appointed for the

head office and such principal tax auditor should submit its consolidated tax audit report by stating the fact that he has considered such report while issuing final tax audit report.

In case the tax auditor is required to provide qualification in Form No. 3CA, the Guidance Note on Tax Audit provides that they should state such qualification in the audit report so that the same becomes comprehensive report and user of the audited statement of particulars can realize the impact of such qualification. He should be required to report reasons where any requirement in this form is answered in negative or with qualification.

3CD

Part A – Clause 1 to 8- Basic information

Clause 1: Auditor is required to ensure that name given under this clause is in line with Permanent Account Number (PAN). Further if there is change in the name during the previous year or after the end of the previous year but before signing of the tax audit report, such fact should be brought in this clause.

Clause 2: The address given under this clause should be consistent with address communicated to income tax department. In case of a Company/LLP, address of the registered office is to be stated.

Clause 3: Under this clause, permanent account number (PAN) allotted to the assessee should be indicated. Clause further asks to mention Aadhaar number (in case of Individuals) as an alternative. It may be noted that in the e-filing format, PAN is a mandatory field and Aadhaar is an optional field.

Clause 4: This clause requires to give registrations numbers or any other identification numbers, if any, allotted in case of an assessee liable to pay indirect taxes. It is important to consider following matters while reporting under this clause.

— All registration numbers given under this clause should be matching with registration allotted by respective departments/authorities as per allotment letter or certificate of registrations.

— In case of multiple registration numbers – all such registration numbers should be included. E.g. GST registration numbers in each state, registrations for various manufacturing units, service units, branches etc.

— It is important to ensure that complete list of registration numbers are covered under this clause and wherever the registration numbers are surrendered during the previous year, such fact should be mentioned by way of note in Form 3CD at least for one year in which such certificates are surrendered.

Clause 5: Under this clause, the status of the assessee is to be mentioned as referred under section 2(31) of the Act namely, individual, Hindu undivided family, company, firm, an association of persons or a body of individuals whether incorporated or not, a local authority or an artificial juridical person.

Clause 6: Under this clause, the previous year has to be stated which begins on 1st April and ends on 31st March. In case of amalgamations, demergers, reconstitution, new business, closure of existing business etc. the date of beginning/ending of the previous year may be different. The auditor shall mention the relevant date of beginning and ending of the previous year in this clause.

Clause 7: Under this clause, the assessment year relevant to the previous year for which the accounts are being audited should be mentioned.

Clause 8: The requirement of this clause of Form No. 3CD is to report the relevant clause of section 44AB under which the audit has been conducted. The said sections as per the present drop down menu in e-filing utility of tax audit report are 44AB(a), 44AB(b), 44AB(c), 44AB(d) and 44AB(e). In addition, the e-filing utility also provides for reporting as "Third proviso to section 44AB: Audited under any other law" under the drop-down option where books of account is audited under other law.

Clause 8a: This clause requires the assessee to mention relevant sections opted for taxation under any of the Section 115BA, 115BAA, 115BAB, 115BAC and 115BAD. It is very important to ensure that there is consistency in selection of appropriate section, since the option once selected cannot be subsequently withdrawn for the same or any other previous year.

Clause 9(a) and (b): This clause is applicable only in case of firm (including Indian LLP), AOP or BOI. Normally, the names of partner/members with profit sharing ratio shall be given. The term profit sharing ratio would also include loss sharing ratio since loss is nothing but negative profit. All the changes during the previous year like change in partners, members or profit-sharing ratio should be reported under this clause.

Clause 10(a) and (b): Assessee is required to carefully mention the sector and sub-sector in which the business or profession of the assessee falls considering the principal line of business. It is very important to select appropriate code considering the nature of business in which the assessee is involved. Further, any material change in the nature of business during the previous year should be precisely set out in form 3CD.

Clause 11(a) to (c): This clause requires to report on the list of books of account prescribed, maintained and examined. There may be differences between the three lists. The books of account prescribed are governed under Rule 6F for a person carrying on certain professions specified under Section 44AA (1). In case of person for whom the books of account have been prescribed under rule 6, the list of books of account so prescribed have to be stated under clause 11(a). The list of books of account maintained by the assessee should be reported under Clause 11(b). Section 44AA(2) provides that the person carrying on the business or profession other than those specified under section 44AA(1), shall keep and maintain such books of account and other documents as may enable the AO to compute his total income, if his income from business or profession exceeds the monetary limits prescribed under section 44AA(2) or his total sales, turnover or gross receipts in business or profession exceed the monetary limits prescribed under section 44AA(2) in any of the three years immediately preceding the previous year.

Clause 11(b) also requires to state the address at which such books of account are kept. In case the books of account are kept at more than one location then the details of address of each such location along with the details of books of account maintained thereof should be stated.

In case, where books of account are maintained and generated through computer system, the details of address of the place where the server is located or the principal place of business/Head office or registered office by whatever name called should be reported under clause 11(b). Where the books of account are stored on cloud or online, IP address (unique) of the same may be reported. It is mandatory to specify which books of account have been maintained in computer system and which of the records have been

maintained in hard copy form under this clause.

Clause 11(c) requires auditor to state the list of books of account that has been examined and nature of relevant documents which has been examined.

Clause 12: This clause requires to report profit and gains of the business which are assessable to tax under presumptive basis under section 44AD, 44AE, 44B, 44BB, 44BBA, 44BBB, Chapter XII-G, First Schedule or any other relevant section. Any other relevant section refers to the sections not listed above under which income may be assessable on presumptive basis like section 44D and section 115A(1)(b) and will include any other section that may be enacted in future for presumptive taxation. Though there is no mention about section 44ADA under this clause, however it should be reported under residuary clause i.e. under any other relevant section considering the intent of the clause.

It is critical to determine the amount of profit under any of the above provisions where the assessee has more than one business which includes business of the nature assessable on a presumptive basis. Auditor is required to perform detailed verification of how bifurcation has been made between two profits including basis of appropriation of common expenditures. Where the auditor is not satisfied with any of the basis considered by the assessee for allocation of the common costs, such fact should be stated in Form 3CD.

Part B - Clause No. 13 (d) to 13(f) - Income Computation and Disclosure Standards (ICDS)

Clause No. 13(d) requires the auditor to provide as to whether any adjustment is required to be made to profit and loss account so as to comply with ICDS under section 145(2) of the Act. If the answer is yes, details of such adjustments are required to be reported in clause No. 13(d). Further certain disclosure as required under ICDS is also to be reported vide clause No. 13(f).

ICDS Background

For computing income chargeable under the head "profit and gains of business and profession" or "income from other sources" Central Government had notified 10 ICDS under section 145(2) of the Act vide notification S.O.3079(E) dated 29-09-2016 as under:

ICDS I	Accounting Policies
ICDS II	Valuation of Inventories
ICDS III	Construction Contract
ICDS IV	Revenue Recognition
ICDS V	Tangible Fixed Asset
ICDS VI	Effect of Changes in Foreign Exchange Rates
ICDS VII	Government Grants
ICDS VIII	Securities
ICDS IX	Borrowing Cost
ICDS X	Provisions, Contingent Liabilities and Contingent Assets

Since it is computation and disclosure standards, it has been clarified by CBDT that ICDS is not issued for the purpose of maintenance of books of account. Further, where there is a conflict between ICDS and the provision of the Act, the Act shall prevail.

Applicability of ICDS

ICDS are applicable to all assessee (other than an individual or HUF who are not subject to tax audit u/s. 44AB of the Act) and shall apply in relation to assessment year 2017-18 and onwards. Further such ICDS are applicable where the assessee follows mercantile system of accounting. Therefore, ICDS are not applicable in case of cash system of accounting. Certain clarification by CBDT has given applicability of ICDS in specific cases. The same is summarized below.

- Person who are not required to maintain books of account or those who are covered by presumptive scheme of taxation e.g., 44AD, 44ADA, 44AE, 44BB etc., ICDS (e.g. Revenue Recognition, Construction Contract) are applicable to the extent of computing receipt or turnover for computing presumptive income under applicable section.
- ICDS are not applicable for computing Minimum Alternative Tax u/s. 115JB, Alternative Minimum Tax u/s. 115JC of the Act.
- In the absence of specific ICDS for real estate developers, BOT Projects and lease, relevant provision of the Act and ICDS shall apply to these transactions as may be applicable.
- In the case of Banks, Non-banking financial companies, Insurance Companies, Power Sector etc., general provision of ICDS shall apply to such persons unless there are sector specific provisions contained in the Act or in ICDS.

Conflict between Judicial decisions vs. ICDS which will prevail

FAQ No. 2 of CBDT Circular No. 10/2017 provides that since ICDS has been notified after due deliberations and after examining judicial views for bringing certainty on the issue covered by it, the provision of ICDS shall prevail over judicial precedents. This position has been challenged before the Delhi Court in the case of ***Chamber of Tax Consultants vs. UOI (2017) 87 taxmann.com 92***. In this case Hon'ble Delhi High Court has struck down such FAQ No. 2 as ultra virus by holding that ICDS shall not override binding judicial precedents or provision of the Act. The Delhi High Court had also struck down various provisions of ICDSs which are in conflict with judicial precedents or with the provision under the Act.

In order to overcome the above decision of Delhi High Court, the Finance Act, 2018 has made various amendments under the Act whereby various provisions of ICDS have been incorporated (refer section 43AA, 43CB, 145B) as part of law so as to validate the provisions of such ICDS which affects taxability and deductibility of various items covered as part of ICDS.

ICDS-I: Accounting Policies

ICDS-I deals with the application of significant accounting assumptions and policies in computation of income under the Act. The corresponding principles for maintenance of books of account/preparation of financial statements are governed by *Accounting Standard -1 Disclosure of Accounting Policies (AS-1)* for Non-ind AS entities and *Indian Accounting Standard -8- Accounting Policies, Changes in Accounting Estimates and Errors (Ind AS-8)* for Ind-AS entities.

Fundamental issue that arose is whether ICDS-I should be regarded merely a disclosure standards or even income computation standard. Para 3.4 and 3.5 of Technical Guide on Income Computation and Disclosure Standards issued by ICAI clarifies that ICDS-I

is not merely a disclosure standard because it requires income computation to factor in accrual, going concern and consistency. For example, accounting for derivative contracts not governed by ICDS-VI is covered under ICDS-I as clarified in FAQ No. 10 of CBDT Circular No. 10/2017 dated 23rd March 2017 read with para sub para (3) of para 8 of ICDS-VI.

Comparison between AS 1 and ICDS I – the fundamental accounting assumptions under both the standards remain the same i.e., Going Concern, Consistency and Accrual. Further, para 17 of AS-1 considers Prudence, Substance over form and Materiality as the primary consideration in selection and application of accounting policies by an enterprise so as to give a true and fair view of the state of affairs of an enterprise. On the other hand, ICDS-I does not regard materiality as consideration for selection and application of income computation and disclosure policies for reporting income under the Act. Accordingly, ICDSs require to consider all items of income to be considered irrespective of its materiality while computing the Income.

Another critical item which is required to be kept in mind while performing the tax audit is Mark to Market (MTM) loss or an expected loss. Para 4(ii) of ICDS-I provides that MTM loss or an expected loss shall not be recognized unless the recognition is in accordance with the provisions of any other ICDS. However, such MTM is permissible to be recorded under AS or Ind AS. Hence, adjustment with respect to such an item is required while computing the total income under the Act. As clarified under Question-8 in FAQ No. 10 of CBDT Circular No. 10/2017 dated 23rd March 2017, same principles as contained in ICDS-I relating to MTM loss or an expected loss shall apply mutatis mutandis to MTM gains or an expected profit.

Accounting policies adopted by a person shall be such so as to represent a true and fair view of the state of affairs and income of the business, profession, or vocation. Under Ind AS -1, deviation from requirement from Ind AS is allowed, if management concludes that compliance would make financial statements misleading. However, under ICDS standards are mandatory to be followed and there is no flexibility for such deviation. Accordingly, adjustment to such an extent may be required while computing the total income.

Para 6 to 10 of ICDS-I requires certain disclosures like significant accounting policies, changes in accounting policies, if any, the impact of such change, if material, in the previous year in which such change is adopted and in the previous year in which such change has material effect for the first time.

ICDS-II: Valuation of Inventories

ICDS-II applies to valuation of inventories except Work-in- Progress dealt with other ICDS e.g. WIP in case of construction contracts, Shares, Debentures and other financial instruments held as stock-in-trade dealt with by ICDS on Securities, Producers inventories of livestock and forest products, mineral oils, ores and gases to the extent that they are measured at net realizable value and machinery spares which can be used only in connection with a tangible fixed asset and their use is expected to be irregular dealt by ICDS on Tangible Fixed Assets.

Para 3 of ICDS-II states that inventories should be valued at cost or net realizable value (NRV), whichever is lower which is similar to AS-2 and Ind AS-2. However, there is an exception to this rule in respect of valuation of raw materials or other supplies held for use in production of inventories. According to para 21 of ICDS-II, materials and other supplies

held for use in production of inventories need not be written down below cost if the finished products in which they will be incorporated are expected to be sold at or above cost. However, it should be written down to NRV when there has been decline in the prices of material and it is estimated that the cost of finished products will exceed the NRV, the value of material shall be written down to NRV. Such NRV shall be the replacement cost of such materials.

Another important matter under ICDS-II is treatment of reversal of write down of inventories. Para 33 and 34 of Ind AS-2 requires a write-down to be reversed if subsequent to write-down, the selling price of the inventory item increases. AS-2 or ICDS-II is silent about the same i.e. it neither permits or prohibits such reversal. So one may take a view that such reversal should not be offered to tax by Ind-AS entities and should be adjusted in computation of income. However, under AS-2 & ICDS-II, valuation is required to be made by comparing NRV with Cost and not the carrying value. Therefore, effectively ICDS-II and AS-2 also permits reversal of earlier write-down.

The definition given for cost of conversion under para 8 of ICDS-II is identical to para 8 of AS-2 and para 12 of Ind AS-2. Cost of conversion broadly includes costs that are directly related to the unit of production, fixed production overheads and variable production overheads.

Para 11 of ICDS-II states that Interest and borrowing costs shall not be included in the cost of inventories, unless they meet the criteria for recognition of interest as a component of the cost as specified in the ICDS on borrowing cost. However, Para 12 of AS-2 states that interest and other borrowing costs are usually considered as not relating to bringing the inventories to their present location and conditions and are, therefore, usually not included in the cost of inventories. According to Ind AS-23, where borrowing costs are directly attributable to the acquisition, construction or production of a qualifying asset, it shall form part of the cost of that asset otherwise these will be recognised as expense. However, in case the borrowing costs are directly attributable to the acquisition, construction or production of inventories that are manufactured, or otherwise produced, in large quantities on a repetitive basis, paragraph 4 of Ind AS 23 provides that an entity is not required to capitalise borrowing costs on such inventories. Considering such variation between ICDS, AS and Ind-AS, one requires to evaluate applicable ICDS adjustment depending upon the facts of the case.

Para 13 to 17 of ICDS-II deals with cost formulae i.e. specific identification, FIFO and Weighted Average Cost which is similar AS-2 and Ind AS-2. Hence, the assessee who has been following applicable accounting standards i.e. AS-2 or Ind AS-2 may continue to use the cost formulae since these are ICDS compliant and there is no need to have any adjustment while computing the total income.

With respect to principles of cost of purchase of inventories under ICDS-II (para 5) and AS-2 (para 7), it is the same except for one difference. AS-2 specifically mentions that duty drawbacks should be deducted in determining the cost of purchase. The requirement of para 5 of ICDS-II on inclusion of duties and taxes in cost is in line with section 145A(ii) of the Act but it differs from AS-2 and Ind AS-2. Since compliance relating to provision of section 145A is required to be disclose separately under clause 14 of the Tax Audit Report, necessary disclosure to that extent can be made under this clause.

Inventories purchased on deferred settlement terms are not covered by ICDS-II and are not explicitly dealt with in AS-2, but the cost of inventories will generally be the purchase price for deferred credit terms unless the contract states the interest payable for such deferred terms. Whereas, Ind AS-2 states that any difference between the purchase price of inventories for normal credit terms and the amount paid for deferred settlement terms should be recognized as an interest expense.

Further in the tax audit report following disclosure is required to be made:

— The accounting policies adopted in measuring inventories including the cost formulae used where standard costing has been used as a technique for measurement of cost, details of such inventories and a confirmation of the fact that the standard cost approximate actual cost and

— The total carrying amount of inventories and its classification appropriate to a person.

ICDS-III: Construction Contracts

ICDS-III deals with recognition of cost and revenue in relation to construction contracts which are in nature of fixed price contract, cost plus contracts or hybrid contracts. It provides that the contract revenue and contract costs should be recognized as revenue and expense with reference to stage of completion of contract on reporting date by following percentage of completion method ('POCM'). Further it has been clarified by CBDT that ICDS-III is not applicable for real estate developers and BOT Projects and lease and applicable provision of the Act shall apply.

The provisions of ICDS-III are mainly in line with AS-7. Also, Ind AS-115 requires recognition of revenue over a period of time (like POCM) on fulfilment of applicable condition. However, there are a few differences which may need to be considered and accordingly necessary adjustments should be made while offering income to tax.

Where the outcome of the early stage of contract (not more than 25% of the stage of completion) cannot be estimated reliability, income to the extent of cost incurred is required to be recognized under ICDS-III. AS-7 provides the identical condition except absence of specific criteria relating to percentage of completion of contract. Accordingly, if no income is recognized in books in absence of reliability of estimate, the income is required to be offered to tax under ICDS if stage of completion of contract is more than 25%.

Whereas AS-7 is silent on inclusion of retentions in contract revenue, Para 10 of ICDS-III read with section 43CB provides that contract revenue shall comprise of amount of revenue agreed including amounts of retentions. Accordingly, retention money is to be included in contract revenue. Here, it is important to note that despite the condition laid down in contract for release of retention money are not fulfilled, the provisions of ICD-III require to recognize proportionate retentions revenue to the extent of work performed. However Technical Guide on ICDS issued by the ICAI provides that one would have to ascertain whether test of accrual under section 5 of the Act is satisfied or not since section 5 would prevail over provisions of ICDS-III in case there is conflict between the two. However, considering the amendment made in section 43CB, the argument that the principle of accrual as provided in section 5 will override is highly litigative.

Further ICDS-III and AS-7 allow the netting off of incidental income from contract cost. However, ICDS-III further provides that such incidental income shall not include interest income, dividend, or capital gain.

Para 19 of ICDS-III provides that when stage of completion under POCM is determined by reference to cost incurred up to the reporting date, cost that reflect work performed should be considered & included in cost incurred up to the reporting date. However, any cost relating to future activity is prohibited to be considered while applying POCM. Hence, expected loss on construction contract is not allowable as deduction. Also, ICDS-I provides that the expected losses shall not qualify as a deduction unless specifically permitted under any provisions of the Act. However, para 35 of AS-7 provides that expected losses shall be recognized in the financial statement. Thus, one will have to make a distinction between incurred losses and expected losses and suitable adjustment is required to be made to taxable income while applying provisions of ICDS-III.

Further tax audit form requires auditor to make certain disclosures with respect to construction contracts i.e. (i) amount of contract revenue recognized as revenue in the period (ii) method used to determine stage of completion of contract (iii) amount of cost incurred and recognized profits (net of losses) up to reporting date (iv) amount of advance received and (v) amount of retentions.

ICDS-IV: Revenue Recognition

ICDS-IV deals with recognition of revenue arising from sale of goods, rendering of services and passive income in nature of interest, royalties, and dividend.

As per ICDS-IV, income from sale of goods is required to be recognized when all significant risk and rewards relating to ownership have been transferred. However, Ind AS-115 requires to recognize revenue from sale of goods either at a point in time (like transfer of risk and reward) or over a period of time on cost or relevant key basis as per detailed criteria provided in such Ind AS. If in case such income is recognized not based upon the criteria of risk and reward in books, ICDS adjustment may arise to such extent.

Further Ind AS-115 provides recognition of fair value of consideration by discounting all future receipts using imputed rate of interest in case where seller has extended interest free credit or credit at low rate of interest resulting into financing transaction. The provisions of ICDS-IV do not permit the recognition of income on such basis. Hence, while computing total income, the revenue should be recognized without any discounting and necessary adjustment in that regard should be made.

Another important distinction in AS-9 and ICDS-IV is with regard to method used for recognition of revenue from rendering of services. ICDS-IV prescribes that revenue from rendering of services has to be recognized by applying POCM. Para 12 of AS-9 gives an option to recognize revenue from services on completed service contract method. Since ICDS-IV does not provide such option (except where duration of contract is less than 90 days), necessary adjustment shall be required to be made to taxable income to bring recognition of revenue basis POCM method.

In case of hybrid transaction, i.e. where transaction involves both sale of goods as well as rendering of services, the present provision of ICDS does not provide any guidance as to recognition of revenue. In such case, one has to examine what is predominant aspect of the transaction or whether consideration

can be divided into sale of goods and sale of services. If circumstances so suggest, a necessary adjustment should be made while computing taxable income in this regard.

The provision of Para 8(1) of ICDS-IV requires that interest shall accrue on a time basis and calculated on the basis of amount outstanding and at applicable rate of interest. Thus, ICDS-IV requires recognition of interest income on time proportionate basis. However, provisions of the Act provide recognition of interest income on any other basis, the same would prevail and such income may accordingly be adjusted for computation of taxable income purpose e.g. the provisions of section 145A(b) provide that interest received on compensation or enhanced compensation shall be deemed to be income of the year in which it is received. Thus, in such case, irrespective of provisions of ICDS-IV as well as method of accounting followed by the taxpayer, such interest income would subject to tax in year of actual receipt only. Such differences in the provision of ICDS vis-à-vis provisions of the Act should be taken care.

Further, with reference to principle of recognition given with respect to interest income at Para 8 of ICDS-IV, another important distinction which can be evaluated is with reference to interest on debt security where interest becomes due and payable on a particular day for e.g. on 30th June or 31st December every year. In such case, by relying upon the judgement of Bombay High Court in case of ***DIT vs. Credit Suisse First Boston (Cyprus) Ltd [2013] 351 ITR 323***, a view can be taken that right to receive such interest income is established on a date when interest becomes due and payable and not prior to such date. Thus, if such view is followed, an adjustment may be required in computation of total income where interest on debt security is recognized in books on time proportionate basis.

In respect of recognition of income in form of Royalty, the provisions of ICDS-IV as well AS-9 provides that it should be recognized as per terms of accrual provided in relevant agreement except where there is other systematic and rational basis available having regard to the substance of transaction. Thus, the provisions of ICDS-IV provide freedom to taxpayer to decide basis of recognition of income in nature of royalty which is systematic and more rational considering substance irrespective of the terms of agreement. Also, it is important to note that where taxation of royalty is governed as per provisions of Double Tax Avoidance Agreement (DTAA) where it is more beneficial, in such case provisions of ICDS-IV shall not apply as tax treaty overrides provisions of the Act as provided in section 90 of the Act. There are judicial decisions available [Refer ***Saira Asia Interiors (P.) Ltd vs. ITO (2017) 164 ITD 687***] which provides that under provisions of relevant DTAA, income from royalty shall not be taxed unless same has actually been received. If such view is relied, the provisions of ICDS shall not apply and same would require necessary adjustment while computing taxable income.

Apart from above differences requiring analysis and quantification of adjustments required in computation of income, tax audit form requires auditor to make certain disclosures with respect to Revenue Recognition i.e. (i) amount of revenue from sale of goods not recognized due to lack of reasonable certainty of its collection (ii) revenue from service transactions recognized during the year (iii) method used to determine stage of completion for service transactions (iv) for services transactions,

amount of cost incurred and recognized profits (net of losses), amount of advance received and amount of retentions.

ICDS-V: Tangible Fixed Assets

ICDS-V deals with the expenditures that can be considered as "actual cost" of a tangible fixed asset, which shall form the "block of Asset" for the purpose of charging depreciation under section 32 of the Act. ICDS-V defines tangible fixed assets as an asset being land, building, machinery, plant, or furniture held with the intention of being used for the purpose of producing or providing goods or services. While on the other hand the corresponding Ind-AS 16 and AS-10 lay down criteria for recognizing plant, property, and equipment, if its cost can be reliably measured and it is probable that future economic benefits would flow through the assets.

Ind AS and AS consider the "materiality" and "judgement" criteria to recognize a tangible asset, thereby a low value tangible asset may be expensed out. However, ICDS does not provide any such exception for materiality and thereby every tangible asset which meets the recognition criteria has to be capitalized irrespective of the quantum of its cost.

Certain tangible assets may undergo major improvement and repairs over their life. In this context, Ind AS-16 and AS-10 provide that cost of replacing a part of asset or cost of major inspection is to be added to carrying amount of asset if it meets the recognition criteria. However, for ICDS-V a subsequent expenditure on a tangible asset can be added to "actual cost" only when such expenditure increases the future benefit from the existing asset beyond its previously assessed standard of performance.

While determining the cost of an asset, Ind-AS and AS also consider future cost over and above the cost of the asset, and include initial estimates of the cost of dismantling, removing and restoration of site as well. However, ICDS-V just considers the "actual cost" incurred as cost of the tangible asset. Thereby such cost of dismantling etc. are not to be considered as "actual cost" considering the ICDS framework.

In case of acquisition of a tangible fixed asset in exchange for shares and securities, ICDS-V states that the fair value of the tangible fixed asset shall be its actual cost. While on the other hand the Ind-AS and AS recognize such tangible fixed asset at fair value of shares and securities or the tangible fixed asset whichever is more evident.

ICDS-V also requires certain disclosures with regard to description of block of asset, rate of depreciation, actual cost or written down value (WDV), details of addition and deletion, depreciation allowable and WDV at end of the year. These disclosures are in line with Clause 18 of the Tax Audit Report and therefore an appropriate reference can be made to such clause in compliance with the disclosure's requirements of the ICDS-V.

ICDS-VI: Effects of Changes in Foreign Exchange Rates

ICDS-VI provides that, subject to provision of section 43A of the Act, monetary and non-monetary foreign currency transactions are required to be recorded at the rate prevailing on the date of transaction (Similar to AS-11 & Ind AS-21). On the closing date outstanding monetary transactions are required to be restated. Accordingly, under ICDS-VI both realized and unrealized exchange gain or loss are required to be considered while computing taxable income whereas non-monetary exchange gain or loss is considered only when it is realized. (Similar to AS-11 & Ind AS-21).

Section 43A provides the tax treatment of exchange loss/gain for restatement of creditor/ loan relating to acquisition of an asset from a country outside India. However, if the foreign borrowing was utilized for the purpose of construction or acquisition of an asset within India, there were conflicting ruling of various courts regarding its taxability/allowability. However, in view of ICDS-VI read with insertion of section 43AA, now such exchange variation (both realized and unrealized) is required to be considered while computing business income.

Further AS and Ind-AS require restatement of both monetary and non-monetary items for recording exchange variation while incorporating operation of a foreign branch of an entity. In the case of AS-11 such exchange variation is required to be adjusted to reserve (foreign currency translation reserve) and in case of Ind AS-21, in OCI and reclassified from equity to profit or loss on disposal of net investment of such branch. However, ICDS-VI requires to consider only realized/unrealized exchange variation on restatement of monetary items of foreign branch operation. Accordingly, while computing taxable business income, to the extent exchange difference relates to monetary items, the same is required to be offered to tax/claimed separately as ICDS-VI adjustment, since the same is adjusted in FCTR Reserve or OCI account in books of account.

AS-16 and Ind-AS require certain exchange differences arising from foreign currency borrowing as regarded as adjustment to interest cost on loan taken for capital purpose as computed in the manner under such accounting standard. In view of the same, such exchange difference may be capitalized as part of cost of asset or debited to profit and loss account as interest cost as per such accounting standard. However, under ICDS-VI such exchange difference is required to be recognized in profit and loss account as exchange difference unless it is hit by section 43A. In such case there arises an ICDS adjustment on account of such different treatment under accounting standards and ICDS.

ICDS-IV requires to recognize mark to market gain/loss if it is related to hedging of actual foreign currency transaction represented by asset or liability. If the forward contract is entered into for trading purposes or speculation purpose or it is intended to hedge the foreign currency risk of a firm commitment or a highly probable forecast transaction, then entire premium, discount or exchange difference on forward contract shall be recognized at the time of settlement. To such extent there could arise ICDS-VI adjustments in case mark to market gain or loss accounted in books of account related to such transactions.

Foreign currency derivatives are not within the scope of ICDS-VI. In this regard it has been clarified by CBDT vide FAQ No. 10/2017, dated 23-03-2017 that provision of ICDS-I would apply in respect of derivatives contracts.

There is no disclosure requirement in respect of ICDS-VI under tax audit report.

ICDS-VII: Government Grants

ICDS-VII provides the manner of dealing with Government Grant while computing taxable income.

ICDS-VII defines "Government Grants" are assistance by the Government in cash or kind to a person for past or future compliance with certain conditions. E.g. IT subsidy or reimbursements receivable as per applicable state policy or central government policy on fulfillment of applicable conditions. However,

such Government Grants exclude those forms of assistance which cannot have a value placed upon them and the transaction with Government from a normal trading transaction of person. E.g. free technical or marking advice by government, provision for guarantees by government, Purchase policy of government to acquire agriculture products or procurement policy to purchase goods/service from MSME giving benefit of higher price to such industry.

ICDS-VII provides that Government Grant should not be recognized until there is reasonable assurance that the person shall comply with the conditions attached to them and the grant shall be received. This is line with AS-12 and Ind AS-20 being accounting standards applicable in the case of government grants.

ICDS-VII read with section 145B (3) of the Act further provides that recognition of the Government Grant shall not be postponed beyond the date of actual receipt.

It is to be noted that ICDS-VII does not provide exact timing of recognition of Government Grant (except in case of receipt of Government Grant) but provide a negative clause for recognition. Further section 145B (3) of the Act also does not provide timing of recognition of government grant when entity has followed accrual basis. In this regard, it is important to refer the decision of Apex Court in the case of Excel Industries Limited 358 ITR 295 & decision in the case of Godhra Electricity Company Limited 91 Taxman 351 wherein it was held that in absence of right to receive, the amount cannot be regarded as income. Accordingly, though the position may be litigative, it can still be argued that if no claim has been made or the claim of government grant is not approved by the applicable government authority, there is no right to receive such grant and in absence thereof such income shall not be taxable under the Act. Hence there may be inconsistency of ICDS-VII to such an extent.

In case Government Grant relates to depreciable assets, ICDS-VII provides to reduce the same from the cost of asset/block of asset. AS-12 also provides the same treatment however alternatively under AS-12 the same may be treated as deferred income over the useful life on systematic basis. In case such an alternative approach is followed, necessary adjustment is required to be made under ICDS-VII.

AS-12 provides that Government Grant in the nature of Promotor's Contribution is required to be credited to reserve account whereas under ICDS-VII Proportionate portion of the Government grant shall be deducted from the actual cost or WDV of the asset in the manner provided in ICDS-VII. To this extent there may arise ICDS-VII adjustment and the same is required to be reported in tax audit report.

Further necessary disclosure in respect of Government Grant bifurcating into amount reduced from actual cost or WDV, amount required to be recognized as income and reason for non-recognition of government grant under ICDS-VII with reason thereof is required to be stated.

ICDS- VIII: Securities

ICDS-VIII is broadly divided into two parts i.e., Part A which deals with securities held as stock-in-trade and Part B which deals with securities held by a scheduled bank or public financial institutions formed under a Central or State Act or so declared under the Companies Act, 1956 or Companies Act, 2013. Therefore, mutual funds, banks other than scheduled banks, insurance companies and non-public financial institutions are not covered by ICDS-VIII. Further, Securities held

by foreign institutional investors are treated as capital assets under the provisions of section 2(14)(b) of the Act, including securities which could otherwise be considered to be held as stock-in-trade by such entities, and therefore this part of ICDS-VIII will also not apply to such assessee. Further ICDS-VIII is not applicable to derivatives.

There is no difference at the time of initial recognition of securities between ICDS-VIII and AS-13 i.e., a security on acquisition shall be recognized at actual cost and actual cost comprises of its purchase price plus acquisition charges such as brokerage, fees, tax, duty, or cess. (Para 4 to 6 of ICDS-VIII). As per Ind AS -109, securities are financial instruments and initial measurement is always at fair value plus transaction cost in case of securities other than those classified as FVTPL. Subsequent measurement of securities depends upon classification of securities into either Amortized Cost or FVTPL or FVTOCI.

There is difference in accounting as per AS-13 with respect to securities acquired in exchange of other securities or another asset. Para 6 and 7 of ICDS-VIII states that whereas security is acquired in exchange of other securities or another assets, the fair value of security so acquired shall be the actual cost. As per AS-13, if an investment is acquired or partly acquired, by issue of shares or other securities, the acquisition cost should be the fair value of the securities. Similarly, in case of investment acquired in exchange for another assets, the acquisition cost of the investment should be determined by reference to the fair value of assets given up. This results in a difference in cost as per AS-13 and ICDS-VIII. Therefore, while computing gain/loss on sales of such securities for income tax purposes, these differences would have to be factored in while claiming deductions of cost and adjustments will have to be made in computation of total income.

Another aspect to be understood while computing the income under the act is valuation of securities under ICDS-VIII and AS-13. Though ICDS-VIII and AS-13 suggest the same principle for valuation of securities subsequent to acquisition i.e., lower of cost or NRV but there is difference in mechanism as to how it should be calculated. ICDS-VIII suggests following the aggregation approach before comparison of cost or NRV i.e., all securities held to be bifurcated into Shares, Debt Securities, Convertible Securities, and any other securities not covered in the first three categories. Unlike AS-13, which requires comparison of cost and fair value to be done individually security wise. Accordingly, this may result in a difference and a necessary adjustment is required to be made while computing the income.

Further, para 12 of ICDS-VIII mandates valuation of securities at cost at the end of the previous year which are not listed on recognized stock exchange or listed but not quoted on a recognized stock exchange with regularity from time to time. AS-13 does not distinguish between the securities as listed or listed but not quoted on a recognized exchange with regularity from time to time. Accordingly, under AS-13, all securities to be valued at cost or fair value, whichever is lower. Therefore, the difference arising on account of the value of closing stock as per AS-13 and this ICDS would need to be considered in computing the total income. I

There is no disclosure requirement in respect of this ICDS under tax audit report.

ICDS-IX: Borrowing cost

This standard provides the manner of capitalization of borrowing cost (interest and other borrowing related expenditures).

In line with provision of section 36(1)(iii) of the Act, borrowing cost specifically incurred for acquisition of a tangible fixed asset and intangible fixed asset is required to be capitalized till the date on which such asset is put to use. However, under AS-16 or Ind AS-23, borrowing cost specifically incurred for acquisition of asset is required to be capitalized as part of cost of asset only where such asset generally take 12 months or more time to ready to use. To such an extent, there can arise ICDS adjustment for capitalization of borrowing cost for tax purpose with respect to such asset.

ICDS also provides capitalization of interest cost to inventory if such inventory takes more 12 months or more to bring them to salable condition (similar to AS-16/Ind AS 23). However, it has been clarified by ICAI in Technical Guide on ICDS that such tax treatment is not line proviso to section 36(1)(ii). Such proviso to not applicable to stock in trade as held by the Bombay High Court in the case of ***CIT vs. Lokhandwala Construction Industries (2003) 260 ITR 579***. Therefore, the provisions of the ICDS are in conflict with section 36(1)(iii).

ICDS-IX provides that General Purpose borrowing cost is also required to be capitalized as part of Tangible Assets, Intangible Assets or inventory provided such assets require a period of 12 months or more for its acquisition, construction, or production on given formulae basis. The same is in line with AS-16 or Ind AS-23. However, section 36(1)(iii) covers a situation where funds are borrowed specifically for acquisition of assets. To that extent it can be arguable that general purpose borrowing is not required to be capitalized under the Act.

Under AS-16, income on temporary investment of borrowed funds which are specifically borrowed for obtaining a qualifying asset, can be netted off from borrowing cost. However, under ICDS-IX no netting off from cost of asset is permissible.

It is to be noted that ICDS-IX does not permit suspension of capitalization of borrowing cost. However AS 16, Ind AS permits such suspension of borrowing cost during periods in which active development is interrupted.

Further Intangible Assets are not defined as qualifying assets under AS-16 whereas ICDS-IX covers Intangible Assets as part of qualifying assets for the purpose of capitalization of borrowing cost.

ICAI Technical Guide on ICDS provides that the deductibility of Borrowing Costs would depend upon the provision of the respective section and would not be governed by the provisions contained in this ICDS.

Technical Guide on ICDS issued by ICAI provides that the accounting policy required to be disclosed in respect of borrowing costs would be the policy followed as per ICDS I. Further the ICDS requirement of disclosure of the amount of borrowing costs capitalized during the previous year on an aggregate basis. The amount of borrowing cost capitalized during the previous year should be the borrowing cost that required to be capitalized under this ICDS. It is, however, necessary to keep the details of block -wise, capitalization of borrowing costs to tally the total figure with the additions to the respective blocks of assets.

ICDS-X: Provisions, Contingent Liabilities & Contingent Assets

This ICDS deals with Provisions, Contingent Liabilities and Contingent Assets. It corresponds to AS-29 and Ind AS-37. The language of this ICDS is however closer to that

of AS-29, and significantly different from that of Ind AS-37.

This ICDS specifically excludes provisions, contingent liabilities and contingent assets resulting from financial instruments, executory contracts, and insurance business from contracts with policy holders. This also excludes provisions, contingent liabilities and contingent assets governed by other ICDS i.e., ICDS-III, ICDS-VI and ICDS-VIII. This also excludes all executory contracts and not just executory contracts which are not onerous, unlike AS-29 and Ind AS-37.

Before we move forward to understand this ICDS, it is very critical to understand the various definitions given under this ICDS vs AS 29/Ind 37. Para 4(1)(a) of ICDS-X and Para 10.1 of AS 29 defines provision as liability which can be measured only by using a substantial degree of estimation. Para 10 of Ind AS-37 defines provision as liability of uncertain timing or amount. ICDS and AS emphasis on degree of estimation whereas Ind AS-37 focuses on uncertainty involved with respect to timing and amount.

The definition of "liability" "contingent liability", "contingent assets" and "executory contracts" as per this ICDS are consistent with the definition of the term in both AS-29 as well as Ind AS-37. There is no difference in the definition of present obligation as per ICDS and AS-29. However, present obligation is not defined under Ind AS-37.

The definition of "obligating event" is again identical to the definition contained in AS-29. Ind AS-37 has a slightly modified definition as it qualifies the term "obligation" with the term "legal or constructive". In Ind AS-37 therefore, an obligating event occurs not only when a legal obligation arises, but also in a case where a constructive obligation arises.

ICDS also provides that in respect of new law which is yet to be enacted, obligation can arise only when the law is enacted whereas under AS and IND AS it would be sufficient if there is a possibility that the new law will be enacted for an obligation to arise.

Another difference in ICDS and AS-29 or Ind AS-37 is under measurement para, Para 12 of ICDS-X and para 35 of AS-29 – both requires that provision should not be discounted to its present value. Para 45 of Ind AS-37 requires discounting to the present value where the effect of time value of money is material. Hence, necessary adjustment is required to be made in 3CD with respect to this difference.

ICDS-X provides that Contingent Assets and related income is required to be recognised when there is a reasonable certainty that inflow of economic benefit will arise. Whereas AS & Ind-AS requires more stringent condition of virtual certainty for accounting such asset in books of account. Therefore, under this ICDS, the recognition of a contingent assets would be sooner than that under accounting standards.

Similar to the above, for recognition of reimbursement in respect of a provision, ICDS permits to recognize basis reasonable certainty whereas AS-29 allows only upon virtual certainty. Accordingly, the adjustment with respect to this is required to be made while computing the total income.

Further, necessary disclosure in respect of each class of provision as stated and para 21(1) and for each class of assets and related income recognized as stated in para 21(2) of this ICDS should be made in form 3CD. Further it has been clarified by CBDT that provisioning for employee benefits under AS-15 shall continue to be governed by the respective Act and not dealt with by ICDS-X. Accordingly,

no disclosure in respect of such provision is required.

Clause No. 14- Method of Valuation of closing stock and deviation from the method of valuation prescribed under section 145A of the Act and effect thereof on profit and loss account.

Under this clause, Auditor is required to provide the method of valuation of closing stock used while computing valuation of stock in audited books of account. As per AS-2 and Ind AS-2 on inventories, such standards require disclosure of accounting policy adopted for valuation of inventories in audited books of account. Considering the same the reporting of the same can be made by inviting reference to such clause or producing such accounting policy at such clause.

Further there is also a requirement to report deviation from the method of valuation prescribed under the Act and its effect on profit and loss account. Section 145A of the Act valuation of inventories, purchase and sale of goods and services shall be made inclusive of duties and taxes whether or not they are subsequently recoverable from the taxing authority.

The above inclusive method is not permitted under AS-2 or IND AS-2 which are mandatory standards for valuation of inventories. In view of the above, adjustment under section 145A is required to be made in all cases where the exclusive method of accounting is followed in books.

In case of increase in value of sales of goods and services and closing stock on account of inclusion of such taxes, there would be an adjustment of increase in profit whereas in case of increase in value of purchase of goods and services & opening stock on account of inclusion of such taxes, there would be a decrease in profit.

It may be noted that the GST is on supply of goods and services and not leviable on manufacturing of goods. Accordingly, there is no requirement to create provision for expenses for GST on closing stock of finished goods. Hence there is no need to include GST as part of valuation of closing stock of finished goods. However, to the extent of GST is not included in the RM and Other Cost (which are subject to GST) while computing valuation of finished goods as per books of account, the amount thereof to that extent is required to be included while valuing closing stock. In this regard it is important to refer the decision of Apex Court in the case of Indo Nippon Chemical Co. Ltd 261 ITR 275 wherein the Apex Court held that to the extent of the Modvat credit on the unconsumed raw material no income can arise under the Act.

Further Guidance Note issued by ICAI in 2014 provides that irrespective of the method followed for accounting the excise duty, the resultant profit would be same. Vide para 23.15 of such Guidance note the ICAI has analyzed the provision of Section 145A and reached the conclusion that there will be no impact on the net profit of the company by either following inclusive method of accounting as per the provision of Section 145A. It is however to be noted that the recent Guidance Note on Tax Audit issued for AY 2022-23 does not contain any such example. However the earlier Guidance Note (2014) example can be evaluated under the present situation to determine the effect of inclusive method of accounting on taxable income.

CA Kishor Phadke

Capital asset converted into stock-in-trade, Amounts not credited to the profit and loss account, Various deductions including depreciation, Tax loss deduction, Tax Incentive deductions

Prologue

Reporting under form 3CA/3CB coupled with form 3CD is demerging as a challenge in this e-compliance world. At one hand, the Tax Auditor has to ensure normal auditing compliances and at the other hand, the Tax Auditor is expected to carry out a mini-assessment of related situations. For such mini-assessments, apart from robust knowledge of the latest updates of judicial rulings/CBDT circulars/notifications, etc.; study of accounting systems of the assessee, the study of the manner in which computation of income is made by the assessee, etc. are also relevant. TAR has emerged ahead of a rudimentary compliance and has become, a part of the collective e-processing systems where, many actions are to trigger based on info in form 3CD. Hence, one needs to be cautious as well as transparent apart from being true and fair.

Clause 15 - Capital asset converted into stock-in-trade

Clause in TAR reads as under -

15. Give the following particulars of the capital asset converted into stock-in-trade:-

(a) Description of capital asset; ....

(b) Date of acquisition; ....

(c) Cost of acquisition; ....

(d) Amount at which the asset is converted into stock-in-trade ....

Remarks

1. **Background** – A phenomenon of converting a capital asset into stock-in-trade exists in Income-tax. In yesteryears, the difference between the cost of a capital asset and market value on conversion was held not taxable under the head "Business Income" since, for finding out business income, it was thought essential to record the stock-in-trade at market value. To overcome the plausible tax loss, section 45(2) was introduced. An obligation was cast upon the Tax Auditor to provide details of the said transaction.

2. **Relevant sections and scope in Tax Audit Report ('TAR')** – We need to consider sections 45(2) and 2(47) of the Income-tax Act, 1961 ('the Act') in this context. Section 45(2) of the Act refers to two different situations, first of "conversion" and second of "treatment" of a capital asset into stock-in-trade. The wording in clause-16 refers to merely the "conversion" phenomenon. The clause does not require details regarding the taxability of capital gains or business income arising from such deemed transfer. Further, there is no opinion sought to be expressed by the Tax Auditor. As such, this clause appears merely informative. Artificial Intelligence ('AI') of The Centralised Processing Center ('CPC') is becoming more and more robust every day. At some future date, this information is certain to be used working of business income as well as, pro-rata capital gain.

3. **Compliances in TAR – Date & Cost of acquisition** - The particulars to be stated under clauses 15 (b) and (c) should be furnished with respect to the previous year in which the asset has been converted into stock-in-trade. This reporting is to be done one-by-one for each of such conversions. For ascertaining the correct date, the tax auditor will have to refer to the accounts of the financial year in which such capital asset is acquired. The date assumes importance to determine whether the asset is long-term or short-term in nature. The cost of acquisition as per the books of account is to be mentioned. In the case of depreciable assets, the carrying cost that appears in the books will be the written-down value. As per the block of assets mechanism, the individual identity of an asset is lost, once such asset enters the block of depreciable assets. But the value to be reported will be the original cost of acquisition. The date to be reported will be the date of the original acquisition. Even in the case of an asset acquired before the 1st day of April, 2001; the value to be reported will be the original cost of acquisition. To this extent, there is a diversion between reporting in TAR as against, provisions and mechanism of law. But this part will have to be left to the tax proceedings.

4. **Compliance in TAR – Conversion value** - Under clause (d), the amount recorded in the books of account at which the asset is converted into stock-in-trade should be stated. Such an amount may not be the fair market value as on the date of conversion or treatment as stock-in-trade. This value is not required to undergo an auditing process. As such, it is a mere reporting of the conversion value as appears in books and records.

5. **Entries in books** - It is essential to relate to accounting entries passed in the books of account at the time of conversion of the asset/assets into stock-in-trade. After all, this is the basis of the entire reporting process.

6. **Caution** – Under this clause, only conversion from capital asset to stock-in-trade is to be reported. No specific clause exists for reverse reporting, though, from AY 2019-20, conversion of stock-in-trade into capital asset triggers taxation (in a little awkward manner). Such reverse reporting is not envisaged here.

Clause 16 - Amounts not credited to the profit and loss account

16. Amounts not credited to the profit and loss account, being, -

(a) *the items falling within the scope of section 28 ....*

(b) *the proforma credits, drawbacks, refund of duty of customs or excise or service tax, or refund of sales tax or value added tax where such credits, drawbacks or refunds are admitted as due by the authorities concerned; ....*

(c) *escalation claims accepted during the previous year; ....*

(d) *any other item of income; ....*

(e) *capital receipt, if any ....*

Clause in TAR reads as under -

Remarks

1. **Background** – It is the expectation of the tax system that, all revenue items/ taxable incomes, ought to find a place in the credit side of P & L. With "AI of CPC" pressed into life, this clause assumes crucial relevance. Tax Auditor is expected to list out all such items one-by-one and report them into the appropriate sub-clause of the TAR. While so reporting, a professional view as regards such items is necessary. Hence, even in the absence of words like "admissible/allowable/taxable, etc.", the opinion of the Tax Auditor is expected to be exercised in this compliance reporting. In other words, this is not mere compliance, but, an opinion-based compliance. This issue is often the bone of contention between assessee and tax officials.

2. **Relevant sections** – Relevant sections to be remembered for this compliance are, section 2(24), section 28, section 41 and so on. Now, section 2(24) is an inclusive section defining the meaning and scope of income. It consists of natural streams of income, as well as, artificial ponds of income too. Again, section 28 of the Act starts with the wording 'profits and gains of business of profession" which includes direct items of profits as well as peripherals. Section 41 of the Act is a specific section adhering to specific situations. Now, for culling out and zeroing on items not considered in P & L, all these sections are to be kept in perspective. The true import of these sections, clarified by various court rulings, needs to be considered here, before any actual reporting. Reporting under this clause is a clear trigger point for the "AI of CPC" to perform additions of equal amounts.

3. **Compliances in TAR** – Segregation of overall set of all eligible unreported items of income items into subsets, and then, reporting – Considering the expectation of separate sub-sets, one will have to report each item under a proper sub-set only. These sub-sets are mutually exclusive. For culling out such items which are reported in P & L, a deep analysis of factual and legal aspects is required to be gone into by Tax Auditor. For example, consider the case of carbon credit, which, despite being a value add for the business, does not satisfy the test of "business". Another issue (till AY 2023-24) is a waiver of bank loan or FOREX gains, etc. The impact of Income Computation and Disclosure Standards ('ICDS') is required to be ensured in this case. In the reporting windows, one gets many row items, wherein, such deserving amounts (and not credited top P & L) are to be stated one-by-one. Gimmicks of circumvention of taxation by credit to Capital/Reserves, etc. ought to be overcome by reporting all such issues.

4. **Certainty** – Only such items are required to be reported herein, which pass the test of accrual of income following ICDS. For example, export/import benefits or, area dispersal benefits or MEGA project benefits, are typically recognised only upon receipt of the said amounts. ICDS provides taxation based on reaching of reasonable certainty. All items of such benefits are to be deliberated to their minute details. Many examples exist when such committed benefits (especially fund-based subsidies) are not being released by Government for many years. But with the advent of systems and cessation of funds-based benefits, life is a bit easy. Hence, the system of extending benefits is to be carefully studied by the Tax Auditor, before emerging with any reportable items in this clause.

5. **Compliance** – In clause (b), reporting is to trigger only when benefits or claims are admitted/accepted by the sanctioning authorities. That too, in only such cases where corresponding debits are routed through P & L. Example could be a case where Goods and Service Tax ('GST') is applied by vendors of the assessee for an export assignment. On export, there is no GST. As such, some enterprises maintain the GST portion out of the vendors bills into "Current Assets" and then, upon admission of the claims/receipt of the refund, adjust them against earlier created "Current Assets". Now, such claims/refunds ought not to be reported herein. In other words, reporting herein ought to be confined to their plausible debits in P & L. Further, Tax Auditor is expected to peruse correspondence with the Government departments/ authorities in this regard. In these days of online compliances and e-governance, it would be expected of the Tax Auditor to log in on the relevant portals/ websites, to test and verify, the factual aspect of such admissions/acceptance in a real sense. As regards clause (c), acceptance of the escalation claims is to be culled out from the factual events, i.e. correspondence and the related quid-pro-quo. As regards other clauses i.e. (a), (d) and (e) are concerned, deep study till endpoint is expected. Further, such items to be reported herein, should be in consonance with phraseology used in various relevant sections. Let is take two case studies.

a) Waiver of Cash Credit loans – Judicial precedents are divergent on this aspect. One view is, Cash Credit loans are part of current liabilities and used for payment to creditors and as such, fit into 41(1) wording. Reference – ***Solid Containers Ltd vs. DCIT – 308 ITR 417 (Bom).*** A contrary view is, vis-à-vis the loan amount per se, no deduction is/was claimed as a debit to P & L, and as such, the waiver is not taxable at all – ***PCIT vs. GSFC – 426 ITR 47 (Guj).***

b) Benefit arising from business – Considering the peculiar phraseology of "arising" used in section 28(iv) instead of the word 'accruing", divergent results are noticed. Consider the case o***f CIT vs. KNB Investments – 367 ITR 616 (AP)*** where market value (and value difference benefit) relating to shares under a lock-in period of 3 years was held as not "arising" unless such period is over. In the majority of situations, the difference between "accrual" and "arisal" is lost sight of. Further, it

is qualitatively difficult to come out with conviction as regards such issues.

The challenge arises, which view to be adopted. In such cases, it will be reasonable to resort a conservative approach and report all items or, at least, add a qualifier in the main report in Form 3CA/3CB. Issues also arise considering the wider scope of the last limb i.e. sub-clause (e) which requires all capital receipts to be reported here. On a conservative view, many professionals report even items like the share of profit from firm/AOP in this clause. Now, such reporting may lead to the addition by "AI of CPC" leading to frivolous demand of double taxation. To overcome the same, it is apt to include such reported items in TAR in relevant parallel row-items of Return of Income, and thereafter, to remove them.

6. Caution – In clause-41, information as regards refunds received during the year, is required to be stated. In a case where such refunds emanate from the sub-clauses specified herein, there would be a duplicated disclosure. One should not get confused about duplicate reporting and plausible additions thereto. The purposes of the two clauses are different.

Clause 18 - Depreciation

Clause in TAR reads as under -

18. Particulars of depreciation allowable as per the Income-tax Act, 1961 in respect of each asset or block of assets, as the case may be, in the following form :-

(d) Description of asset/block of assets ....

(g) Rate of depreciation ....

(h) Actual cost of written down value, as the case may be..........................

[1][(ca) Adjustment made to the written down value under section 115BAC/115BAD (for assessment year 2021-2022 only) ....

(cb) Adjustment made to written down value of Intangible asset due to excluding value of goodwill of a business or profession ....

(cc) Adjusted written down value]

(i) Additions/deductions during the year with dates; in the case of any addition of an asset, date put to use; including adjustments on account of-

(i) Central Value Added Tax credits claimed and allowed under the Central Excise Rules, 1944,in respect of assets acquired on or after 1st March, 1994, ...

(ii) change in rate of exchange of currency, and ....

(iii) subsidy or grant or reimbursement, by whatever name called ....

(j) Depreciation allowable ....

(k) Written down value at the end of the year ....

Remarks

1. **Background** – The degree of compliance expected herein is of a higher pedestal. Whatever the working made by the

1. Substituted by the Income-tax (Eighth Amendment) Rules, 202 l w.e.f. 1-4-2021.

assessee client of his block of assets, Tax Auditor is expected to report precise details after due verification and after forming an opinion. Depreciation finally reported herein is compared by the "AI of CPC" and adjustments are made directly in the 143(1)(a) intimation (after affording an opportunity, etc.)

2. **Relevant sections** – Application of all relevant sections is to be ensured in a sacrosanct manner. Relevant Sections are section 32, 36(1)(iii), 43(1), 43(2), 43(3), 2(11), 43(6), and 43A. Practically, it results in certification of the claim of depreciation made by the assessee. As such, this compliance is very crucial in the process of overall tax compliance. The word "allowable" implies that depreciation should be permissible as a deduction, as per the provisions of the Act and the Rules. This would require the exercise of judgment having regard to the facts and circumstances of the case, developments in law from time to time, etc.

3. **Compliances in TAR – Classification** - At present, even the TAR is required to be prepared by adhering to a drop-down menu. Hence, classification issues and puzzles thereto are mitigated. But the listing is expected to be given vis-à-vis each item of addition to asset/each item of deletion from block and so on. The additions/deductions during the year have to be reported, with dates. The tax auditor is advised to get the details of each asset or block of assets added during the year or disposed of during the year with the dates of acquisition/ disposal. Where any addition was made, the date on which the asset was put to use is to be reported. In respect of deductions, the sale value of the assets disposed of along with dates should be mentioned. Making compliance herein becomes tedious at times, yet an essential part. To determine the rate of depreciation, the tax auditor has to examine the classification of the assets into various blocks. For example, a particular asset may be classified as plant or machinery from the viewpoint of one class of assessees, yet it may not be plant or machinery from the viewpoint of another class of assessees. The purpose for which the asset is used is also very material in this regard. Hence, the tax auditor should ensure that the classification as made by the assessee is in consonance with legal principles. In this connection, he should traverse through judicial pronouncements as well as through the past assessment history of the assessee, and upon an analysis thereof, if he comes to the conclusion that the matter is not free from doubt or controversy, he has to indicate the fact in his report by way of suitable qualification. It may also be necessary to rely upon technical data for determining the proper classification of the block. Since the tax auditor is not a technical expert, he has to obtain a suitable certificate from concerned experts.

4. **Compliance in TAR – Rates** - Once the classification has been ascertained and checked properly, the rates applicable as per the Income-tax Rules, 1962 follow as a natural corollary. The tax auditor must have due regard to the Income-tax Rules, 1962, relevant clarifications from the Department and judicial decisions. The tax auditor should check the working regarding the calculation of depreciation allowable under the Act.

5. **Compliance in TAR – Other information** - In respect of the existing assets, the computation of depreciation would involve stating the opening written

down value of the block of assets which should be taken from the relevant income-tax records. The auditor should ensure the opening block of assets matches with the Income Tax Return filed for the immediately preceding previous year. The tax auditor will be conducting the audit in the current year only. As such the tax auditor can rely upon the classification of assets and written down value stated in the income tax records available with the assessee. The tax auditor should mention the fact that he has relied upon the income tax records of the assessee in respect of the information regarding the classification of assets and written down value of the existing assets. To ascertain when the asset has been put to use, the tax auditor could call for basic records like production records/installation details/ excise records/service tax records/goods and service tax records/records relating to power connection for operating the machine, title deeds or building completion certificate etc. in case of immovable assets and any other relevant evidence. In the absence of any specific documentation with regard to the effective date from which the asset is put to use, he could get a representation letter from the management, in respect of the assets acquired. He should examine whether the apportionment of depreciation in cases like succession, amalgamation, demerger etc. has been properly made. The auditor should reconcile the additions made in books of account matches with that of additions made for computation of depreciation for Income Tax purposes. Considering the relevance of these compliances, a mini-assessment of the depreciation claim occurs at the end.

6. **Issues** – Many issues arise in this area. Some are listed down to get a glimpse of the same.

   a) ***FOREX impact*** - In many situations, ECB loans/foreign currency credits are availed for the purchase of plant & machinery and some FOREX impact arises at the year end. Such impact is to be adjusted on the WDV in cases covered u/s 43A i.e. when assets are imported. However, in cases where assets are not imported, such impact ought to go to P & L as a revenue item considering the ICDS and evolving accounting wisdom. This aspect needs the attention of the Tax Auditor as well.

   b) ***Subsidies*** – After the amendment in section 2(24)(xviii), all subsidies and assistances from the Government are considered as "income" to the extent, such subsidies are not taken into account for determining the actual cost of the asset. A major shift has started evolving, wherein, in yesteryears, such subsidies were claimed as capital receipts (and not taxable at all); which are nowadays, considered as a mitigation of the actual cost of the assets. These treatments are bound to meet objections from I-T officials. Tax Auditor is expected to go through the foot-prints of the subsidy scheme and locate, whether, such schemes were meant for mitigating actual cost, or whether, for inducing businesses to say put units in remote areas or (say) enter into desired lines of activity. In mixed situations,

the principal purpose test will have to be adhered to. Reference could be made to many landmark decisions like ***CIT vs. Ponni Sugar & Chemicals Ltd – 306 ITR 392 (SC) or Sahney Steel & Press Works Ltd vs. CIT – 306 ITR 392 (SC) or, CIT vs. P.J. Chemicals Ltd. 210 ITR 830 (SC)*** and so on.

c) ***Goodwill*** – After much discussion about the decision in the case of ***CIT vs. Smiff Securities Ltd – 348 ITR 302 (SC)***, major amendments were proposed in the Income Tax Act for denying the claim of depreciation of Goodwill. Conceptually, Goodwill was considered as a compendium of many intangible assets. Despite the denial of depreciation on Goodwill, other intangible assets are retained as they were and permitted to be depreciated. Attempts are made to segregate Goodwill and place the same into various permissible intangibles and, claim depreciation on the same. Though the proposition is valid, Tax Auditor finds himself facing first-degree heat of the entire process and hence, ought to be cautious and ought to avail suitable backup papers for any such exercise. The principle remains that, Tax Auditor is expected to state, allowable depreciation on such intangibles. Suitable notes ought to exist in Form 3CA or 3CB as the case may be.

d) **Thrusting of depreciation** – After the insertion of Explanation 5 below sub-section (1) of section 32, depreciation is to be allowed (rather thrust if not claimed) to the assessee. Thus, the claim for depreciation is now mandatory and the written-down value of each asset every year has to be reduced by the amount of depreciation allowable under the Income-tax Rules and the details required under the relevant sub-clauses need to be stated. Tax Auditor ought not to concur with the assessee for any pretext and should report allowable depreciation in a sacrosanct manner.

e) **Opting for the different regime** – Various new sections permit the assesses to opt for a lower tax regime such as section 115BAA, 115BAB, 115BAC or 115BAD of the Act. In such cases, the claim for depreciation under section 32(1)(iia) of the Act cannot be made. The tax auditor will need to verify the claim of additional depreciation under this clause as well and should also work out the enhanced opening WDV as the case may be.

f) **Concessional tax regimes** – In sub-clause (ca), two sections i.e. 115BAC and 115BAD are mentioned, i.e. new regimes for individuals and cooperative societies. One wonders, why there is no mention of sections 115BAA/115BAB. Considering specific stipulations, a view could be formed that, reporting need not be extended to 115BAA/115BAB situations. But, considering the obligation to quantify correct depreciation, opening WDV is required to be correctly stated. In cases of 115BAA and 115BABA also, the mechanism demands restatement of opening WDV after sacrificing the unabsorbed depreciation w.r.t. section 32(1)(iia).

As such, it is recommended that, despite the absence of mention of sections 115BAA and 115BAB, similar reporting be extended for these sections. Further, one wonders, why there is a specific mention of words "AY 2021-22 only". Considering the context, there could arise a situation where an assessee may opt for a concessional regime u/s 115BAC /115BAA/115BAB/115BAC/115BAD in any subsequent year, say AY 2023-24 or so. For ensuring congruence with the correct claim of depreciation, the reporting even for such subsequent years, overcoming the embargo of "AY 2021-22 only" ought to be adopted.

Clause 19 - Various admissible deductions starting from section 32AC till Section 35E

19. Amounts admissible under sections :

Section	*Amount debited to profit and loss account*	*Amounts admissible as per the provisions of the Income-tax Act, 1961 and also fulfils the conditions, if any specified under the relevant provisions of Income-tax Act, 1961 or Income-tax Rules, 1962 or any other guidelines, circular, ere., issued in this behalf.*
32AC		
32AD		
33AB		
33ABA		
35(1)(i)		
35(1)(ii)		
35(1)(iia)		
35(1)(iii)		
35(1)(iv)		
35(2AA)		
35(2AB)		
35ABB		
35AC		
35AD		
35CCA		
35CCB		

Section	***Amount debited to profit and loss account***	***Amounts admissible as per the provisions of the Income-tax Act, 1961 and also fulfils the conditions, if any specified under the relevant provisions of Income-tax Act, 1961 or Income-tax Rules, 1962 or any other guidelines, circular, ere., issued in this behalf.***
35CCC		
35CCO		
350		
350D		
35DDA		
35E		

Remarks

1. **Background** – The degree of compliance expected herein is also of a higher degree considering the usage of the word "admissible". Due to the said word, such claims are akin to certification by Tax Auditor. Despite a long list, typically, one or two of these sections come into life for actual certification. Some of these sections are irrelevant as of date, yet occur in the above long list.

2. **Compliance** - As the table indicates, there is information as regards debit to P & L, and then, the actual admissible amount against the same. Tax Auditor is expected to refer to all relevant sections, conditions thereto, the satisfaction of the same, and then, report the final admissible amount. There are some sections for which, the admissible deduction is linked to the deposit of the amount in the designated account for a specific purpose. In this connection, the Tax Auditor has to work out, on the basis of the conditions prescribed in the concerned Section, the amount admissible there under and report the same.

3. **Peculiarities** – Some of these sections have special features. For example, sections 35(1)(i) and 35(1)(iv) require the presence of a scientific research pursuit. Such a scientific pursuit is not required to have any approval from (say) DSIR. As such, it works on the simple claim to that effect from the assessee. Here, Tax Auditor has to proceed one step forward and satisfy himself as to the existence of such a pursuit.

Clause 32 - Details of brought forward loss or depreciation allowance

Clause in TAR reads as under -

32. [2][(a) Derails of brought forward loss or depreciation allowance, in the following manner. to the extent available:

SI No	Assessment Year	Nature of loss/ allowance (in rupees)	Amount as returned* (in rupees)	All losses/ allowances not allowed under section 115BAA/ 115BAC/ 115BAD	Amount as adjusted by withdrawal of additional depreciation on account of opting for taxation under section 115BAC/115BAD^	Amounts as assessed (give reference to relevant order)	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

** If the assessed depreciation is less and no appeal pending than take assessed.*

^ To be filled in for assessment year 2021-22 only.)

*As corrected by corrigendum GSR 841(E), dated 6-7-2017.

(b) Whether a change in shareholding of the company has taken place in the previous year due to which the losses incurred prior to the previous year cannot be allowed to be carried forward in terms of section 79..........................

(c) Whether the assessee has incurred any speculation loss referred to in section 73 during the previous year, If yes, please furnish the details of the same..........................

(d) whether the assessee has incurred any loss referred to in section 73A in respect of any specified business during the previous year, if yes, please furnish details of the same..........................

(e) In case of a company, please state that whether the company is deemed to be carrying on a speculation business as referred in explanation to section 73, if yes please furnish the details of speculation loss if any incurred during the previous year..........................

Remarks

1. **Clause (a)** – The degree of compliance expected herein, as regards clause (a) is rudimentary. Information in the columns across clause (a) is related to past years returns/TAR and current year's TAR. Link has to be ensured appropriately since any variation may lead to some adversities at the "AI of CPC" level.

2. **Clause (b)** - As regards clause (b), compliance proceeds through the specific pharology imported from section 79 of ITA 1961. By itself, the clause does not inform us, the exact situations for which, the reporting is to be done.

2. Substituted by the Income-tax (Eighth Amendment) Rules, 2021, w.e.f. 1-4-2021.

A reference to section 79 becomes essential, as per which, we are told that,

- trigger point when losses are not to be allowed for carry forward is, 51% change
- this 51% change has to be qua new shareholders v. old shareholders and to be gauged on the basis of voting power
- such 51% shareholding test is to be applied qua beneficial owners
- company in which public are substantially interested does not suffer from rigor of section 79
- transmission of gift of shares is not considered as change in shareholding for this section
- inbound cross border amalgamations are also an exception
- change in shareholding due to resolution plan under IBC is also an exception .. and so on

Hence, for effective reporting under this clause, an in-depth study of all conditions is required to be undertaken. Various crucial decisions have made the applicability of this section a further challenge. For example, in the case of ***Yum Restaurant (India) P Ltd vs. ITO – 380 ITR 637 (Del)***, losses suffered by the Indian entity were denied owing to a change in shareholding (despite that, the transferor and transferee were subsidiaries of the same ultimate parent). In another interesting case of ***Daimler Chrysler India (P) Ltd vs. DCIT – 120 TTJ 803 (Pune),*** despite the change in shareholding between the immediate owners, the loss was permitted to be carried forward considering that (and after invoking Article-24 of the DTAA), the company is a company in which, the public are substantially interested. Many such situations exist, which are required to be deeply mind applied by the Tax Auditor before concluding the issue and reporting in affirmative or in negative for carry forward of losses.

3. **Clause (c)** – Similar to clause (b), even categorising losses as "speculation losses" under section 73 is a challenging situation for the Tax Auditor. Compliance herein is least on quantitative terms and heavy on qualitative aspects. Tax Auditor has to start from the concept of "speculative losses" for the purpose of Explanation to section 73 of ITA. Now, this Explanation categorises actual losses from share transactions, as "speculative losses". Some riders exist for this harsh categorisation such as –

   - nonapplicability to a company whose GTI consists of four heads of income other than business income
   - non-applicability to a company whose main business is trading in shares or banking
   - Losses in derivative trading is not hit by this section
   - Losses arising from sale of shares allotted initially (and not purchased) is not hit …

   As in case of section 79, a subject-oriented view ought to be developed by the Tax Auditor before proceeding for reporting herein.

4. Clause (d) - Details of Losses incurred in respect of a Specified business as referred to under section 73A. This is a niche area reporting. Section

73A provides for provisions relating to carry forward and set off of losses by specified business. It provides that any loss, computed in respect of any specified business referred to in section 35AD shall not be set off except against profits and gains, if any, of any other specified business. Conditions specified in this regard are required to be ensured by the Auditor before stipulating the view.

5. Concessional tax regimes – Comments stated in clause 6(f) w.r.t. clause-18 of TAR may be considered here also for drawing congruence to each other.

Clause 33 - Tax Incentive/deductions

Clause in TAR reads as under -

33. Section-wise details of deductions, if any, admissible under Chapter VIA or Chapter Ill (Section 10A, Section 10AA).

Section under which deduction is claimed	***Amounts admissible as per the provision of the Income-tax Act, 1961 and fulfils the conditions, if any, specified under the relevant provisions of Income-tax Act, 1961 or Income-tax Rules, 1962 or any other guidelines, circular, etc, issued in this behalf.***

Remarks

1. Background – The degree of compliance expected herein is also of a higher degree considering the usage of the word "admissible" as stated in earlier clauses. Moreover, unlike the earlier clause, for deductions specified herein, separate forms like form no. 10CCB, etc. are also required to be filed. Congruence between these figures is expected so that, "AI of CPC" does not cause disturbance.

2. Compliance – As the table indicates, there is information as regards debit to P & L, and then, the actual admissible amount against the same. Tax Auditor is expected to refer to all relevant sections, conditions thereto, the satisfaction of the same, and then, report the final admissible amount. There are different situations like (say) claim of deduction for SEZ unit or, (say) claim of deduction u/s 80JJA for increased employment and so on. Conditions of each section are expected to be verified by the Tax Auditor before certifying the admissibility of such deductions.

3. Peculiarities – While so certifying, the Tax Auditor enters into the realm of controversies relating to these deductions. Consider few interesting examples –

   - The claim of deduction u/s 10AA without the creation of the adequate reserve in the current year, but having an extra reserve of past year/years

   - The claim of deduction of (say) ₹ 1 CR u/s 80-IBA is set off by a loss of Rs. 1 CR from another housing project, but, rent income of ₹ 2 CR exists, and as such, the

assessee becomes entitled to claim 80-IBA relying upon ratio of ***CIT vs. Reliance Energy Ltd dated 28/4/2021***

- As per present norms, Tax Audit Report is to be uploaded one month prior to the last date of compliance u/s 139(1) of the ITA, 1961. Now, data relating to head-wise and source-wise incomes, forming part of the final GTI may not be available with the Tax Auditor at a (say) one month earlier stage. Such final formation of incomes into GTI has a direct bearing on the eligible claims under various sections of Chapter VI-A. Tax Auditors may find themselves into a puzzling situation regarding the correct quantification of such claims.

  A way out could be, obtaining the entire data as of the date of the report and stipulating quantifications accordingly with suitable remarks.

Conclusion

Despite challenges in the phraseology used in various clauses of form 3CD, the tax Auditor is expected to orient his compliances considering the veiled sections of the ITA, 1961. The focus ought not to be on “AI of CPC” but, the focus ought to be on, expectations/mechanism implicit into various sections of ITA. Afterall, “AI of CPC” is an evolving system, becoming robust year-after-year. Suitable qualifiers ought to find their place in form 3CA/3CB (only place for any subjective remarks available now). Transparent reporting will be beneficial in the long-run despite initial hiccups.

“Take up one idea. Make that one idea your life; dream of it; think of it; live on that idea. Let the brain, the body, muscles, nerves, every part of your body be full of that idea, and just leave every other idea alone. This is the way to success, and this is the way great spiritual giants are produced.”

— *Swami Vivekananda*

“This is my belief: that through difficulties and problems God gives us the opportunity to grow. So when your hopes and dreams and goals are dashed, search among the wreckage, you may find a golden opportunity hidden in the ruins.”

— *Dr. A.P.J. Abdul Kalam*

CA Pramod Achuthan CA Priyanka Batheja

Various Disallowances, Real Estate Transactions

In the below paragraphs, we have captured the key nuances and peculiarities of clause 17 and clauses 20 to 27 of Form 3CD with focus on key developments for FY 2023:

Clause 17 – Where any land or building or both is transferred during the previous year for a consideration less than the value adopted or assessed or assessable by any authority of a State Government referred to in section 43CA or 50C

Relevant provisions of the Income-tax Act, 1961 ('the Act')

Section 43CA provides that where consideration on transfer of an asset (other than a capital asset), being land or building or both, is less than the value assessed for stamp duty calculation by any authority of a State Government, such stamp duty value would be deemed to be full value of consideration for computing gains on transfer of asset. However, if the stamp duty value does not exceed 110% of the consideration, the consideration received or accrued will be the full value of consideration. Further, for certain residential units being transferred during 12 November 2020 to 30 June 2021, 110% has been replaced by 120%.

Section 50C similarly provides that where on transfer of capital assets (being land or building or both), if stamp duty value exceeds 110% of the consideration received or accrued, such stamp duty value would be deemed to be full value of consideration.

Reporting required

Clause 17 requires reporting of the following details where consideration for transfer of any land or building or both is less than the value adopted or assessed or assessable by any authority of a State Government:

1. Details of property
2. Consideration received or accrued
3. Value adopted or assessed or assessable
4. Whether provisions of second proviso to section 43CA(1) (condition of 120% for transfer of residential units) or fourth proviso to section 56(2)(x) (this is no longer relevant)

Tax auditor would be required to report the details of transfer of asset in case the stamp duty value is higher than the consideration, irrespective of whether it exceeds the actual consideration by 110/120% or not. Also, tax auditor would be required to evaluate whether leasehold land would form part of the capital assets for reporting under section 50C of the Act. Similarly, where plant and machinery

are a part of the sale deed under which land and building are being transferred, appropriate bifurcation would be required for reporting of the same in this clause.

Further, there may be cases where there is substantial time gap between the date of agreement and the date of actual registration of transfer instrument. In this case, though consideration affixed as on the date of agreement is higher than stamp duty value, in view of the time gap, stamp duty value may be greater than such consideration as on the date of actual registration of the document. In such cases, taxpayers should fairly be able to defend assessment of differential value on the basis that fair value needs to be determined on the date of agreement and with reference to contractually committed value. Reference in this regard may be made to the decision of SC in K. P. Varghese[1] which considered a situation of completion of sale taking place years after date of agreement and in the context of applicability of s. 52(2) - suggested that evaluation of understatement of consideration should be with respect to value as on date of agreement and not on date of completion of transaction. In any case, this aspect has been now codified in the section itself with the date of agreement being provided as the reference date subject to certain conditions.

It may be noted that section 50C provides an opportunity to the assessee to claim before the Assessing Officer that even though the stamp duty value exceeds the actual consideration, the fair value of the property is represented by the actual consideration and not the stamp duty value. However, the tax auditor need not delve into these aspects or into the position proposed to be taken by the assessee in its return of income or in the assessment proceedings. The tax auditor should continue to report in this clause all cases of transfer where the stamp duty value exceeds the actual consideration.

Clause 20

20(a) – Sum paid to an employee as bonus or commission for services rendered, where such sum was otherwise payable to him as profits or dividends.

Relevant provisions of the Act

Section 36(1)(i) allows deduction of sum paid to an employee as bonus or commission, for services rendered where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission.

Reporting required

If bonus or commission being paid to the employee is in lieu of or otherwise payable as profits or dividends disclosure of the amount is required under this clause.

20(b) – Details of contributions received from employees for various funds as referred to in section 36(1)(va)

Relevant provisions of the Act

Section 36(i)(va) of the Act permits deduction of any sum received by the Assessee from any of his employees (like contributions to recognised provident fund or superannuation fund or ESI Fund or any other Fund for employees' welfare) if it is credited by the assessee to the account of the employees in the relevant statutory fund on or before the due date.

1. 131 ITR 597 (SC)

In this regard, earlier, taxpayers adopted a position that payment made by an employer under section 36(1)(va) of the Act will have to be read with section 43B of the Act and hence deduction of such amount would be allowed to the employer even where payment is made after the due date under the relevant statute but before the due date of filing the income-tax return. This view was also supported by various courts including the Apex Court[2]. These decisions have been overruled in the case of the decision of the Supreme Court in the case of ***Checkmate Services P Ltd vs. CIT***[3].

Also, *explanations* were added to the section 36(1)(va) w.e.f. 1 April 2021, wherein it has been clarified that 'due date' shall mean the due date as per the relevant fund under any Act, rule, order or notification issued thereunder and provisions of section 43B shall not apply and deemed never to have applied for determining the same.

Reporting requirements

Under this clause, the tax auditor shall report:

1. Nature of Fund
2. Sum received from employees
3. Due date for payment
4. The actual amount paid
5. The actual date of payment to the concerned authorities

Tax auditors should ensure caution while reporting dates and amounts under this section as any incorrect reporting/typos may attract unwarranted adjustments in case of the taxpayer at the time of automatic processing of Income-tax return under section 143(1) of the Act. For example, if the amount received from employee and paid is ₹ 1 Crore but amount paid is inadvertently reported in the tax audit report as ₹ 10 lakhs, amount of ₹ 90 lakhs would be disallowed in the intimation under section 143(1) and result in unnecessary litigation.

Clause 21

21(a) - Expenditure in the nature of capital, personal, advertisement expenditure etc

Relevant provisions of the Act

Section 37(1) provides that any expenditure (other than discussed in other provisions of the head PGBP), not being personal or capital in nature and incurred wholly and exclusively for the purpose of business shall be allowed in computing income under the head PGBP. Further, any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be allowed. Also, expenditure advertisement in any souvenir, brochure, tract, pamphlet or the like published by a political party shall not be allowed.

An explanation to section 37 was inserted by the Finance Act 2022 to clarify that expenditure for purpose of an offence or prohibition by law includes and shall deemed to have always included expenditure incurred:

- For any purpose which is an offence or which is prohibited by any law for the time being in force in India or outside India

2. *Alom Extrusions [(2009) 319 IT 306] (SC); CIT vs. Hindustan Organics Chemicals Ltd. [(2014) 107 DTR 1051] (Bom HC)*
3. Civil Appeal no. 2833 of 2016

- To compound an offence under any law for the time being in force in India or outside India
- To provide any benefit or perquisite to person, whether or not in course of business or profession, where acceptance of such benefit or perquisite by such person is in violation of law/ regulations/guidelines governing conduct of such person.

To simplify – this would include payments to a person, acceptance of which by him is in violation of law governing his conduct. For example, Medical Council of India (MCI) has restricted accepting of gifts, travel facility, hospitality or monetary grants by doctors in regulations governing them. Insertion of this explanation has put an end to the legal debate (on account of divided opinion of various courts) which existed earlier, on deductibility of expenditure incurred towards extending gifts and freebies to doctors.

Reporting requirements

Clause 21 (a) primarily requires reporting of disallowances under sections 37 which are as under:

(i) Expenditure of Personal Nature

(ii) Expenditure on advertisement in any souvenir, brochure, tract, pamphlet or the like, published by a political party

(iii) Expenditure incurred at clubs being cost for club services and facilities used, entrance fees and subscriptions

(iv) Expenditure by way of penalty or fine for violation of any law for the time being force

(v) Expenditure by way of any other penalty or fine not covered above

(vi) Expenditure incurred for any purpose which is an offence or which is prohibited by law

Following details are required to be reported for the aforesaid items under this clause:

1. Nature and particulars of expenditure
2. Details of the payee
3. Account head under which the expense is debited
4. Amount of expenditure

Clause 21(a) has a wide coverage and tax auditors typically consider accepted accounting principles and judicial pronouncements in forming an opinion on the data furnished by assessee for disclosure under clause 21(a). To illustrate by way of example, there are mixed judicial precedents on whether stamp duty paid on leasehold agreements would be treated as capital or revenue for the purpose of section 37 of the Act and accordingly, the tax auditor would be required to evaluate whether the same would be reported under this clause or not, basis discussions with the assessee[4].

21(b) - Amounts inadmissible under section 40(a)

Relevant provisions of the Act

Section 40(a)(i)/(ia) provide for disallowance where - payments have been made by an Assessee to non-residents and residents respectively during a year whereon tax is deductible at source and such tax has not

4. *Gobind Sugar Mills Ltd. [(1998) 232 ITR 319] (SC); CIT vs. Reliance Industrial Infrastructure Ltd. [(2015) 61 taxmann.com 407] (Bom HC)*

been deducted or after deduction has not been paid during the previous year or in the subsequent year before due date of filing of Income-tax return. For such defaults in withholding, section 40(a)(i) states that entire expenditure would be disallowed for payments to non-residents whereas section 40(a)(ia) provides that 30% of such payments made to residents would be disallowed.

Such amount would be allowed for deduction in the year in which TDS is deducted or paid by the taxpayer.

Additionally, following amounts are disallowable under section 40(a)

Section 40(a)(ib) – Payments to non-residents where equalisation levy has not been deducted or not paid timely post deduction.

Section 40(a)(ii) – Any sum paid on account of any rate or tax levied on the profits or gains of profession or assessed at a proportion of such profits or gains.

Section 40(a)(iii) - Any payment towards 'Salaries', if it is payable outside India; or to a non-resident, and if the tax has not been paid thereon nor deducted therefrom.

Section 40(a)(iv) - Any payment to a provident or other fund established for the benefit of employees of the assessee, unless effective arrangements have been made to ensure tax deduction at source from any payments made from the funds.

Section 40(a)(v) - Any tax actually paid by an employer referred to in clause (10CC) of section 10.

The subject of deductibility of education cess has been a vexed issue, in context of whether "*any rate or tax levied*" as per section 40(a)(ii) includes education cess or not. Various assesses were claiming deduction of education cess on profits and gains from business or profession relying on certain favourable judicial precedents[5]. To neutralise the impact of such decisions and also in line with SC[6], FA 2022 has sought to clarify that cess shall not be allowed as a deduction while computing business income. This amendment is applicable retrospectively w.e.f. 1 April 2005.

Tax auditors should be specifically mindful of the impact of the above amendments to the reporting in this clause.

Reporting requirement

Tax auditors are required to align this clause with clause 34(a) of the tax audit report. Ideally, difference in amount reported to have been paid during the year as compared to the amount on which TDS is deducted under clause 34(a) should tie with amount reported in clause 21(b). Any difference in the two may result in adjustment in the intimation under section 143(1).

21(c) - Amount debited to profit and loss account being, interest, salary, bonus, commission or remuneration inadmissible under section 40(b)/40(ba) and computation thereof

Relevant provision of the Act: Section 40(b) provides for amount of interest, salary, bonus, commission or remuneration that would be inadmissible. Conditions for admissibility:

5. *Chambal Fertilizers & Chemicals Ltd vs. JCIT [(2019) 107 taxmann.com 484] (Raj HC); Sesa Goa vs. JCIT [(2020) 423 ITR 426] (Bom HC)*
6. *CIT vs. K. Srinivasan [(1972) 83 IT 346] (SC)*

- Remuneration to working partner
- Remuneration/interest is authorized by partnership deed
- The interest should not exceed 12% p.a. and the remuneration should not exceed the maximum permissible limits.

Section 40(ba) states that any payment of interest, salary, bonus, commission or remuneration made by an association of persons or body of individuals made to a member shall not be allowed.

Reporting requirement

Tax auditor is required to report the nature of amount paid, section involved, amount debited to profit and loss account, amount admissible and amount inadmissible along with remarks on the same.

21(d) - Disallowance/deemed income u/s 40A(3)/40A(3A)

Relevant provisions of the Act

Section 40A(3) provides that where assessee incurs any expenditure in respect of which payment is made in a sum exceeding ₹ 10,000 (₹ 35,000 in case of plying, hiring or leasing of goods carriage) otherwise than by an account payee cheque/account payee bank draft/other prescribed modes, 100% of such expenditure shall not be allowed as deduction.

Further, Rule 6DD provides for certain cases and circumstances under which disallowance shall not be made even if the payment is not made as per the prescribed modes.

A question may arise whether in a set off of account receivable balance against account payable balance pertaining to sale and purchase transactions disallowance under section 40A(3) may trigger or not. In this regard, as per Rule 6DD(d) payment by way of adjustment against the amount of any liability incurred by the payee for any goods supplied or services rendered by the assessee to such payee would fall outside of ambit of section 40A(3).

However, in case where trade payable and trade receivable are from different parties which is being set off, impact of section 40A(3) would be required to be evaluated. Reference in this regard may be drawn to the decision of P&H HC[7], wherein it was held that "According to rule 6DD(e), the expenditure in respect of which the payment by book adjustment is made to the payee, who directly supplied the goods or services to the assessee, falls outside the mischief of rule of prohibition. The Tribunal was, therefore, right in holding that the prohibition in section 40A(3) was attracted even in cases of payments by book adjustments which were not made by the assessee directly in the accounts of the party who supplied to it the goods or services.". There are various decisions of courts with different views on the subject.

21(e) - Provision made for payment of gratuity not allowable under section 40A(7)

Relevant provisions of the Act

As per section 40A(7), deduction shall be allowed in relation to any provision made by the Assessee for payment of a sum as contribution towards an approved gratuity fund, or for payment of any gratuity that becomes payable during the year.

7. *Kishan Chand Maheshwari Dass [1980] 3 Taxman 155 (P.&.H)*

Reporting requirement

Tax auditor to report whether the provision made for gratuity is not allowable under section 40A(7), depending on the approval status of the gratuity fund.

Tax auditor should consider the interplay of this section with section 43B while reporting under this clause.

21(-) - Any sum paid by the assessee as an employer not allowable under section 40A(9)

Relevant provisions of the Act

Section 40A(9) disallows any expenditure incurred on setting up or formation of, or as contribution to, any fund, trust, company, association of persons, body of individuals, society registered under the Societies Registration Act, 1860, or other institution (other than contributions to recognised provident fund or approved superannuation fund or approved gratuity fund).

Reporting requirement

Tax auditor is required to furnish details of payments not allowable under this section.

21(-) - Particulars of any liability of a Contingent nature

Relevant provisions of the Act

Auditor is required to furnish particulars of any liability of a contingent nature debited to the profit and loss account.

If a particular liability which is contingent in nature but not debited to profit and loss account and merely disclosed in the notes to financials, disclosure is not needed under this clause.

Further, contingent liabilities do not constitute expenditure and cannot be said to be subject matter of deduction even under the mercantile system of accounting. Tax deductible expenditure is towards a liability actually existing at the time, whereas, setting apart money which might become expenditure on the occurrence of an event is not expenditure[8]. There are a lot of judicial precedents on this aspect covering topics like warranty expenditure, etc and tax auditors should make disclosures in appropriate cases.

21(–) - Amount of deduction inadmissible in terms of section 14A in respect of the expenditure incurred in relation to income which does not form part of the total income.

Relevant provisions of the Act

Section 14A of the Act states that no deduction is allowed in respect all those expenditures incurred by the assessee towards the income that does not form part of total income of the assessee as per provisions of the Act.

In case where the Assessing Officer is not satisfied with the correctness of the claim, the computation shall be done in accordance with the method prescribed under Rule 8D. If the AO is satisfied with the claim of the Assessee, calculation of expenditure under Rule 8D will not trigger.

Prior to the insertion of explanation to section 14A w.e.f. 1 April 2022, treatment of expenses incurred in absence of any exempt income was an ongoing controversy and different courts had varied views on the subject. However, explanation inserted by Finance Act 2022 has clarified that section 14A shall apply and shall be deemed to have always applied in a case

8. *Shree Sajjan Mills Ltd vs. CIT [(1985) 156 ITR 585] (SC); India Molasses Co (P) Ltd vs. CIT [(1959) 37 ITR 66]*

where exempt income has not accrued/arisen/ received during the year and expenditure has been incurred during the year in relation to such exempt income.

Reporting requirement

Tax auditor is required to report the amount of deduction inadmissible in terms of section 14A of the Act.

21(i) - Amount inadmissible under the proviso to section 36(1)(iii)

Relevant provisions of the Act

As per section 36(1)(iii) of the Act, interest paid in respect of capital borrowed for the purpose of business or profession would be allowed as a deduction in computing income referred to under section 28 of the Act. It further provides that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset (whether capitalised in the books of account or not), for the period between date of borrowing for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.

The term interest has been defined under section 2(28A) and covers interest payable in any manner in respect of moneys borrowed or debt incurred and includes any services fee or service charge. Therefore, interest has a wider meaning for the purpose of the Act and would cover various costs incurred in respect of money borrowed and hence, the tax auditor should consider the same while evaluating the amount of inadmissible interest to be reported under this clause.

Further, the tax auditor should consider ICDS IX – Borrowing Costs while computing the interest inadmissible under section 36(1)(iii).

Clause 22 – Amount of interest inadmissible under section 23 of the Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED Act')

Relevant provisions of the MSMED Act: Section 15 of the MSMED Act broadly provides a default timeline of 15 days which contractually can be extended to 45 days but not beyond. For instance, the timeline of 45 days applies even if the contract with Medium and Small Enterprises ('MSE') provides for credit period of 60 days and if such credit period is absent in the agreement, the default timeline is 15 days.

The delay in payment beyond the above timeline triggers interest payment under section 16 of MSMED Act for which the buyer gets obligated to make the payment.

Section 23 of MSMED Act lays down that interest payable/paid by the buyer under MSMED Act shall not be allowed as a deduction for the purpose of the Act,

In this regard, Bangalore ITAT[9] held that basis section 23 of MSME Act, any interest payable under MSME Act to the buyer will not be allowed as a deductible expenditure in the computation of taxable income.

Reporting requirement

Tax auditor is required to state the amount of interest inadmissible under section 23 of the MSMED Act.

Clause 23 – Particulars of payments made to persons specified under section 40A(2)(b)

Relevant provisions of the Act

Section 40A(2)(b) provides that payment made/ to be made to specified persons therein shall be disallowed to the extent such amount is

9. *Bosch Ltd. [(2017) 87 taxmann.com 351]*

excessive or unreasonable having regard to - its fair market values, for the legitimate needs of business or profession of the assessee, and the benefit derived by or accruing to the assessee from such expenditure.

Reporting requirement

This clause requires the auditor to furnish the details of payments made to specified persons – name of the related party, relation, date, payment made (amount), nature of transactions, PAN of related party.

Tax auditor is required to report the amounts irrespective of whether the same is reasonable or excessive.

Clause 24 - Amounts deemed to be profits and gains under section 32AC or 33AB or 33ABA or 32AD or 33AC

Relevant provisions of the Act

Section 32AC – Not applicable for investments made after 30 March 2015

Section 33AB – Deduction in respect of Tea Development Account, Coffee Development Account and Rubber Development Account.

Section 33ABA - Deduction in respect of Site Restoration Fund for taxpayers engaged in the business of prospecting for or extraction or production of petroleum or natural gas or both in India, and who entered into an agreement with the Central Government for this purpose.

Section 32AD – Deduction of 15% for investment in new plant or machinery in notified backward areas in certain States in the period from 1 April 2015 to 31 March 2020.

Section 33AC – Not applicable from AY 2005-2006

Reporting requirement

Under this clause, tax auditor is required to report the deemed income chargeable as profits and gains of business in case where the specified circumstances as per the aforesaid provisions are violated.

Clause 25 - Any amount of profit chargeable to tax under section 41 and computation thereof

Relevant provisions of the Act

Section 41 of the Act subjects the following to tax:

- Amounts allowed/deductions claimed in earlier years on account of loss, expenditure or trading liability and subsequently assessee receives any benefit on account of remission or cessation thereof (e.g., Trade creditors no longer payable written back)
- Moneys payable in case of assets of an undertaking which is engaged in generation and distribution of electricity, and which is demolished, discarded, sold or destroyed. If Moneys payable exceeds WDV of the asset, so much of excess, which does not exceed the depreciation claimed on such assets is chargeable as income in the year in which such money become due
- Assets used for scientific research are discarded without being used for other purposes and the sale proceeds together with the deduction under section 35 exceeds the capital expenditure, then such surplus or the amount of deduction allowed which is less is treated as business income in the year of such sale.
- Bad Debts Recovery –Amounts written off as bad debts and received subsequently
- Withdrawal of any special reserve created under 36(1) (viii) which is applicable in the case of specified banking/finance companies.

Reporting requirement

The tax auditor is required to report the name of the person along with the amounts involved, description of transaction and adjustments if any to be made (computation)

In this regard, it is important for the tax auditor to note that only the amounts for which deduction was claimed are reported in this clause on remission or cessation of liability. Items for which deduction was not claimed for tax purpose when the expenditure was debited to the profit and loss should not be reported. E.g. provisions no longer required written back amount will not be offered to tax if the same were not claimed as an expense in the year in which they were created.

Clause 26 - In respect of any sum referred to in clauses (a), (b), (c), (d), (e) or (f) or (g) of section 43B, the liability for which

26(a) - pre-existed on the first day of the previous year but was not allowed in the assessment of any preceding previous year and was

(a) Paid during the previous year

(b) Not paid during the previous year

26(b) - was incurred in the previous year and was

(a) paid on or before the due date for furnishing the return of income of the previous year under section 139(1)

(b) not paid on or before the aforesaid date

Relevant provisions of the Act

Section 43B provides that for claiming deduction of certain expenditure in the relevant previous year in which the expenditure is incurred, the assessee is required to make the payment on or before the due date for furnishing Income-tax return of the year in which the liability to pay such sum was incurred.

Accordingly, for most payments, expenditure is allowed in the year of accrual if payment is made by due date of filing of return of income of the year in which expenditure has accrued.

Recently, Finance Act 2023 introduced sub clause (h) to section 43B, to support timely receipt of payments by MSEs, extending the deduction linked to year of actual payment in respect of ‘any sum payable by the Assessee beyond time limit specified in section 15 of the MSMED Act of 2006’. This provision is applicable w.e.f. 1 April 2024.

The term MSEs has the same meaning as per MSMED Act and hence, tax auditor should evaluate whether the seller falls within the said definition for evaluation and if the same would fall within the ambit of section 43B(h) of the Act. SC[10] has discussed various nuances of MSEs including the aspect of whether an entity can claim benefits of MSMED Act.

Further, referring to the provisions of MSMED Act (discussed in Clause 22 above), coverage of section 43B(h) is broad and would cover every payment to MSEs (purchase cost, service charges, contractor payments, etc). The provision is relatively stringent as it provides for deduction only in the year of accrual when the payment is made either within due date as per MSMED Act or the year of actual payment. Also, tax auditor should evaluate whether this provision may also extend to payments made by one MSE to another.

We have provided below few illustrations to indicate likely impact of section 43B(h):

10. *Silpi Industries Ltd. vs. Kerala State Road Transport Corporation & Ar. (Civil Appeal No. 1570-1571 of 2021)*

Particulars	*Situation 1*	*Situation 2*
Year of incurrence of liability	FY 23-24	FY 23-24
Due date as per section 15 of MSMED Act	Nov 23	April 24
Actual date of payment	Feb 24	May 24
Whether section 43B(h) applies	Yes	Yes
FY in which deduction can be claimed	FY 23-24	FY 24-25

Reporting requirement

In clause 26(i)(A), the tax auditor is required to report the payment status of the liability that is already existing on the first day of the previous year and was not allowed in the assessment of any preceding previous years. Further, in clause 26(i)(B), payment status of the liability that was incurred only in the previous year is required to be reported.

Further, tax auditor should decide a consistent way to report payments which are made after completion of tax audit of earlier year but before filing of return of income.

It may be noted that while Clause 26 is not currently updated to include reference to sub-clause (h) of section 43B, it is expected that suitable amendments in this regard will be notified in due course.

Clause 27

27(a) - Amount of Central Value Added Tax credits availed of or utilized during the previous year and its treatment in the profit and loss account.

Reporting requirements

This clause requires the factual reporting about the CENVAT credit availed and utilized during the year as well as its treatment in profit and loss account and treatment of outstanding Cenvat credits in the accounts.

Further, reporting requirement under clause 14(b) (i.e. deviation from method of valuation under section 145A) is distinct and separate from this clause and tax auditor should verify that information furnished under this sub-clause is in sync with disclosures in clause 14(b).

27(b) - Particulars of income or expenditure of prior period credited or debited to the profit and loss account.

Applicable provisions under the Act: Section 37 allows only the expenses incurred during the year, wholly and exclusively for the purpose of business.

Reporting requirement

Under this clause, prior period items debited/credited to profit and loss account, along with the year to which such item pertains, should be reported. This clause would be only relevant for the Taxpayers following mercantile system of accounting.

In this regard, expenditure or income of prior periods that are crystallized during the current year should not be considered as prior period items.

Further, certain material adjustments necessitated by circumstances which may be related to previous periods but determined in the current period, will not be considered as prior period items. The tax auditor has to make a judgmental call on the same (eg recording of expense on settlement of a long dispute in a particular year, debit of sales return of sales recorded in earlier years, etc).

CA Anil Sathe

Clauses relating to deemed income under section 56, acceptance and repayment of loans and deemed dividend - Clauses 28, 29, 29A, 29B, 30, 31, 36A

I. Introduction

Conduct of tax audit has become an increasingly onerous task and has undergone a sea change in the near past. It goes way beyond an expression of opinion on a true and fair view on the accounts and a true and correct view regarding the particulars in Form 3CD based on examination of books of accounts. There are a large number of clauses in the audit report, where, despite compliance by the auditee, the assertion of their correctness will require expression of a view/opinion on the interpretation of various provisions of the Income Tax Act 1961 (hereafter referred to as the "Act").

A disclosure made in Form 3CD will be tested even when a return is processed under section 143(1). Particularly, Section 143(1)(a)(iv), permits an adjustment to the return income based on the disclosure in the tax audit report. Thus, the manner of disclosure in tax audit report is of immense significance. This Article endeavours to discuss this theme.

II. Scope of Article

This article deals with the clauses relating to deemed income under section 56, hundi loans under section 69D, the acceptance and repayment of deposits in excess of the limits set out in section 269SS/T, the receipt of monies other than through banking channels beyond the limits prescribed under section 269ST and the provisions of deemed dividend. The mandate is to discuss the relevant provisions of law, developments in regard thereto in the recent past, while providing suggestions on the disclosures. A reference will be made to the Guidance note issued by the Institute of Chartered Accountants of India ("ICAI") on tax audit, wherever necessary. However, the process of auditing and verification of various items are not discussed here, for an attempt to do so, will result in the article becoming a mini publication.

III. Deemed income under section 56 - clauses 28, 29, 29A and 29B

1. *Limitation to scope of audit*

While it is well-known to readers, it is essential to reiterate that tax audit is conducted in respect of the accounts and records of a business or profession. Consequently, any transaction which

is not recorded in the said books of accounts is outside the ambit of audit. Such scope limitation should be properly disclosed in audit report and shall also be set out in the engagement letter. However, if an auditee maintains books of accounts in which all transactions pertaining to all sources of income, including those of business are recorded, then the auditor will be bound to take cognizance thereof and report thereon if necessary.

2. Overview of Section 56

Section 56 of the Act, which at its inception was a provision primarily dealing with the residual head of income, has come a long way. Inclusion of various scenarios, which will be dealt with later in greater detail have resulted in certain notional income becoming chargeable to tax, which ordinarily would not have been treated as "income" in the classical sense. The important principle to note is that even with an ever-expanding scope of section 56, the basic structure of the Act consisting of heads of income has not been given a go by. Consequently, if any receipt or a transaction falls under a specific head of income, say business income or capital gains and if such income is not taxable under the respective head of income in view of a specific exemption provision or the computation machinery failing, the said income cannot be charged to tax under section 56 or as Income from Other Sources.

3. Section 56(2)(viia) - Clause 28

A. Applicability of Section 56(2)(viia)

The section applies to:

A firm or company in which the public are not substantially interested, i.e. a closely held company, on receipt of any property, being shares of a company in which public are not substantially interested, i.e. a closely held company, if such receipt is

- without consideration and the fair market value (FMV) of the shares received exceeds ₹ 50,000; or
- for a consideration which is less than the FMV by an amount exceeding ₹ 50,000,

The consequence of application of this section is that the FMV or the difference between the FMV and the consideration, as may be applicable, would be treated as income of the recipient of shares. The provision will apply only to transactions between the 1st June 2010 June 2010 and 31st March 2017.

Though the said section is no longer in force, section 56(2)(x) would cover such transactions.

B. Issues

(a) Where a company buys back its own shares, whether the provisions of section 56(2)(viia) would apply?

Two decisions, viz. ***DCIT vs. Venture Lighting India Ltd 150 taxmann.com 523 (Chennai)*** and ***VITP (P.) Ltd vs. DCIT 143 taxmann.com 304(Hyd),*** have taken a view that such a transaction cannot result in any notional income. While these were rendered in the context of section 56(2)(vii)(c), they would apply with equal force to section 56(2)(viia) and consequently to section 56(2)(x) as well.

(b) Applicability to issuance of bonus shares?

Non-application of Section 56(2)(viia) on receipt of bonus shares seems to be now well settled. Since the issue of bonus shares does not lead to any accretion of rights of an assessee, no income can be said to arise as the value of the original shares would reduce to the extent of the accretion in the form of bonus shares. However, where right shares are issued and the shares are not subscribed to by all the shareholders leading to a disproportionate allotment, whether a charge under this section can fructify is still an open question.

(c) Whether an issue of share by way of allotment be covered within the phrase "receives"?

This aspect is extremely technical. One possible interpretation is that, for a share to be received it must be in existence, a moment anterior to its being received by the recipient. I would not concur with such an interpretation.

The provisions which seek to bring to tax notional income, have been enacted to limit tax evasion. If one considers the provision with this purpose in mind, while a strict interpretation is undoubtedly warranted, an interpretation which defeats the very purpose of legislation should not be propagated. The aforesaid argument may still be pressed into service, for those having the appetite to absorb the tax risks associated with it.

C. Reporting under the clause

The clause requires reporting of the receipt of shares, and whether they have been received without consideration or for inadequate consideration. The receipt of shares is obviously a question of fact on which, there cannot be a debate. It is only if the consideration is absent or inadequate will an issue of reporting arise. If the auditee asserts that either the clause does not apply or even if it applies the consideration is adequate and the auditor agrees with the view of the auditee, no reporting will be required. However, in case of a disagreement, an appropriate disclosure by way of a qualification in the main audit report is desirable.

4. Section 56(2)(viib)-Clause 29

A. Applicability

This provision applies in a situation where shares are issued in excess of its face value and seeks to bring to tax the difference between:

(a) the fair market value of the shares; and

(b) the consideration received for the issue of shares.

Unlike other clauses of section 56, there is no threshold specified for application of the clause. If there is a difference between the fair market value of the shares and the consideration received, the same is chargeable to tax. Hitherto, the clause applied only when the shares were issued to a resident. Finance Act, 2023, has made it applicable to non-residents as well. Th clause has following carve-outs for non-applicability:

(a) issue of shares by a venture capital undertaking from a venture capital company or a venture capital fund or specified fund

(b) by a company from a class or classes of persons as may be notified by the central government in this behalf

Further, the CBDT, by its notification dated 30th August 2019, has notified those entities which are registered registration with DPIIT and fulfilling the conditions prescribed. These are primarily start-ups.

B. Issue

(a) Determination of fair market value

The primary issue under this sub-section, is the determination of fair market value ("FMV"). For the purposes of this sub-section, the FMV is to be determined in accordance with Rule 11UA(2) of the Income Tax Rules. Under the said Rule, the FMV shall be computed at the net asset value ("NAV") as per the balance sheet or shall be determined by a merchant banker as per the discounted free cash flow ("DCF") method. There is near unanimity, among judicial fora that the choice of the method of determination of the FMV is that of the assessee and the AO cannot reject the method. He can however, dispute the manner in which the method is applied. Valuation could be highly contentious when DCF method is adopted. It may be noted that the valuation using DCF method has to be obtained from a merchant banker and the option of obtaining a report from an accountant (CA) has been deleted with effect from 24th May 2018.

(b) Which balance sheet shall be used for determining the NAV?

Fortunately, for the purposes of the valuation under this clause of Section 56(2), the balance sheet which has been approved and adopted in the annual general meeting of the shareholders, immediately preceding the valuation date can be relied on. However, this leeway is not available in terms of the valuation under section 56(2)(vii), (viia) and (x). Under those provisions, the balance sheet is required to be drawn up on the valuation date and shall also be audited.

C. Reporting under the clause

The clause requires reporting only if the consideration received is in excess of the FMV. If the auditor is satisfied that the consideration is not in excess of the FMV, no reporting is required. However, it would be necessary for the auditor to obtain the requisite evidence for his record. If the auditee claims that the provision does not apply on account of an exclusion clause, then the auditor needs to verify whether the requisite institution or class of investor stands excluded under the notification.

5. Section 56(2)(ix)-Clause 29A

A. Applicability

The clause (ix) to Section 56(2) provides that, if any advance is received –

- in the course of negotiations for transfer of a capital asset; and
- such sum is forfeited; and
- the negotiations do not result in the transfer of such capital asset.

then the forfeited sum is income chargeable to tax, under this clause.

It is pertinent to note that three conditions are mandated for the section to apply, viz. (i) the receipt of advance

in the course of negotiations for transfer of the capital asset; (ii) forfeiture thereof; and (iii) the negotiations not resulting in the transfer of such capital asset.

B. *Issues*

Whether all the three conditions need to be satisfied cumulatively, for a charge under section 56(2)(ix)?

All the three conditions specified above need to be satisfied simultaneously before a charge can fructify. If the advance is not received in the course of negotiation, this provision does not apply - ***Mangal Credit and Fincorp Ltd vs. DCIT 150 Taxmann.com 168 (Mum).*** It may also be noted that the mere fact that the advance is recognised as a liability in the balance sheet of the assessee and the period of limitation has expired cannot result in the same being treated as forfeiture. There must be appropriate evidence to establish that the said sum has actually been forfeited.

C. *Reporting under the clause*

The verification of facts for reporting under this clause could be difficult. This is for the reason that, while receipt of an advance is a question of fact, the fact of conduct of negotiations and that the negotiations have finally not resulted in the transfer of a capital asset could be difficult to determine. In such a situation, the auditor may have to depend on the auditee's representation and draw attention to such reliance.

6. *Section 56 (2)(x)-Clause 29B*

A. *Applicability*

The section seeks to bring to tax receipt of money or a benefit arising on account of receipt of immovable or movable property at the time of its receipt by the auditee. It treats the following as income of the recipient:

(a) receipt of money from a person in the aggregate in excess of ₹ 50,000;

(b) receipt of immovable property without consideration or for consideration which is less than the fair market value of the property by sum of ₹ 50,000 or more;

(c) receipt of movable property (described in the section as "property other than immovable property") without consideration or for consideration which is less than the fair market value of the property by a sum of ₹ 50,000 or more;

For the purpose of determination of fair market value, the section adopts the rules of valuation as well as the stamp duty value assessable, as may be applicable. The operation of the section is excluded by receipt of money or property from the specified class of persons and/or on certain occasion/s or in certain circumstances. The definition of expressions "stamp duty value", "assessable" and "fair market value", are to be imported from section 56(2)(vii). The term "property" also is to be similarly imported from section 56(2)(vii), while specifically including a virtual digital asset.

As mentioned earlier, the ambit of section 56 was hitherto of residuary head which included income which did not fall under other heads. With the amendments, particularly after the

introduction of this clause (x), which applies to all assessee, it brings to tax what can be termed as notional income. It has therefore been converted from residuary head to a deeming fiction.

B. Issues

There are a large number of issues which have arisen in the past and will possibly continue to create controversies and consequential litigation. The major issues are

(a) An important aspect on which focus has increased is the impact of "waiver of a loan". The increase in focus is a fallout of the amendment by Finance Act 2023 to section 28(iv). As far as business entities were concerned, the issue stood concluded, by a decision of the Supreme Court in ***Mahindra and Mahindra 404 ITR 1***. The Supreme Court in that ruling clearly held that the waiver of a loan was a receipt in cash and consequently, the provisions of section 28(iv) as it then stood would not apply.

The waiver of a loan cannot be termed as" receipt" of property, in the hands of the beneficiary of the waiver. Once section 28(iv) failed at the threshold as the waiver amounted to receipt of money, section 56 cannot be invoked. Therefore up to assessment year 2023-24, section 56 will not apply to a waiver of loans taken in the course of business. However in regard to loans not arising or taken in the course of business , based on the ruling of the Supreme Court (which holds that the waiver of a loan amounts receipt of money) the provision may apply unless the person giving the waiver falls within the exceptions provided by the section. In such a situation only the general defences of whether section 56 can convert a receipt which is not in the nature into income or that the provision is intended only as an anti-tax avoidance measure and cannot hit a genuine transactions would remain. From assessment year 2024-25, the difficulties of a person receiving a waiver would be compounded as section 28(iv) has been amended and this may to an extent strengthen the hands of an assessing officer while interpreting section 56.

(b) the applicability is restricted to property which is a capital asset (except a virtual digital asset which has been included separately). Consequently, receipt of property which is in the nature of stock in trade for the receiver will stand excluded.

(c) The term "property" has been defined in a specific manner. Immovable property has not been defined separately and therefore an issue as to whether the term as defined under section 2(47) will apply is a matter of debate. The issue however is possibly only of academic interest, as if a property is not immovable but answers to the description of a capital asset being right in a property, it could be taxed as movable property.

(d) On the valuation front, all the disputes which apply to

taxability under the head capital gains will apply with equal force for taxability under these provisions. This is because, while sections 50C/50CA/43CA apply from a sellers perspective any interpretation therein would certainly affect the determination of a charge in the hands of the receiver.

(e) the exact ambit of the term "on the occasion of marriage" has also created controversies. Whether it is the day of marriage or any period prior or after thereto is a matter of debate.

(f) the term "relative" also causes disputes. There are occasions where the donor is a relative but the property is transferred on his behalf by someone else. Judicial fora have adopted a purposive interpretation on many occasions. To illustrate, where the gift was from an uncle but the monies were transferred by the uncle's son and daughter-in-law, it was treated as constituting a gift entitled to the exemption ***[P. Srinivasan vs. ITO 144 taxmann.com (Chennai)***].

(g) Interestingly, wisdom often dawns on lawmakers with passage of time. The inclusion of receipt of shares on amalgamation, which was conspicuous by its absence in the provisions of section 56(2)(viia), is evidence of this fact.

I have tried to highlight some of the issues which would be of common interest. A further detailed analysis will require an standalone article on these issues alone.

C. *Reporting under the clause*

Reporting under this clause is required only if, income is chargeable to tax. If there is receipt of money or property the provision is attracted at the threshold. Once the applicability is tested, the auditee will have to take a view as to whether there is any income chargeable. The auditor shall verify the transaction and come to a conclusion whether he agrees with the view of the auditee. If there is a difference in the opinion, then the auditor must suitably disclose the same in the audit report.

IV. Few other sections of the Act and corresponding clauses under Tax Audit report

1. *Section 69D (Borrowing or repayment on Hundi) - Clause 30*

A. *Applicability*

This section provides that, if the auditee has borrowed any amount on a hundi and repays such borrowing otherwise than by way of account payee cheque, the amount so borrowed or repaid, shall be deemed to be income of the auditee. This section is very rarely applied in practice, as modern businesses hardly borrow any sums on hundi. The prime requirement is that the instrument on which the sum is borrowed is a "hundi" [***CIT vs. Ram Niwas 170 Taxman 5 (Delhi)***].

A "hundi" is negotiable instrument in vernacular language. For understanding the meaning of a hundi, useful reference

may be made to ***CIT vs. Dexan Pharmaceuticals (1995) 214 ITR 576***.

B. Reporting under the clause

In case there is a repayment of an amount borrowed on hundi, other than by account payee cheque, the same has to be reported under this clause.

2. Section 269SS, Section 269ST, Section 269T- Clause 31

A. Applicability

Section 269SS

The section prohibits taking or accepting a loan, deposit or specified sum, of an aggregate amount of ₹ 20,000 or more, other than by way of an account payee cheque, account payee bank draft, use of electronic clearing system through a bank account, or through the prescribed electronic mode. This provision was introduced in 1984 as an anti-evasion measure. Initially the section applied only to loan or deposit and the word "specified sum" was included by the Finance Act 2015 with effect from 1st June 2015.

The term "specified sum" has been defined to mean a sum of money receivable whether as advance or otherwise, in relation to transfer of an immovable property whether or not the transfer takes place.

In keeping with the development of technology in the year 2019, prescribed electronic modes were added as permissible modes of acceptance.

The Finance Act 2023 has enhanced the permissible limit to ₹ 2 lakhs for acceptance of deposit in the case of primary agricultural credit Society or a primary co-operative agriculture and rural development bank from its members or a loan taken by member of such credit society or bank.

As stated earlier, since provision was an anti-evasion measure, infringement of the provision attracted a penalty equal to the amount of loan deposit or specified sum. In case penalty proceedings are initiated, the defence of reasonable cause is available. The section does not apply to the government banking companies, Post Office savings Bank or cooperative banks, corporations established by a Central or State or provincial Act, a Government company or notified institutions or associations.

Section 269T

While section 269SS applies to acceptance of loans or deposit, section 269T applies to repayment of loans or deposits of ₹ 20,000 or more, other than other than by way of an account payee cheque, account payee bank draft, use of electronic clearing system through a bank account, or to the prescribed electronic mode.

Like section 269SS, there is a relaxation with regard to repayment of deposits by primary agricultural credit Society or primary co-operative agriculture and rural development banks or repayment of loans taken by members of primary agricultural credit Society or primary co-operative agriculture and rural development banks.

Section 269ST

This is relatively a new provision introduced by Finance act 2017 with effect from 1 April 2017. This section

prohibits a person from receiving an amount of ₹ 2 lakhs or more –

(a) in aggregate from a person in a day; or

(b) in respect of a single transaction; or

(c) in respect of transactions relating to one event or occasion from a person,

otherwise than by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account or through prescribed electronic modes.

The section does not apply to a receipt by the government, banking company, Post Office savings Bank or cooperative bank or transactions of the nature referred to in 269SS or other notified persons.

This again is an anti- evasion measure, with an exposure to a possible penalty in case of infringement of the provisions of an amount equivalent to the amount of receipt (Section 271DA). It is essential to point out the difference between the defence to the penalties for infraction of section 269SS/T vis-à-vis 269ST. In case of proceedings with reference to section 269SS/T, the defence is to show "reasonable cause" while in the case of an infringement of section 269ST the defence is to show "good and sufficient cause". Thus, a higher burden is cast on the assessee if penalty is initiated for non-compliance with section 269ST.

B. *Issues*

Both section 269SS/T have been in the statute book from 1984 and the law with reference to these sections is virtually settled. As stated earlier, both these provisions were anti-evasion measures. The acceptance of repayment by modes other than those specified did attract a penalty. However, if the transaction was in respect of identified persons, *bonafide*, then judicial fora have taken a liberal view of the matter.

With reference to penalties in respect of acceptance/repayments made by way of journal entries, the Bombay High Court did take a view that adjustment by way of journal entries was an infringement, but since the transactions was done by identified persons, levy of penalty was not confirmed. This is however still a matter to be settled and the Supreme Court has admitted two special leave petitions in the case of ***PCIT vs. Shakti foundation 107 Taxmann.com 460(SC)*** and ***CIT vs. Object Frontier Software (p) Ltd. 75 Taxmann.com 196 (SC).*** It is interesting to note that in a recent decision, the Mumbai Tribunal in a case where transactions had been adjusted by journal entries, held that since the net difference after passing the journal entries was settled by cheque, there was no infringement of the provisions [Refer ***DCIT vs. Macrotech Developers Ltd. 143 Taxmann.com 106 (Mum)***].

C. *Reporting under this clause*

The reporting requirements in this clause are divided into 9 sub-clauses and for ease of reference were reproduced hereunder by way of a table

Clause	***Particulars to be reported***
31(a)	All loans or deposits accepted in excess of specified limit under section 269 SS during the previous year

Clause	*Particulars to be reported*
31(b)	Particulars of all specified sums accepted in excess of the specified limit under section 269SS during the previous year
31(ba)	All receipts in excess of the limit specified in section 269ST otherwise than by way of cheque, bank draft or electronic clearing system through a bank account
31(bb)	Receipts in excess of limits specified under section 269ST by cheque or demand draft not being account payee cheque or account payee bank draft
31(bc)	All payments in excess of the limits specified in section 269ST otherwise than by way of cheque, bank draft or electronic clearing system through a bank account
31(bd)	Payments in excess of the limits specified in section 269ST by cheque or bank draft not being an account payee cheque or account payee bank draft
31(c)	All repayments of loan deposit or specified advance exceeding the limit specified in section 269 T
31(d)	Particulars of repayment of loan deposit or specified advance in excess of the limits specified in section 269T otherwise then by way of otherwise than by way of cheque, bank draft or electronic clearing system through a bank account
31(e)	Particulars of repayment of loan deposit or specified advance in excess of the limits specified in section 269T by cheque or bank draft which is not an account payee cheque or account payee bank draft

3. Section 2(22)(e)-Clause 36A

A. *Applicability*

This provision taxes the distribution of funds by a company, in which the public are not substantially interested, i.e. a closely held company, either by way of a loan or advance or incurrence of expenditure for the benefit of such shareholders, to its specified shareholders, to the extent that it possesses accumulated profits. The ambit of the provision was expanded to include payment of loans or advances to concerns in which such "specified shareholder" had substantial interest.

Specified shareholder is one who holds not less than 10% of the voting power, of the company. The exclusion is in respect of a loan or advance to the shareholder or the concern in which he is interested, by the company in its ordinary course of business, where lending of money is a substantial part of the business of the company.

B. *Issues*

This provision has been in the statute for a long period of time. Many contentious issues have been settled, though some important ones still remain.

Whether the transaction constitutes a loan or advance really depends on the facts of each case and the appreciation thereof by the assessing authorities and judicial fora. By and large, if these are transactions which are between shareholders/ directors and the company in the form of temporary fund transfers for specific business purposes, judicial fora have not treated these as deemed dividend. Useful reference may be

made to the CBDT Circular No. 19/2017 dated 12th June 2017. However, these interpretations will always be subject to the spectrum of facts. The scope of this article being limited, the possible scenarios for applicability or non-applicability of this section are not discussed here.

The deemed dividend is chargeable only to the extent of accumulated profits of the company. The majority of the rulings now take a view that profit accrued upto the point of time when the funds were defrayed /distributed will be considered as "accumulated profits".

It is also well settled that the dividend will not be taxable in the hands of the receiving entity (unless it is a specified shareholder itself) but will be chargeable to tax in the hands of the specified shareholder who has substantial interest in the receiving entity [Refer ***Madhur Housing and development Co. 340 ITR 14 (SC)***]. However, what still remains undecided is whether the shareholder needs to be a registered shareholder or whether being beneficial owner of the shares will suffice to attract the rigors of this section. In ***National Travel Services vs. CIT 89 Taxmann.com 332 (SC)***, the apex court felt that the decisions in ***CIT vs. C.P. Sarathy Mudaliar 83 ITR 170 (SC)*** and ***Rameshwarlal Sanwarmal 2 SCC 371 (SC)***, were in conflict with each other and decided to refer the matter to the Chief Justice. To my knowledge the matter is still not settled.

C. *Reporting under the clause*

The clause requires reporting as to whether the assessee has received any amount in the nature of dividend as referred to in section 2(22)(e). Where the recipient auditee is the specified shareholder, the reporting problems are limited. What has to be ascertained is only whether the paying company has accumulated profits on the date of receipt. If that information is not available, a disclaimer to that effect will have to be given by the auditor.

If the auditee is a concern, the auditee may not be aware of the status of accumulated profits of the paying company. It may also not have information regarding shareholding breakup of the payer company. In such a situation disclaimer may be the most appropriate form of reporting.

V. Conclusion

As mentioned earlier, over a period of time the complexities of reporting have continuously been on the rise. There are many clauses where the auditor will be required to express an opinion on the applicability of particular provision. In the scheme of things, the auditor's role has become more of an expert on tax matters, rather than an auditor. This was possibly not envisaged when tax audit requirement was introduced in 1984. Considering the fact that the opinion of the auditor will be considered by the tax authorities both at the time of processing the returns and while making assessments, the auditor needs to be extremely careful so as to protect the interests of his auditee client as well as his own interests, so that he does not face any difficulties from the regulators.

CA Sachin BP

Tax Audit Report in Form 3CD - An Analysis of Key Clauses

(Special focus on - GST Reconciliation and GAAR, Ratio analysis, TDS, Transfer pricing, Interest deduction limitation, Master file, Cost and other audits, Refund, Form 61)

Introduction

Once again, it's that time of the year when fellow professionals are busy with tax audits and returns. For AY 2023-24, CBDT[1] has widened the scope of Form 3CD by including disclosures with respect to impermissible avoidance arrangement under provisions of GAAR[2], transfer pricing-related disclosures like secondary adjustment, interest limitation, CbCR[3] and GST[4] related disclosures. While some of the clauses, being introduced only in recent times, need extensive deliberation, some others demand clarifications from the CBDT to put the debate at rest.

Having said this, insinuations emanating from some of the clauses are discussed in the ensuing paragraphs.

Clause 30A (Transfer Pricing)

Secondary adjustment provisions under transfer pricing, contained in Section 92CE (1) of the Income Tax Act, 1961 ("the Act"), require a disclosure under this clause. A plain reading of Section 92CE(1) may lead to a conclusion that these provisions are not applicable if the primary adjustment is less than ₹ 1 crore or if the primary adjustment pertains to AYs prior to AY 2017-18. However, the language of clause 30A suggests that a disclosure is required in respect of each and every primary adjustment made in the previous year to which adjustment pertains, i.e. (a) primary adjustments for AYs prior to AY 2017-18 or (b) primary adjustments aggregating less than ₹ 1 crore for a previous year which do not warrant secondary adjustment. All such adjustment should also be reported under clause 30A(b)(i).

A view may be taken that since the applicability of Section 92CE is subject to a threshold limit, no disclosure is required under clause 30A(b)(i) if the limit is not

1. Central Board of Direct Taxes
2. General Anti Avoidance Rules
3. Country-by-country reporting
4. Goods and Services Tax

crossed. However, on a conservative note, and in the absence of any explicit mention of a threshold limit in the said clause in Form 3CD, it is advisable to strictly adhere to the words of this clause and disclose each and every primary adjustment.

Further, in case where excess funds are not repatriated from the foreign associated enterprise ("AE") within the prescribed time, the imputed interest income must be computed as per Section 92CE(2) of the Act. For this, the tax auditor must verify the interest calculations on the basis of SBI/ LIBOR rate certificates plus the incremental interest as per Rule 10CB of the Income tax Rules, 1962 ("the Rules"). It is to be noted that a transition is currently taking place from interbank offered rates (IBORs) to alternative benchmarks and as a result, over time, all IBORs will have to be replaced with an alternative system for determining the base component in variable interest rates.

Also, if the imputed interest is calculated till the date of filing of tax audit report, then the tax auditor should appropriately bifurcate the amount of interest pertaining to the period till 31st March of the previous year and the interest pertaining to the period beginning thereafter till the date of filing the tax audit report.

Clause 30B (Thin Capitalisation)

Interest expenses paid by an entity to its foreign AEs must be restricted to 30% of its EBITDA[5] or interest paid or payable by AEs, whichever is less. The interest amount so disallowed, can be carried forward for next 8 AYs immediately succeeding the AY for which excess interest expenditure was first computed. Further, the debt shall be deemed to be treated as issued by an AE, where it provides an implicit or explicit guarantee to the lender or deposits a corresponding and matching amount of funds with the lender.

While reporting under this clause, the tax auditor must consider the following aspects:

a. Firstly, the tax auditor should ascertain whether interest payable to AE is otherwise deductible under various provisions of "Profits and gains of business or profession" including section 14A, under the proviso to section 36(1)(iii), under section 40A(i) or section 40A(2). Thus, any interest disallowed under these sections should not be considered as interest for the purposes of Section 94B. Thereafter, it should be checked for arm's length consideration and transfer pricing adjustments under Section 92 of the Act. The interest so derived should be considered for the provision of Section 94B of the Act and such an interest should be compared with the 30% limit, i.e., if interest amount exceeds ₹ 1 crore. If 30% limit is exceeded, excess will not be allowed in current year but carried forward for the next 8 years.

   It is debatable whether the limit of ₹ 1 crore is applicable qua AY (aggregate interest to all non-resident AEs) or *qua* each non-resident AE. In that case, an appropriate disclosure should be made in Form 3CD depending on the view taken by the auditor.

b. The extant clause also requires the details of expenditure incurred by way of interest or of *similar nature*. A plain reading of the clause creates a doubt whether it requires a disclosure of the total amount of interest and similar expenditure claimed as deduction or only w.r.t interest paid to non-resident

5. Earnings before interest taxes depreciation and amortization

AE(s). A better view would be that the tax auditor is required disclose interest paid only to non-resident AE(s) as this clause specifically pertains to meeting of requirement of Section 94B of the Act.

c. While computing EBITDA, the tax auditor must consider the figures as per the final audited stand-alone accounts of the company, and not the figures as adjusted for the income tax computation after various allowances and disallowances. The amount by which the interest exceeds 30% of EBITDA must be reported. In case EBITDA is negative, entire interest and other similar expenditure incurred must be disclosed, without any adjustment for the negative figure, i.e., the negative figure being taken as nil.

d. The tax auditor should check the computation of income to verify the brought forward excess interest disallowed in earlier years and details of carried forward excess interest that are to be reported.

Thus, the tax auditor has to obtain and report the expenditure incurred by way of interest or of similar nature, paid to its non-resident AE or to the lender to whom the AE has provided an implicit or explicit guarantee or has deposited a matching amount of funds, out of the total interest and similar expenditure claimed as deduction. It should be kept in mind that word 'paid' means actually paid or incurred according to the method of accounting employed.

In short, the tax auditors need to check the interest paid by the assessee on loans issued by non-resident foreign entity who either itself is the AE of assessee or such loan was granted on implicit or explicit guarantee of the AE (whether resident or non-resident) of the assessee.

Clause 30C (GAAR)

Brief History

The reporting requirements relating to this clause were kept in abeyance till 31st March, 2022. The CBDT deferred the applicability of this clause on several occasions since it was first introduced in 2018. Initially, stakeholders had expressed their concerns about the onerous nature of this clause and the burden posed on the companies for reporting on this clause. Taking these concerns into considerations, the CBDT had earlier deferred its implementation to give businesses time to prepare for the new reporting requirement and meanwhile, assess the impact of these clauses on taxpayers. Also, in the times of global pandemic, the reporting requirement under this clause was kept in abeyance in view of representations received from various stakeholders. After all these deferments and hiccups on reporting under this clause, it has now become applicable for all the reports submitted after 31.03.2022.

GAAR – Background

Chapter X-A of the Act includes GAAR provisions, which have an overriding effect on the other provisions of the Act. GAAR applies to any arrangement that is considered an "Impermissible Avoidance Arrangement (IAA)". GAAR is not merely restricted to cross-border transactions, but also applies to domestic arrangements as well.

The provisions of GAAR shall not apply to an arrangement, where the tax benefit arising in the relevant AY, in aggregate, to all the parties to the arrangement, does not exceed ₹ 3 crores.

It is interesting to note that CBDT, in a circular, has indicated that where any Court or NCLT[6] has explicitly and adequately considered the tax implications while sanctioning the arrangement, then GAAR provisions will not apply to such arrangement, however, there are no judicial precedents or explanatory guidelines to infer meaning of the term 'explicitly' and 'adequately'.

In the context of the rulings of NCLT on the issue including the recent ruling of ***Panasonic India (P.) Ltd., In re ([2022] 138 taxmann.com 570),*** one may argue that NCLT has not explicitly and adequately considered the tax implication of the scheme. This is in line with the NCLT observation that issues with respect to carry forward of losses and GAAR etc. will come for consideration before the AO in the course of the assessment proceedings.

GAAR – Auditor's role

Considering the above background, it appears that NCLT is not observing 'explicitly' and 'adequately' on tax matters while sanctioning arrangements such as mergers, de-mergers, capital reduction etc. Consequently, even arrangements sanctioned by the NCLT may not be 'ring-fenced' from applicability of GAAR.

Thus, evidently, all structuring options, including the ones sanctioned by NCLT or the Court should be examined meticulously even by the auditor from the perspective of GAAR and it should be ensured that they have strong commercial rationale supporting the transaction. For this, it is critical for the tax auditor to have a discussion with management of the company/entity on significant events, such as compromise, arrangement, amalgamation, demerger, investment structuring, reorganization of shareholding, transfer of assets, intra-group payments etc. concluded during the previous year.

The tax auditor should analyse the knowledge and information so gathered from the management from the perspective to understand -

- the business or commercial objective of such arrangements/transaction;
- rationale for adopting the manner of structuring in comparison with other plausible alternatives;
- whether the parties have adhered to the terms and conditions of the structuring contract;
- whether any contracts, documents etc. executed around the relevant structuring event could impact the arrangement under examination.

Further, the 'opinions' obtained by the assessee from various experts/professionals should be referred to. As, it has been clarified by CBDT that GAAR will not be invoked if the Board for Advance Ruling rules in favour of a assessee, check if any advance ruling has been obtained by the assessee or whether the tax payer is in process to obtain advance ruling for such an arrangement.

However, considering the subjective nature of the GAAR provisions, wherever necessary, the tax auditor must obtain appropriate management representation letter from the assessee. The tax auditor may also to have make appropriate disclaimer where tax benefit arising to all parties may not be determinable, for want of relevant data or where the parties are non-residents.

In addition to this, the tax auditor should examine whether the assessing officer, Principal Commissioner or the Commissioner or the Approving Panel have, in any earlier years, inquired about or declared any

6. National Company Law Tribunal

arrangement as IAA. If yes, the tax auditor must report if any such transaction has taken place during the relevant AY. Further, in case any reference has been made for declaring an arrangement as an IAA, the auditor should report the fact in form 3CA or form 3CB, as the case may be.

In a nut shell, there are no objective criteria laid down in law to determine whether the transaction will be subject to GAAR or not. The auditor must exercise his discretion and prudence while reporting on GAAR.

Clause 34 (Tax Audit Report)

Clause 34 as contained in Form 3CD requires the tax auditor to comment on the assessee's overall compliance with respect to tax deduction at source (TDS) and tax collection at source (TCS). The tax auditor must verify whether the taxes are deducted and deposited within the prescribed time. Needless to mention, non-compliance of TDS/TCS provisions can result in disallowance of expenses, attract interest, penalties and also prosecution in some cases. Hence, this clause assumes significance.

For the purpose of reporting under this clause, the tax auditor may consider the following practices:

- He may begin with understanding the assessee's transactions and review TDS complicance w.r.t such transactions (including expenses routed through profit and loss account as well as other transactions like sale of assets or loans/advances which may not be reflected in the profit and loss account).

- The tax auditor has to ascertain whether the assessee is required to furnish the TDS/TCS statement under clause 34(b) and whether such statement contains information about all transactions that are required to be reported. If not, the tax auditor needs to furnish the list of details/transactions which are not reported. As there could be a number of reasons for not including such transactions in the statement like non-availability of PAN etc., therefore, after due verifications of such transactions, it will be appropriate for the auditor to obtain management representation letter on the matter.

- All businesses, which follow the mercantile system of accounting, are required to create year-end provisions for the expenses incurred in respect of services availed till 31st March of a financial year. More often than not, provision for expenses is reversed in subsequent month(s) when the actual invoice is received. This has led to a vexed issue – whether tax is required to be withheld on such year-end provisions or not. Even the judiciary is divided on this front. Therefore, tax auditor should specifically disclose about the view followed on the requirement of TDS deduction on year-end provisions.

The tax auditor may rely on certain judicial pronouncements while reporting under this clause. In case of ***DishTV India Ltd. vs. Asstt. CIT [2017] 86 taxmann.com 177 (Mum. - Trib.)***, it was observed that TDS mistakes, causing shortfall in collections, can't automatically invite wrath of disallowance under Section 40(a)(ia) of Act. One may take a view that provisions under 201(1A) i.e. interest on shortfall of deduction TDS cannot be invoked if the deductee has already paid taxes to the government. The same has been held in the case of Supreme Court in the case of ***Hindustan Coca Cola Beverages (P.) Ltd. vs. CIT [2007] 163 Taxman 355 (SC)/293 ITR 226.***

As a good practice, to the extent possible, the tax auditor should cross-verify the reporting under clause 34 with the disallowances reported u/s 40(a) in clause 21(b) of Form 3CD. Few examples where the both the clauses will not match are – TDS on advance receipts, capital expenditure etc.

- The tax auditor must also verify compliance under the newly introduced TDS provisions under sections 194R[7] and 194S[8]. Though section 194S may not be applicable to most assessees, applicability of section 194R must be verified, especially where benefits/ perquisites are provided in kind.

- The tax auditor may have a difference of opinion with regard to the applicability of the provisions of TDS/TCS on a particular payment. In such a case, he should appropriately as make an observation in clause (3) of Form No. 3CA or clause (5) of Form No.3CB as the case may be.

Clause 35 (Stock Details)

The tax auditor, under this clause is required to report quantitative details of principal items of goods traded, principal items of raw materials, finished products and by-products of a manufacturing company. Typically, goods that make up more than 10% of total purchases, consumption, or turnover, as the case may be, are categorized as principal items.

The tax auditor may check the requisite data of purchase, consumption, sale, manufacturing item using advanced software/analytical tools. Further, the tax auditor may obtain a copy of the stock statements provided to bankers and reconcile them with the stock as appearing in books of accounts. Additionally, analysis of differences between stock records, gross profit, yield rate, and its variance vis-a-vis previous year will further aid the tax auditor in performing his tax audit.

Clause 37: (Cost Audit)

This clause requires disclosure of any disqualification or disagreement on any matter/item/value/quantity as may be reported/ identified by the Cost Auditor if a cost audit was carried out. Also, it would be useful to refer the report of the statutory auditor on CARO on the maintenance of cost records by the company. In a case, where the cost audit is not completed, the auditor should state this fact in his report.

Clause 38 (Audit under Excise Act)

This clause requires disclosure of any disqualification or disagreement on any matter/item/value/quantity as may be reported/ identified by the excise auditor, where the assessee is subject to an excise audit under the Central Excise Act, 1944.

The auditor should examine the time period for which the excise audit is required to be carried out. Information is required to be given only in respect of such audit report, the time period of which falls within the relevant previous year.

Clause 39 (Audit under Service Tax)

This clause requires the tax auditor to disclose any disqualification or disagreement on any matter/item/value/quantity as may be reported/

7. Section 194R provides that person responsible for providing any benefit / perquisite arising from business or exercise of profession by such resident shall ensure that before providing such benefit or perquisite, tax is deducted at the rate of 10% of the value of such benefit or perquisite.
8. Section 194S provides that any person responsible for paying any resident any sum by way of consideration for transfer of virtual digital asset shall deduct tax at the rate of 1% of such sum.

identified in the audit conducted under section 72A of the Finance Act, 1994 (the erstwhile service tax law).

Since, service tax has been repealed, there are two views on reporting under this clause. One view is that since Finance Act, 1994 is replaced by a similar law on GST, the appropriate GST disclosures are required under this clause. The other view supports the idea that since the provisions of service tax, as contained in Finance Act 1994, have been repealed, this clause becomes redundant. Moreover, in advent of digitalization, the regulatory authorities already have the access to the relevant GST records, thus information under this clause will not provide any relevant information in addition to the information already in possession with the authorities.

Having said this, on a conservative note, it is advisable for the tax auditor to report on GST related information under these clauses.

Clause 40 (Details regarding turnover, gross profit, etc., for 2 years)

This clause requires reporting of the performance or capability of the business of the assessee in the form of ratios. It enables stakeholders to assess the performance of the assessee over a period of 2 consecutive years.

According to the clause, the information regarding turnover and ratios of the present and preceding year (as per previous tax audit report) should be furnished for the principal items of goods traded or manufactured or services rendered by the assessee during the previous year. The auditor must maintain consistency in manner of calculating ratios for both the years. Any significant deviation or revision in numbers from the preceding year should be reported in the tax audit report.

Clause 41 (Income-tax Demand and Refund)

This clause requires disclosure of all demand/refund orders, date, and amount of demand raised/refund issued by the government authorities during the previous year under any tax laws other than the Income Tax Act and Wealth Tax Act, i.e., under Goods and Service Tax (GST), Central Excise Duty, Service Tax, Customs Duty, Value Added Tax, Central Sales Tax, Professional Tax, etc.

Details of demand/refund order pertaining to a particular financial year, but issued during the previous year, adjustment of refund against any demand, the relevant proceedings etc. should also be reported by the tax auditor.

The tax auditor should refer to the books of accounts, Statutory Auditors' Report under CARO and disclosures under "Contingent Liabilities" to ensure true and fair disclosure under this clause.

Clause 42 (SFT)

Section 285BA of the Act casts obligations on specified persons to furnish a statement of financial or reportable account ("SFT Statement").

Reporting of Specified Financial Transactions (SFT) under the Act has certain practical challenges like -

1. Identification of SFT: The first challenge is to identify the transactions that fall under the definition of SFT.

2. Gathering accurate and complete information: Sourcing accurate and complete information regarding SFT can be difficult, especially if the transactions involve multiple parties or complex structures. It may require coordination with various stakeholders and obtaining the necessary documentation.

3. Data organization and management: Once the information is gathered, organizing and managing the data for reporting purposes can be challenging. It is crucial for "specified person" to maintain accurate records and ensure that all relevant data is reported

With the above background, in case of tax audit of a "specified person", the tax auditor must:

- Verify books of account to identify transactions which are required to be reported under the Rules 114B, 114E, 114F, 114G and 114H of the Rules;
- Check the SFT returns in Forms 61/61A/61B and match them with the ITDREIN (Income-tax Department Reporting Entity Identification Number) of the assessee on the Income Tax Portal;
- Reconcile the transactions reported in such forms with books of account; and
- If any transaction has not been reported in the prescribed form and manner, report the same under this clause.

Clause 43 (Reporting of International Group entities)

For reporting under this clause, the auditor should check the applicability of Section 286 of the Act and related notifications/circulars and if applicable, furnish the reports in Forms 3CEAC to 3CEAE. The auditor must also obtain a certificate from the assessee in respect of the organization structure of the international group, entities resident/non-resident in India and details of an entity appointed as an alternate reporting entity, if any.

Here, the auditor is not required to comment upon the completeness or correctness of the report filed under Section 286(2).

Clause 44 (GST)

This clause is aimed to ensure that assessees comply with the GST law and do not claim input tax credits on ineligible expenses.

The various issues that could emerge as a result of the new reporting requirements which tax auditor needs to be mindful while reporting:

- Tax auditor needs to verify the updated information available in the GSTN portal to check the status of GSTN of the party issuing the bill.
- Depreciation, deduction for bad debts etc. which are not real expenses should not be reported under this clause.
- Expenditure w.r.t certain activities or transactions, that are treated neither as a supply of goods nor a supply of services, need not be reported under this clause.
- The total expenditure should include the capital expenditure.
- If the payment is made in a particular year and the bills are received in the next year, it must be adjusted as advances in the year of receipt and shown under expenses against the bills received in the next year.
- In case the advance payment is reported when the bill is received (in the next financial year), then reconciliation gets easier on receipts of bills later.

Conclusion

Commercial transactions in our era are becoming more and more complex. By introducing onerous reporting clauses in the tax audit report, CBDT has cast a huge responsibility on the tax auditor to certify the accuracy, genuineness and tax compliance wr.t. transactions undertaken by the assessee.

The tax auditors may obtain references from the guidance notes issued by the ICAI, CBDT circulars and relevant judicial pronouncements. However, it is advisable for tax auditors to be mindful of making appropriate disclosures and disclaimers to mitigate the risk of tax demand in the future or any action against the auditor.

CA Maulik Doshi CA Anita Basrur

Forms for claiming deductions or for opting new regime of taxation - Key Updates

The Government provides incentives by way of tax deduction to encourage investment in specified sectors or to the units set up in Special Economic Zone ('SEZ'). Similarly with an objective to promote "Make in India" initiative and make India an attractive Investment destination, the Government has introduced concessional tax rates for domestic companies engaged in manufacturing and also introduced lower tax rates for other non-manufacturing domestic companies.

These reduced rates can be availed by fulfilling the conditions specified in respective provisions and filing the prescribed form within the prescribed due dates.

This Article gives a brief insight of the relevant law under Income Tax Act, 1961 (ITA) and the prescribed forms and related judicial decisions.

1. Sections 115BAA: Tax on income of certain domestic companies

This section provides lower taxation rate for domestic companies. It was introduced to fulfil the Government objective to reduce the corporate tax rate in the phase manner and to promote India as an attractive Investment destination for foreign investors.

A. Relevant provisions of the clause and law in brief- Summarized:

Applicability	• Concessional tax rates- applicable from Financial Year (FY) 2019-20 [Assessment Year (AY) 2020-21] i.e. 22% plus 10% surcharge and 4% health and education cess (Effective Tax Rate – 25.168%) • Available to all Companies opting to be taxed under this regime
Minimum Alternate Tax (MAT)	• MAT is not applicable. Consequently, the MAT credit of the years prior to new regime will not be available.
Specified deductions not allowed	• Tax Exemption for the units in SEZ, Additional depreciation for investment in plant and machinery, Research and Development expenses, Tax deductions specified under Chapter VIA of the ITA.

	However, the Company shall be eligible to claim deduction under Sections 80JJAA and 80M.
Brought forward losses and depreciation	• The Companies opting to be governed by this regime will not be eligible to claim brought forward loss or depreciation to the extent it relates to the deduction specified above. Remaining losses can be carried forward and set off.
How to claim the benefit of this provision	• The Company will need to intimate the Tax Authority in the prescribed form (Covered in Para b below) that it is opting for this section, on or before the due date specified under Section 139(1) for furnishing the tax returns.
Whether in subsequent years the same rate will follow	• Once the option is exercised the same becomes applicable to all subsequent years and it cannot be withdrawn. • The option exercised can be considered as invalid only on account of violation of any specified condition mentioned therein.

B. Exercising of option

i. Rule 21AE of the Income-tax Rules, 1962 prescribes Form No. 10-IC to be filed by the companies to opt for the concessional tax rate.

ii. This form is required to be furnished electronically either under digital signature or electronic verification code.

C. Key court ruling & circulars along with our analysis and suggestions

i. Rajkamal Healds And Reeds Pvt. Ltd vs. ASSISTANT DIRECTOR OF INCOME TAX (Guj HC) (Feb 2022)

Assessee-Company filed its ROI for AY 2020-21 by resorting to concessional tax rate u/s 115BAA but failed to file Form No. 10-IC electronically, mandatory for availing the concession. Assessee's return was thus processed with a demand. On appeal, HC considers Assessee's submission that it was the first return of the Assessee filed in accordance with Section 115BAA where inadvertently Assessee's CA missed filing the Form No. 10-IC electronically. HC also considers Assessee's plea that the omission in non-filing was not a deliberate act. Concurs with Revenue's stand that the legal remedy available is to make a request with PCCIT/CCIT u/s 119(2)(b); Therefore, directs that the Assessee should at the earliest file an appropriate application in writing addressed to the PCCIT/CIT making a request to permit him to file the Form 10 IC electronically after condoning the delay in that regard so that the return can be re-processed or regular assessment can also be framed accordingly and the liability can be determined.

ii. Circular No. 6/2022 [F. No. 173/32/2022/ITA-1], DATED 17-3-2022

Failure to file the form results in denial of concessional tax rates. The Board had received the representation stating that Form 10-IC could not be filed along with the return of income for AY 2020-21, which was the first year of filing of this form. With a view to avoid genuine hardship. Vide the aforesaid circular

CBDT has condoned the delay in filing of Form 10-IC for AY 2020-21 being the first year of filing this Form on satisfying certain conditions as under:

(i) The ROI for AY 2020-21 has been filed on or before the due date specified under section 139(1) (i.e. 15-02-2021 for the said AY);

(ii) The assessee company has opted for *taxation u/s 115BAA in (e) of "Filing Status" in "Part A-GEN"* of the Form of ROI ITR-6 and

(iii) Form 10-IC is filed *electronically on or before 30-6-2022 or 3 months from the end of the month in which this Circular is issued, whichever is later.*

iii. Bholanath Precision Engineering (P.) Ltd. vs. CIT (Appeals) [2022] 145 taxmann.com 180 (Mumbai - Trib.)

In this case, the Hon'ble Mumbai ITAT (Dt of order: 23-11-2022) held that filing the Form 10-IC is the mandatory requirement for claiming option available under section 115BAA, failing which the Assessee shall not be allowed the benefit of concessional taxes under the section.

iv. Point to be noted

From the recent circular and the tribunal ruling as referred above, it can be concluded that filing of Form 10-IC is a mandatory requirement and not merely a procedural footstep. Non-filing of the same shall lead to disallowance of the claim of beneficial tax rate for the companies, except for AY 2020-21 where deduction is available on fulfilment of conditions specified in CBDT circular.

D. Revised Guidance Note on Tax Audit under Section 44AB of the ITA

In respect of the captioned deduction , following pointers may be considered by the tax auditor while conducting the audit:

At clause 8a the tax auditor has to comment on.: *'Whether the assessee has opted for taxation under section115BA/115BAA/115BAB/115BAC/115BAD?'*

The tax auditor has to mention whether the assessee has opted for taxation under any of the aforesaid sections and in case answer is yes, then he has to select the appropriate section.

Revised Guidance Note on Tax Audit advises the Tax auditor to examine the previous year Income Tax return to verify the option which has been exercised by the assessee. Since the option once exercised cannot be subsequently withdrawn.

It is possible that the assessee may not have opted for lower tax regime in the past and the year under consideration may be the first year of the regime. In such cases, the auditor should mention the selection or the choice of the assessee as on the date of signing of the report.

The tax auditor should verify whether the relevant form for availing new tax regime has already been filed by the assessee. In case, the assessee has not filed the relevant form, written representation from the assessee should be obtained if the assessee wishes to avail the new regime. Where reporting is made solely on the basis of assessee's representation, the fact should be disclosed accordingly.

Tax Auditor should take utmost care while reporting on clauses relevant to tax exemption for the units in SEZ, Additional depreciation for investment in plant and machinery,

Research and Development expenses, Tax deductions specified under Chapter VIA of the ITA as the same are not allowed as the deductions to the companies opting for concessional tax regime under section 115BAA.

2. Section 115BAB : Tax on income of new manufacturing domestic companies

Section 115BAB provides special rate of tax for the domestic companies engaged in manufacturing activity. This rate was proposed with an intention to encourage "Make in India" initiative undertaken by GOI.

A. Relevant provisions of the clause and law in brief- Summarized

Applicability	• Concessional tax rates- applicable from FY 2019-20 [AY 2020-21] i.e. 15% plus 10% surcharge and 4% health and education cess (Effective Tax Rate – 17.16%) for income derived from manufacture or production of article or thing. Other income will not get the benefit of concessional tax rate. • Available to a domestic manufacturing company incorporated on or after 1st October 2019 and the manufacture or production of an article or things should commence on or before 31-03-2024. Under this regime, certain conditions need to be satisfied for being eligible for the concessional tax rates i.e. (a) it is not formed by splitting or reconstruction of the business already in existence; (b) it does not use plant or machinery previously used for any purpose.
Minimum Alternate Tax (MAT)	• Same as specified under section 115BAA.
Specified deductions not allowed	• Same as specified under section 115BAA.
Brought forward losses and depreciation	• Same as specified under section 115BAA.
How to claim the benefit of this provision	• Same as specified under section 115BAA.
Whether in subsequent years the same rate will follow	• Same as specified under section 115BAA. • If any conditions of Section 115BAB is violated, the assessee can exercise option under section 115BAA.

B. Exercising of option under section 115BAB

i. Rule 21AF prescribes Form No. 10-ID to opt for the concessional tax rate.

ii. This form is required to be furnished electronically either under digital signature or electronic verification code.

C. Point to be noted

i. Unlike Form No. 10-IC, delay in filing Form No. 10-ID for claiming benefits under this section has not been condoned by the Board.

ii. Similarly, unlike option of concessional tax regime under section 115BAA which can be exercised at any time in any year on or before filing the return of income, the option under this section is to be exercised in the first year. If option is not exercised in the first year, the same will not be available in any subsequent year.

iii. To avail the concessional tax rate under section 115BAB, the company should be set up and registered on or after 01-10-2019 and it should have commenced manufacturing or production on or before 31-03-2024. Though the conditions would be satisfied, it is possible that the company may need to file its first return before the commencement of manufacturing or production. In such a scenario, it could put the assessee in a dilemma whether or not to go with the concessional tax regime and whether the same would be beneficial.

D. Revised Guidance Note on Tax Audit under Section 44AB of the ITA

The pointers as specified in Section 115BAA above shall equally be applicable for Section 115BAB.

3. Section 80IA – Deduction in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

Section 80IA of ITA provides tax benefits to businesses that operate in specified sectors. This encourages investment in specified sectors and helps in the economic growth of India.

A. Relevant provisions of the clause and law in brief- Summarized

Applicability	• Provides tax benefits to businesses that operate in infrastructure, industrial park, power, reconstruction, and revival of power generating plant on satisfaction of specific conditions (Please refer Table below)
Deduction	• Deduction is available for 100% of profit for 10 consecutive years. • Deduction can be claimed in any 10 consecutive AY out of 15 years beginning from the year in which undertake begins to operates. • This deduction is not available to the taxpayer opting for new regime of taxation under Section 115BAA and 115BAB.
How to claim the benefit of this provision	• ROI and Audit report needs to be furnished within due date (Refer para 'B' below.)

The deduction available to undertaking engaged in different activities is as under:

Sl. No.	*Category of Undertaking*	*Specific conditions to be satisfied*	*Deduction*
1	An Indian company engaged in Infrastructure facility.	Started its business on or after 01.04.1995 and before 01.04.2017.	100% of profit for 10 consecutive years.
2	An undertake which is in Industrial park.	Started its business on or after 01.04.1997 and before 31.03.2011.	100% of profit for 10 consecutive years
3	An undertaking which is engaged in Generation and transmission of power.	• Generation of electricity started between 01.04.1993 and before 31.03.2017. • Transmission and distribution started between 01.04.1999 and before 31.03.2017. • Renovation and modernization between 01.04.2004 and before 31.03.2017.	100% of profit for 10 consecutive years.
4	Undertaking owned by an Indian company for reconstruction and revival of power generating plant.	• Indian company formed before 30.11.2005 with majority of the equity participation by public sector companies. • Begin to generate, transmit or distribute power before 31.03.2011.	100% of profit for 10 consecutive years

For the undertaking which operates in Infrastructure facility, deduction can be claimed in 10 consecutive AY out of 20 years.

B. ROI and Audit Report

As per section 80AC of the ITA, in order to claim the said deduction the return should be filed on or before the due date specified under section 139(1) of the ITA.

Rule 18BBB of the Rules provides that for claiming the deduction, books should be audited by an accountant, and the audit report should be furnished in form **10CCB** on or before 30th September of the AY.

C. Key court ruling & circulars along with our analysis and suggestions

Deduction on the profit enhanced due to disallowance of expenditure

CBDT Circular No 37/2016 dated 02-11-2016 provides clarification on the deduction of profit enhanced due to disallowance of expenditure. The AO may make certain disallowances, such as disallowance pertaining to section 32, 40(a)(ia), 40A(3), 43B etc of the ITA. At times disallowance out of specific expenditure claimed may also be made. The effect of such disallowance is increase in profits. The courts have held that if the expenditure

disallowed is related to the business activity against which the deduction has been claimed, the deductions needs to be allowed on the enhanced profits. CBDT has accepted the settled position that the disallowances made under section 32, 40(a)(ia), 40A(3), 43B etc and other specific disallowances related to the business activity against which the deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction is admissible on the profits so enhanced by the disallowance.

D. Revised Guidance Note on Tax Audit under Section 44AB of the ITA

As per the provisions this section and connected Forms, following pointers may be considered by the tax auditor while conducting the audit:

Reporting clause 33: Requirement under clause 33 relating to section 80IA will have to be with reference to the books of account audited by the auditor. Tax auditor has to ascertain that all the conditions mentioned in the relevant provisions are complied with by obtaining necessary documentary evidence.

Auditor should refer to the separate audit report Form 10CCB while giving information with regard to the deduction allowable under these sections. These audit reports may have been given by the tax auditor or by any other auditor. The figures given in the Form 10CCB should be taken into consideration while giving information with regard to income.

4. 80IB – Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings

Section 80IB of the ITA provides for the deduction in respect of profits and gains derived from industrial undertaking engaged in specified activities.

A. Relevant provisions of the clause and law in brief- Summarized

Applicability	• Provides for deduction in respect of profits and gains derived from the following activities, • An industrial undertaking including a small scale industrial undertaking (SSI) in Jammu and Kashmir (J&K). • An undertaking which begins commercial production of mineral oil or commercial production of natural gas in licensed blocks • An undertaking deriving profits from the business of processing, preservation and packaging of fruits or vegetables or meat and meat products or poultry or marine or diary products or from the integrated business of handling, storage and transportation of foodgrains.
Deduction	• Deduction is available at certain percentage of profit for the initial years depending upon the category of undertaking. Please refer table below for more details. • This deduction is not available to the taxpayer opting for new regime of taxation under Section 115BAA and 115BAB.

How to claim the benefit of this provision	• The Company will need to file ROI and audit report within the due date for claiming the deduction (Refer para 'B' below.)

The deduction available to the undertaking is as under:

Sl. No.	***Category of Undertaking***	***Specific conditions to be satisfied***	***Deduction***
1	Industrial undertaking including SSI in J&K	• It manufactures or produces any article or thing or operates a cold storage plant. • It starts its operation in between 01.04.1993- 31.03.2012. • No deduction will be allowed for the manufacture of article specified in Part C of Thirteenth Schedule. • For manufacturing unit, it should employ 10 or more workers if manufacturing carried with the aid of power and 20 or more workers in other cases.	First 5 years - 100% of the profit. Next 5 (*) years - 25% of the profit(30% in case of companies) (*)(7 years for co-operative societies)
2	Commercial production of mineral oil (**)	Begins commercial production in between 01.04.1997- 31.03.2017	First 7 years - 100% of profit.
3	Commercial production of natural gas in blocks (***)	Begins commercial production in between 01.04.2009 - 31.03.2017	First 7 years - 100% of profit
4	Processing, Preservation, Packaging of fruits or vegetables or meat and meat products or poultry or marine or diary products and integrated business of handling , storage and transportation of foodgrains.	• Begins the operation on or after 01.04.2001. • It should begin the operation on or after 01.04.2009 in case the undertaking deriving profit from the business of processing, preservation and packaging of meat or meat products or poultry or marine or diary products.	First 5 years - 100% of the profit Next 5 (*) years - 25% of the profit (30% in case of companies) (*) (7 years for co-operative societies)
** This shall not apply to blocks licensed under a contract awarded after 31.03.2011 under the New Exploration Licensing Policy announced by the Government of India (GOI). *** This is applicable for commercial production of natural gas in blocks licensed under the VIII round of bidding for award of exploration contracts under the New Exploration Licensing Policy announced by the GOI.			

B. ROI and Audit Report

As per section 80AC of the ITA, in order to claim the said deduction the return should be filed on or before the due date specified under section 139(1) of the ITA.

Rule 18BBB of the Rules provides that for claiming the deduction, books should be audited by an accountant, and the audit report should be furnished in form **10CCB** on or before 30th September of the AY.

C. Key court ruling & circulars along with our analysis and suggestions

i. Deduction on the profit enhanced due to disallowance of expenditure:

CBDT Circular No 37/2016 dated 02-11-2016 which is applicable for section 80IA is applicable for this section as well.

ii. Allowability of deduction in case return is not filed within time or claim is not made in the return:

In the case of Jagtap Patil Promoters & Builders [2023] 147 taxmann.com 199 (Pune-Trib) the Hon'ble ITAT held that no deduction under section 80IB will be allowed if the ROI is not filed in due date and no deduction claimed in the return.

D. Revised Guidance Note on Tax Audit under Section 44AB of the ITA

The pointers as specified under Section 80IA above shall be equally applicable for Section 80IB.

5. Sections 80JJAA of the ITA: Deduction with respect to the additional employment cost

Section 80JJAA provides deductions for the **recruitment of new or additional employees**. It was intended to encourage employers to hire new employees periodically. The main focus of this deduction to generate employment in all sectors of the Indian economy.

A. Relevant provisions of the clause and law in brief- Summarized

Provision	The said section deals with tax deductions on profits and gains from businesses. The section allows a deduction of 30% on additional employee costs for three consecutive AYs.
Purpose	The purpose of this section was to encourage employers to generate new employment opportunities and provide employment benefits to eligible employees. By providing a tax deduction, the aim was to incentivize employers to hire more people and thereby reduce the rate of unemployment in the country.
Meaning of additional employees	An additional employee means an employee who has been employed during the previous year but does not include the following: • Employee whose total salary is more than Rs. 25,000/- per month; • Employee who was employed for less than 240 days in the previous year (150 days in case of manufacture of apparel/ footwear/leather products);

	• In case, employed for less than 240 days in current year but employed for more than 240 days in next FY, the benefit can be availed in next FY; • Employee who does not participate in Recognised Provident Fund like casual workers etc; • Employee whose entire contribution is paid by the Government under the Employees' Pension scheme.
Conditions to claim such deduction	Following conditions needs to be satisfied: • The assessee must have Income from Business and should be liable to get its accounts audited as per the requirement of section 44AB along with a report of a CA in Form 10DA • It should be a new business. It should not be formed by splitting up or reconstruction of an existing business • Business should not be acquired by way of transfer from any other person or as a result of any business reorganization • The claim for deduction under Section 80 JJAA needs to be made in the income ROI.
Form 10DA – important points to be noted	Form 10DA is a mandatory for claiming deduction under the said section. Few important points to be considered in this regard: • Form must be submitted online on the income tax website at least one month prior to the due date of filing of ROI prescribed u/s 139(1) • DSC is mandatory for filing Form 10DA

B. Key notifications & court ruling along with our analysis and suggestions

i. Notification No. 104/2019 dated 18-12-2019

CBDT vide its notification no. 104/2019 dated 18-12-2019 introduced significant amendment in Form 10DA of the Rules. The changes were in line with the amendment introduced by Finance Act 2018 wherein the deduction was allowed with respect to a new employee who did not complete 240 days in the first year but completed the same in the second year. The key changes incorporated in the Form 10DA are mentioned below:

a. the erstwhile Form 10DA, notified prior to amendment made by the Finance Act 2018, did not deal with "spill over employees". The new Form 10DA specifically requires reporting of number and emoluments paid to "spill over employees" in line with the said amendment.

b. The deduction is available for three tax years beginning with the tax year in which additional

employee is recruited i.e. current tax year and two preceding years. The erstwhile Form 10DA required reporting of particulars only for the first year and no other years. The new Form 10DA addresses this issue and requires reporting of particulars for all the three years.

c. The erstwhile Form 10DA required reporting of PAN of the taxpayer. The new Form 10DA requires reporting of either PAN or Aadhar. This will be relevant only for individuals carrying on business who are now permitted to quote Aadhar instead of PAN since both are linked together in the income tax database.

d. The erstwhile Form 10DA required certification of deduction determined on the basis of additional employee cost incurred "in the previous year" (i.e. current tax year). The new Form 10DA omits the reference to "in the previous year" since the deduction could be claimed for the prior two years as well.

There have been instances that assessee's have made a claim for the current year and missed to claim the deduction pertaining to the earlier years. The amendment in the form has captured this omittance.

ii. Ginza Industries Ltd vs. DCIT [2022] ITA No. 619 & 620 (Kolkata - Tribunal)

There is a school of thought that non filing of the relevant forms or mistakes in the form cannot be a reason for rejection of claim. The Hon'ble Kolkata ITAT has in the recent past, in the case of Ginza Industries (Dt of order: 08-12-2022), held that rejection of deduction claimed under section 80JJAA on the basis of minor technical defect is unsustainable if the audit report has given complete clarity on the deduction.

iii. CIT vs. Texas Instruments India (P.) Ltd. [2021] 127 taxmann.com 59 (Karnataka HC)

The law when introduced allowed deduction only in respect of employees who had completed 240 days during the year. Due to this, the deduction was not available in respect of such employees even though they continued in the organisation. The Government realised that this was unfair on the assessee. Accordingly, the law was amended to allow deduction for such employees provided they were employed for 240 days in the subsequent year. This was a beneficial provision and a view prevails that the same was always meant to be that way and that the amendment was more of a clarification. The said issue came up before the Hon'ble Karnataka HC in the case of Texas Instruments India (P). Ltd. (Dt of order: 21-04-2021), wherein the Hon'ble ITAT held that, the amendment brought in by Finance Act, 2018 (allowing deduction under Section 80JJAA in subsequent year, if the new employee satisfies the condition of no. of days of employment in the subsequent year) is clarificatory in nature and can be applied retrospectively for the benefit of the taxpayers.

iv. Point to be noted

Section 80JJAA of the Act holds significance since it is one of the few provisions by which incentive

deductions are still permitted to be availed even by domestic companies who opt for lower corporate tax regime by giving up all other tax incentives and deductions. Taxpayers and practising Chartered Accountants issuing Form 10DA will need to take note of the changes and comply with the new requirements accordingly. By requiring reporting of particulars for three years, the new Form 10DA addresses the gap which persisted between the statutory provision which clearly grants benefits for three years whereas the erstwhile Form 10DA required reporting of particulars for one year only. The other changes were largely in line with the statutory amendments to Section 80JJAA.

Further, the tax auditor would play a major role in determining the amount of deduction and he needs to make sure that the certification from a CA in Form 10DA along with other documentary evidence is obtained.

C. Revised Guidance Note on Tax Audit under Section 44AB of the Income-tax Act, 1961

The pointers as specified under Section 80IA above shall be equally applicable for Section 80JJAA.

6. Section 10A – Deduction in respect of profits and gains of a newly established undertakings in Free Trade Zone ('FTZ')

Section 10A of the ITA provides for deduction in respect of such profits and gains as are derived by a FTZ undertaking from the export of articles or things or computer software for a period of 10 consecutive AYs beginning with the AY relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software.

The said section is not applicable for AY 2012-13 and onwards and is accordingly no more relevant. Further, the concept of free trade zone has been replaced by SEZ which is now governed by Section 10AA of the ITA.

7. Section 10B – Special provisions in respect of newly established hundred percent Export-Oriented Unit ('EOU')

Section 10B of the ITA provides for deduction in respect of such profits and gains as are derived by an EOU from the export of articles or things or computer software for a period of 10 consecutive AYs beginning with the AY relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software. The benefit in respect of newly established 100% Export Oriented Units is available to all assessees on Export of Certain Articles or things or software.

The said section is not applicable for AY 2012-13 and onwards and is accordingly no more relevant. Further, the concept of export-oriented undertakings have not been replaced by SEZ which is now governed by Section 10AA of the ITA.

8. Section 10AA – Deduction in respect of profits and gains from business units established in SEZ.

Section 10AA of the ITA is a special provision that allows newly established businesses or units to enjoy income tax holidays and exemptions for offering services in SEZs. The objective of this section is to promote exports and attract foreign investment by providing tax incentives to units established in SEZs.

Section 10AA was introduced in April 2000 under the Foreign Policy Act and was fully formulated in 2006 under the SEZ Act to provide tax concessions to businesses in SEZ. This provision also is now in its wanning out stage.

A. Relevant provisions of the clause and law in brief- Summarized

Eligibility for deduction	i. The tax holiday is available to units established in SEZs on or after April 1, 2005, and before April 1, 2020 ii. The company should not have been established by relocating previously used plants or machinery. However, in certain cases, SEZ units can use second-hand machinery. iii. The SEZ unit should not be incorporated by reconstructing or splitting an existing business. iv. To claim the tax holiday under section 10AA, the eligible unit must comply with certain conditions, such as obtaining necessary approvals and filing the prescribed ROIs. v. A unit that has claimed deductions under section 10A for 10 consecutive years before the SEZ Act 2005 is not eligible. vi. If the businesses' profits were computed under sub-section (7B) of Section 10A, only gains for the unexpired period of 10 years are eligible under section 10AA.
Amount of Deduction	The amount of deduction available under this section shall be as follows: • 100% of the export profits for the first 5 consecutive AY • 50% of export profits for further 5 AYs after the above period • For the next 5 AYs, not more than 50% of the profit is eligible for tax deduction (this deduction gets debited from an assessee's profit and loss statement and is credited to his/her 'SEZ Re-investment Reserve Account'.) A company may avail deductions from the year previous to the one in which it started manufacturing or providing services. These deductions cannot be more than the taxpayer's total income and are applicable to the industrial undertaking's total income.
Conditions for deduction	• The SEZ unit should not be incorporated by reconstructing or splitting an existing business. • To claim the tax holiday under section 10AA, the eligible unit must comply with certain conditions, such as obtaining necessary approvals and filing the prescribed ROIs.

	• In order to claim the deduction from 11th year onwards, business owners of units in SEZs need to create a reserve account (SEZ Reinvestment Reserve Account) and businesses can utilise the amount only for buying new machinery and plants. • The newly purchased plant or machinery should be used for at least 3 years from the date of creating their reserve account. • The necessary particulars of the purchase of machinery needs to be provided in Form No.56F in order to avail the deduction. • If the reserve account is used for any other purpose, the amount utilised will be deemed to be profits and charged as per applicable I-T laws. Further, if the amount is not utilised within 3 years, it will expire, and taxes will be applicable on it.
Calculation for the deduction	Profit from Export = (Profits of Business x Export Turnover of the Unit)/ Total Turnover of the Business Export turnover refers to what a business operating in India receives for its exports. This amount does not include insurance, freight, telecommunication or foreign exchange expenses incurred for delivering items/products or rendering services.

B. Recent Key court rulings along with our analysis

i. Filing of ROI within specified due date together with Form 56F

ACIT vs. Vishnu Export [2023] 149 taxmann.com 65 (Ahmedabad - Tribunal)

In the case of Vishnu Export, recently the Hon'ble Ahmedabad ITAT had the occasion to examine the allowability of claim u/s 10AA. In its order dated 31-03-2023, the Hon'ble ITAT held that, assessee could not be deprived of claim on grounds that claim was not filed under original ROI within specified time limit as per section 139(1), since there was no specific provision under section 10AA to file ROI within provisions of section 139(1).

It further held that, assessee could not be deprived of benefit available under section 10AA merely on ground that audit report in Form 56 was filed during assessment proceedings and not with ROI.

ii. Allowability of claim in the event proceeds of exports are not within 6 months

Uni Design Jewellery Pvt Ltd vs. DCIT [2023] ITA No. 3006/MUM/2022 (Mumbai – Tribunal)

One of the aspects in the claim for deduction u/s 10AA is to earn from export of articles and/or things and the export proceeds be brought into India. The section per se, unlike section 10A and 10B, does not lay down the timelines within which proceeds need

to be brought into India. The Hon'ble Mumbai ITAT in one of the recent decisions (Dt of order: 28-02-2023), had this issue where it held that Section 10AA does not prescribe any time limit for realisation of export proceeds. Hence, the benefit of the said section cannot be denied merely because the export proceeds were realized after the expiry of 6 months from the end of relevant previous year in which export sales were made.

iii. ***Whether export is a mandatory requirement***

DCIT vs. Serum Institute of India [2023] ITA No. 323/PUN/2021 (Pune – Tribunal)

In the case of Serum Institute of India Ltd. [1] (Taxpayer), the Taxpayer had made supplies of vaccines to UNICEF [2], where delivery was made in India for domestic consumption. It was noted that the comparable provisions of the regulatory and indirect tax laws treat such supplies within India as "deemed exports" and grant benefits thereunder.

In this respect, the Tribunal observed that Section 10AA was inserted vide the regulatory and indirect tax laws and accordingly the legislative intent thereof to provide benefit for such deemed exports would equally apply to Section 10AA.

Accordingly, the Tribunal held that benefit of Section 10AA deduction cannot be denied merely on the grounds that goods were not exported outside India, even though the consideration was received in foreign currency.

iv. ***Point to be noted - amendment w.e.f. 01-04-2024***

In light of the above various decisions and the loophole in the provisions of the Section 10AA of the IT, the Finance Act 2023 introduced certain amendments in the said section which would be effective from 1st April 2024 and will accordingly apply in relation to the AY 2024-25 and subsequent AY. The amendments are mentioned as below:

Section 10AA deduction only if ROI filed before the due date

- The existing provisions of section 10AA does not provide for the condition to file ROI before due date provided under section 139(1) for claiming deduction as is provided for similar exemption provisions [i.e., section 10A, 10B etc.]
- Clause (v) of section 143(1) however provides that deduction under section 10AA shall be eligible only if the ROI is filed before the due date.
- It is now proposed to align the aforesaid provisions by inserting a proviso to sub-section (1) of section 10AA to provide that no deduction under the said section shall be allowed to an assessee who does not furnish a ROI on or before the due date specified under sub-section (1) of section 139.

Time limit stipulated for SEZ units to bring forex in India

- No time-limit is prescribed in the Act for timely remittance of the export proceeds from sale of goods or provision of services by SEZ Units for claiming deduction under the said section as is provided under other similar export

related deductions [i.e., section 10A, 10B etc.]

- A new sub-section (4A) is proposed to be inserted in section 10AA to provide that deduction under the said section shall be available for such unit, if the proceeds from sale of goods or services is received into India by the assessee in convertible foreign exchange within a period of 6 months from the end of the previous year
- The proposed amendment further provides that export proceeds from sale of goods or services shall be deemed to have been received in India where such proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India
- It is also proposed to make consequential amendment in sub-section (11A) of section 155 to allow the AO to amend the assessment order later where the export earning is realized in India after the permitted period.

D. Revised Guidance Note on Tax Audit under Section 44AB of the ITA

The pointers as specified under Section 80IA above shall be equally applicable for Section 10AA.

As for the satisfaction of the conditions, it assumes importance in the initial years of claim. Now with the phase out of the deduction, the tax auditor may not have to get into greater detail. However, the amendment adds additional responsibility on the auditor to ensure that the ROI is filed in a timely manner and that the forex is brought in India within the prescribed time limit.

"All power is within you; you can do anything and everything. Believe in that, do not believe that you are weak; do not believe that you are half-crazy lunatics, as most of us do nowadays. You can do any thing and everything, without even the guidance of any one. Stand up and express the divinity within you."

— *Swami Vivekananda*

"See the flower, how generously it distributes perfume and honey. When it's work is done, it falls away quietly. Try to be like the flower, unassuming despite all it's qualities."

— *Dr. A.P.J. Abdul Kalam*

CA Vipin Batavia

Audit Report Applicable to Charitable Trusts (Form 10B & 10BB)

There is provision for compulsory audit of accounts under Income-tax Act ('Act') applicable to the charitable trusts/institutions u/s. 12A (1) (b) and under tenth proviso to Sec. 10(23C), as the case may be, and they are required to keep and maintain prescribed books of account and documents as per amended provision applicable from AY 2023-24 as per rule 17AA for both the regime.

The monetary limit for compulsory audit is applicable if the total income of the trust or institution as computed under this Act (including corpus and specific donations) without giving effect to the provision of Section 11 and section10(23C) (as the case may be) exceeds the maximum amount which is not chargeable to income-tax in any previous year. The present such limit is Rs. 2.5 Lakhs.

Audit report under the Act is to be issued by a practicing Chartered Accountant in the prescribed form and to be uploaded electronically (w.e.f. AY 2014-15) within the prescribed time. One of the conditions for availing exemptions u/s. 11 and 10(23C) is the requirement of auditing of accounts and to submit it within prescribed time. The consequences for not keeping and maintaining books of account and not obtaining and filing of Audit Report or filing it belatedly is discussed herein after.

The audit report, up to AY 2022 – 23, was required to be issued and submitted in Form 10B for the assesses claiming exemption u/s 11 u/s. 12A(1)(b) and in Form no- 10BB for the assesse claiming exemption u/s 10(23C) (iv), (v), (vi) and (via) under tenth proviso.

The audit report was required to be submitted, up to AY 2020-21, along with the return of income/ITR. Thereafter from AY 2021-22 the audit report is required to be submitted before the specified date referred to in Sec. 44AB. The due date for obtaining and submitting the Audit Report as per Sec. 44AB is at least one month prior to the due date of filing of ITR (which is presently 30th September) along with such particulars as may be prescribed.

Further, the CBDT amended rules amending Rule 16CC, corresponding to tenth proviso to Sec. 10(23C)) and Rule 17B, corresponding to Sec. 12A(1)(b) and prescribed new extensive revised audit report in Form -10B or form 10BB, as applicable, common for all trusts/institution and prescribed statement of particulars vide notification G.S.R.-118(E) issued on 21-02-2023 w.e.f. from 01-04-2023(AY 2023-24) as under-

1) Form No. 10B

The amended form 10B is applicable in one or more following situations –

i) If the total income of trust or institution without giving effect to the provisions of Sec. 11 & 12 or Sec. 10(23C) (iv), (v), (vi), (via) of the Act exceeds rupees five crores during the previous year; or

ii) If such trust or institution has received any foreign contribution during the previous year; or

iii) If such trust or institution has applied any part of its income outside India during the previous year;

2) Form No. 10BB

Form 10BB is applicable in other cases (which are not falling in above situation) other than where the form 10B is applicable.

Explanation - For the purpose of the expression foreign contribution, it shall have the same meaning assigned to it in clause (h) of sub-section (1) of section 2 of the Foreign Contribution (Regulation) Act, 2010.

AUDIT REPORT AND ITS PARTS

The audit report in form 10B & 10BB consist of two parts.

A) Audit Report

B) Annexure

A) Audit report – Form 10B & 10BB

The audit report is similar for both Forms 10B & 10BB under Rules 16CC & 17B respectively.

i) In the first paragraph in the Audit Report the auditor has to state that the Auditor has examined the Balance Sheet and Income & Expenditure A/c or Profit and Loss a/c are in agreement with books of account maintained by the trust/institution. This part has not undergone any change.

ii) The Auditor also have to give its opinion, as to whether proper books of accounts have been maintained at the registered office of the trust/institution at the address mentioned at the serial no. 11 or 14 of the Annexure (as the case may be). In serial no. 11 or 14 of the Annexure information about the details of place where books of accounts and other documents have been maintained is to be provided.

iii) The Auditor has to further give its opinion that the particulars given in the Annexure are true and correct. The auditor can subject this to his observations or qualifications.

This part of the audit report was not there in earlier audit report. The auditor has to certify about the true and correctness of the particulars provided in the annexure to the best of it's information and explanation given to him.

This part of the audit report is precarious since the Auditor has to certify the true and correctness of the details provided in the annexure. Therefore the Auditor should be very careful for reporting these details. He should verify it properly before issuance of report.

It is advisable that the Auditor should obtain a declaration from the Auditee that the information provided by the Auditee is true and correct.

Moreover, wherever the Auditor thinks fit, he should give his observation or qualification to safeguard itself. It is advisable that the Auditor should give as many as qualifications he thinks fit

according to the facts and circumstances of the case.

iv) The Auditor has to give further opinion about the true and fair view of the Balance Sheet and Income & Expenditure A/c or Profit and Loss A/c of the income and application or profit or loss of the relevant accounting year. This can be subjected to observations and qualifications. When reviewed against the old audit report, one change that is noticed is that the words 'Income & Expenditure A/c' and 'of Income and Application' are added in the revised report.

One of the notes given below the audit report reads a follows:

> *"Where any of the matter stated in this report is answered in the negative or with a qualification, the report shall state the reason for the same*

The auditor has to file up required particulars in the annexure in Form No. 10B or Form No. 10BB as the case may be.

Note – 1) The details and my observations and suggestions are given in the remark column.

2) The short heading for the sub points are given, for space saving, in such a brief manner that it can be understood.

Form No. 10B

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
Basic Details	**(1)** PAN **(2)** Name **(3)** Assessment year **(4)** Previous year **(5)** Registered address **(6)** Other address (if applicable)	Simple & Routine Point 6 – Other address as per resolution passed and intimated to AO within 7 days. Where other address is continued since before the amendment. It is advisable to pass resolution now to this effect and to intimate AO about the continuation of such address.
Legal Details	**(7)** Type of Auditee **(8)** Whether established under an instrument	Simple & Routine
Registration Details	**(9)** Details of registration/provisional registration or approval/ provisional approval (Routine tabular format)	1) One of the codes should be selected & provided where regular registration is obtained, no need to provide details for provisional registration (Refer note – 4 of the Notes to Form 10B) 2) As per Code numbers provided it is to be used for registration u/s. 12AB, approval u/s. 10(23C), Approval u/s. 35(1) and approval u/s. 80G (5) and any other please specify. It means if the trust is having IT Reg./Approval and 80G then the indication is one should mention both the registrations.

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
		3) As per CBDT Circular 6 of 2023, dated 24.05.2023, where the application in form 10A for re-registration is missed by any trust now it is allowed to file up to 30-09-2023.
Management Information	**(10)** (a) Details of managing persons anytime during the previous year (Tabular format)	At column – 2 relation code number to be written for each type of person. (Refer note – 5 of the Notes to Form 10B for relation code) At column – 5 - ID code is to be provided (Refer note – 6 of the Notes to Form 10B for ID code)
	(b) Beneficial owners (5% or more) at any time during the year (Tabular format)	At column – 4 - ID code is to be provided (Refer note – 6 of the Notes to Form 10B)
Objects	**(11)** Objects of the Auditee	Applicable one or more limbs of the objects as per Sec. 2(15) to be provided. (Refer note – 7 of the Notes to Form 10B for code number)
	(12) (i) Modification of the objects adopted	(Yes/No)
	(ii) If yes, then –	
	(A) Date - Modification/ adoption	DD/MM/YYYY
	(B) Whether re-registration application submitted in 30 days.	(Yes/No)
	(C) if yes provide details (Tabular format)	Required details to be filled up
Commencement of activities	**(13)** (i) For provisional reg. whether activities have been commenced	(Yes/No)
	(ii)If yes - date of commencement	(DD/MM/YYYY)
	(iii) Whether Reg. application is done.	(Yes/No)

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	(iv) Provide details for application.	Required details to be filled up in tabular format
Details of Place where books of a/cs and other documents have been maintained	**(14)** (i) Whether books of accounts and other documents kept and maintained- Rule 17AA	(Yes/No)
	(ii) Details to be provided for books of accounts and other documents (Tabular format)	* At column – 2 - Code no. to be given for each type of books of account and other documents maintained. ***Note*** – There are 18 codes prescribed. Out of 18 only first 3 are for books, other 15 are for documents. The auditor has to provide separate code number for separate types of documents. To provide these type of informations is very cumbersome and clumsy exercise. These informations are not necessary at this stage. * The auditor has to report whether it is maintained at the reg. office. * In case if A/c's & documents are maintained at other place then address of such place, date of decision and date of intimation to AO to be provided. Therefore, to comply with this requirement it is advised earlier to file the resolution now for being continuation of maintenance of books at other place. * The impact of not keeping and maintaining books of accounts and other documents in prescribed form and manner the provisions of Sec. 12A(1)(b)(i) (added w.e.f. 01-04-2023) will apply and as a result the trust may lose its exemptions. However as per Finance Act, 2023 the benefit of Sec. 13(10) for computation of income in such cases will be available (w.e.f. AY 2023-24)
Advancement of General Public Utility	**(15)** Whether, any activity fall under advancement of any other object of GPU then: -	***Note*** – The Audit Report requires information, whether the auditee is engaged in any activity that falls under proviso to Sec. 2(15) under advancement of General Public Utility
	(A) Whether any activity is in the nature of trade/ commerce etc.	(Yes/No)

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	(B) If yes, then percentage of receipts in relation to total receipts	%
	(C) Whether such commercial activity undertaken in the course of actual carrying out.	(Yes/No) ***Note*** – The auditor has to confirm whether such activity is undertaken in the course of actual carrying out. Therefore, before reporting the auditor should conduct proper study of the case and the verification.
	(D) Whether proviso of Sec. 2(15) applicable?	(Yes/No) ***Note*** – Recently Supreme Court in the case of Ahmedabad Urban Development Authority (2022) 449 ITR 1 (SC) has interpreted the proviso to Sec. 2(15). Which says if such activity is carried out at cost plus reasonable markup, then proviso to Sec. 2(15) will not be applicable. Therefore, if auditee decides whether proviso to Sec. 2(15) is applicable or not on the basis of this Apex Court decision, the auditor should clarify/qualify it in this regard.
	(E) If yes, then % of receipt from such activity vis-à-vis to total receipts.	%
	(F) Whether rendering services is undertaken in the course of actual carrying out of GPU	(Yes/No) ***Note*** – Same given as above at sub point -C.
	(16) If 'A' or 'D' at point-15 is Yes, then provide information given tabular format	To provide Name of Project/Institution and Amount of aggregate annual receipts of Sr. 15(A) & 15(D)
Business Undertaking	**(17)** (i) Any business undertaking as referred to Sec. 11(4)	(Yes/No)
	(ii) If yes, then (a) Nature (b) Business Code (c) Separate books of account (d) Income which is not to be	As per note – 9 of the Notes to Form 10B for row 17(ii)(c) & 18(ii)(c) – Upload Audited accounts and audit report in form 3CA or 3CB as applicable (E-filing utility to provide upload facility) for business undertaking or business incidental to the objects.

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	included (e) Income to be included	As per this note it confirms that if the business undertaking of a trust crosses the prescribed limit u/s. 44AB then tax audit is applicable and the Audit report in 3CA and 3CB are to be uploaded.
Business Incidental to Objects	**(18)** (i) Any income being profits and gains from business (Seventh proviso to Sec. 10(23C) & Sec. 11(4A))	(Yes/No)
	(ii) If yes, then provide details in tabular format	Refer same remark at 17(ii)(c) above
TDS on receipts	**(19)** Details of TDS done U/S 194C or 194J or 194H or 194Q	TDS details are asked only for these four sub sections. Surprisingly the details of Sec. 192 are not asked.
	(20) Whether the provisions of twenty second proviso to Sec. 10 (23C) or Sec. 13(10) are applicable.	(Yes/No) Under both the regime the provision provides special computation of Income beneficial to assessee. This provision is applicable for specified situations, the income chargeable to tax shall be computed for default/situation – (a) Applicability of Sec. 2(15) (b) Violation of keeping & maintaining of Books of Accounts (c) Not getting accounts audited and not furnishing it by due date (d) Default in furnishing of ITR within time allowed u/s139(1)or (4). Then in these situations income is to be computed by allowing deduction for expenses (Other than capital expenditure) incurred for the objects of the trust. But not allowing expenditure out of corpus, out of loans & borrowings, non-allowable depreciation and expenditure in the form of donation to any person and disallowance of TDS [40(a)(ia)] and Cash Expenses [40A(3) & (3A)] The computed such income is chargeable to tax as an AOP.

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
Voluntary contributions	**(21)** Whether form 10BD is filed	(Yes/No) (If no then row no. 23 is to be skipped)
	(22) Total sum as per Form No. 10BD	Rs.
	(23) Donations not reported in10BD/Not required to fill 10BD.	
	(i) U/s. 80G(2)(b)	Rs. (Donations received for renovation & repairs of any such temple, mosque, gurudwara, church or other notified place)
	(ii) Donations qualifies u/s. 80G other than 80G(2)(b) or (a)(iv)	Rs.
	(iii) Donation received u/s. 80G(2)(a)(iv) and not eligible for 80G(5)	
	(a) Cash donations exceeding Rs. 2000	Rs. (Total amount of cash donations exceeding 2000 received)
	(b) Donations received from other charitable trusts	Rs. (Total amount of donations received from other charitable trust)
	(c) Others (Specify nature)	Rs. (Total amount of other donations received)
	(d) Total	Rs.
	(iv) Donations not reported in 10BD due to no identification	Rs. ***Note***- The details of all the donations received are to be reported in this section.
	(v) Donation in kind	Amount in Rs. (The donations in kind is to be computed in monetary value)
	(vi) Anonymous Donations (Sec. 115BBC)	
	There are point no. (a) to (c) for not taxable and (d) taxable donations (e) Total of (a+b+c+d)	The auditee has to provide details of anonymous donations to be provided for not taxable and taxable donations as called for.
	(vii) Any other donations not part of form 10BD	Rs. The nature of such donations to be specified

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	(viii) Total donation is not reported in 10BD	Rs.
	(24) Total voluntary contribution received (22 + 23 (viii)	Rs.
	(25) FCRA out of total contribution at Point 24	Rs. (Fill the Schedule FC)
	(26) Corpus donations	Rs.
	(A) Received for renovation or repair	Rs. (Fill Schedule Corpus)
	(B) Corpus donation eligible for exemption	Rs. (Fill Schedule Corpus) ***Note*** – As per Finance Act, 2021 w.e.f. 01.04.2022 the exemption u/s. 11(1)(d) and third proviso to Sec. 10(23C) will be available only if such donations are invested in prescribed mode u/s. 11(5) and maintained specifically such corpus.
	(27) Voluntary contribution required to be applied	Rs. ***Note*** – Total voluntary contribution required to be applied
Income to be applied	**(28)** Income other than voluntary contributions	Rs. (Total income other than voluntary contribution)
	(29) Income applied outside India	Rs. (Schedule to be filled up)
	(30) Income required to be applied in India (27+28-29)	Rs. ***Note*** – Total Income required to be applied
Application of Income	**(31)** Application of Income (Other than Sr. 37)	
	(i) Total amount applied object wise and bifurcation to be given for Electronic and Other than electronic payment in tabular format	Rs. ***Note*** – As per CBDT circular 6 of 2023 dated 24/05/2023 has clarified that the A/c payee cheques issued for application are to be considered as payments under electronic mode.

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
		Point 31(i)(b)(ix) – The total of application done (other than categorized in i to viii) Under other objects should be provided here.
	(ii) Details of application in excess of 50 Lakhs to any person	Details to be furnished in Tabular format
	(iii) Amount which is not actually paid, if included in (i)(c)	Rs.
	(iv)Amount actually paid which accrued during earlier year and not claimed.	Rs.
	(v) Total amount to be allowed as application	Rs.
	(vi) Bifurcation of application into revenue or capital	Rs.
	(vii) Amount invested or deposited back in corpus	Rs. (Fill Schedule Corpus)
	(viii) Repayment of loans and borrowings	Rs. (Fill Schedule L&B)
	Amount to be disallowed from application (ix) U/s. 40(a)(ia)	Rs. (Fill Schedule TDS)
	(x) U/s. 40A(3) or (3A)	Rs. (Fill Schedule 40A(3)/(3A)
	(xi) Corpus Donations to other reg. trusts	Rs.
	(xii) Donation to other reg. trust not having same objects	Rs.
	(xiii) General Donations (Other than reg. trust)	Rs.
	(xiv) Application outside India - approval not obtained	Rs.

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	(xv) Application outside India - approval has been obtained	Rs.
	(xvi) Applied for beyond the objects	Rs. ***Note*** - The auditor has to verify whether the amount applied is for the objects of the trust or not.
	(xvii) Any other disallowance (Please specify)	Note – Surprisingly please word is used giving good feeling.
	(xviii) Total allowable application	Rs.
	(xix) Amount deemed to be applied accumulated under clause 2 of explanation 1 to Sec. 11(1)	Schedule – D1 to be filled up Filing of Form 9A Applicable.
	(xx) Amount accumulated under third proviso to Sec. 10(23C) or 11(2)	Schedule - AC to be filed Filing of Form 10 applicable for both the regime.
	(xi) Amount accumulated not exceed 15% of Income	Rs.
	(32) Taxable Income	Rs.
Section 115BBI (Specified Income)	**(33)** Income taxable under section 115BBI	(@30% plus SC as applicable)
	(a) Deemed income referred to Sec. 11(1B)	Yes/No – Rs. If yes then Fill Schedule DI (Default in utilization of accumulated amount (Form 9A)
	(b) Deemed income in Explanation 4 to third proviso to Sec. 10(23C) or Sec. 11(3)	Yes/No – Rs. If yes then fill Schedule AC(i) (Default in utilization of accumulated amount (Form 10)
	(i) Accumulated income applied other than charitable or religious purpose or ceases to be accumulated	Yes/No – Rs.

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	(ii) Accumulated income ceases to remain invested in 11(5)	Yes/No – Rs.
	(iii) Accumulated income is not utilised for the purpose it was so accumulated	Yes/No – Rs. ***Note*** – The accumulated amount not utilized for the purpose it was accumulated within a period of 5 years
	(iv) Accumulated income credited or paid to any other reg. trust	Yes/No – Rs.
	(c) i) Income not to be excluded from the total income under twenty first proviso to Sec. 10(23C) or U/s. 13(1)(c)	Yes/No – Rs. ***Note*** - Income used or applied Directly or Indirectly for the benefit of the Specified persons. As per F.A. 2022 w.e.f. AY 2023-24 only such part of income is to be taxed @30% plus SC.
	ii) Income not to be excluded from the total income under third proviso to Sec. 10(23C) or U/s. 13(1)(d)	Yes/No – Rs. ***Note*** – Amount invested otherwise than specified mode and in non-permitted shares prescribed u/s. 11(5). As per F.A. 2022 w.e.f. AY 2023-24 only such part of income is to be taxed @30% plus SC.
	(d) Income accumulated or set apart in excess of fifteen per cent of the income not allowable under specific provision of the Act	Yes/No – Rs. ***Note*** – Specified Income. As per ITR 7 utility the income remained which is even less than 2.5 Lakhs it is calculating tax @30% plus SC being income falling u/s. 115BBI. Therefore as on today the asessee should see that the net income should be Zero.
	(e) Application out of India which is not excluded from total income u/s. 11(1)(c)	Yes/No – Rs. If yes then fill Schedule Int App
-	**(34)** Anonymous donation which is chargeable to tax @30% under Sec. 115BBC	Rs.
Other Income	**(35) Other Income**	Rs.
	(a) Any income chargeable u/s. 12(2)	Rs. ***Note*** – The value of services being medical or educational made available to the persons covered u/s. 13(3) either free or concessional rate is to be provided.

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	(b) Income as per Explanation 3B to Sec. 11(1)	Rs. Fill Schedule Corpus ***Note*** – Where any temple, mosque, gurudwara, church or other place notify have treated any sum received as corpus donations and subsequently violated the prescribed conditions, such sum shall be deemed income of the year in which violation occurred.
	(c) Income as per Explanation 1B to the third proviso to Sec. 10 (23C)	Rs. Fill Schedule Corpus ***Note*** same as above at point no. 35(b)
	(d) Income chargeable under Sec. 11(4)	Rs.
Capital Asset	**(36)** Details of capital asset transferred under Sec. 11(1A)	
	(1) Capital asset wholly for charitable or religious purpose - Net consideration	Yes/No Rs.
	(2) Deemed application is claimed u/s. 11(1A) (a)	Yes/No Rs.
	(3) Capital asset in part only for charitable or religious purpose - Net consideration	Yes/No Rs.
	(4) Deemed application claimed u/s. 11(1A)(b)	Yes/No Rs.
Application of income out of different sources	**(37)** Application of income out of the following sources	(Electronic and Other than Electronic mode for details to be given A to F herein below)
	(A) Income accumulated under third proviso to Sec. 10(23C) or Sec. 11(2)	Rs. Fill Schedule AC (Form – 10)

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	(B) Income deemed to be applied under clause (2) of Explanation 1 to Sec. 11(1)	Rs. Fill Schedule DI (Form – 9A)
	(C) Income of earlier previous years up to 15% accumulated	Rs.
	(D) Corpus	Rs. Fill Schedule Corpus
	(E) Borrowed Fund	Rs. Fill Schedule LB
	(F) Any other (Please specify)	Rs. Fill Schedule LB
	(38) Details of application payment or credit in excess of Rs. 50 lakh to a person	Tabular Format
13(10) and 22nd proviso to section 10(23C)	**(39)** (i) Provisions of twenty second proviso to Sec. 10(23C) or Sec. 13(10) are applicable?	Yes/No
	(ii) If yes then –	
	(a) Proviso to Sec. 2(15) is applicable	Yes/No
	(b) Condition specified in clause (a) of tenth proviso to Sec. 10(23C) or Sec. 12A(1)(b)(i) have been violated	Yes/No ***Note*** – This clause is applicable for violation for keeping and maintaining books of accounts and documents (As per rule 17AA)
	(c) Condition specified in clause (b) of tenth proviso to Sec. 10(23C) or Sec. 12A(1)(b)(ii)	Yes/No ***Note*** – This clause is applicable for violation for not getting accounts audited and not filing audit report.
	(d) Condition specified in twentieth proviso to Sec. 10(23C) or Sec. 12A(1)(ba)(ii) - violated	Yes/No ***Note*** – This clause is applicable for violation for not furnishing ITR u/s. 139(1) & 139 (4)

Particulars	***Sub points (Raw Number in Bold)***	***Remarks***
	(iii) If yes then (a) to (d) working for computation of taxable income	Rs. (Taxable Income) ***Note*** – (i) This provisions is beneficial provision as earlier in these situation the full exemption was denied and the trust was taxed accordingly on gross receipts (ii) The computation of taxable income for the trust having specified situations (such 4 situations as mentioned (a) to (d) above) and to arrive at taxable income in such cases. (iii) It means now the application of income will be allowed with certain conditions for disallowances.
Expenditure Incurred for Religious Purposes	**(40)** In case trust is having 80G(5)	Please provide following details
	(a) Whether amount spent for religious nature	Yes/No If yes specify amount
	(b) Total income	Rs. ***Note*** – Total income of the auditee during the previous year is to be specified including corpus donations.
	(c) Percentage of such expenses to total income	%
Person referred to in 13(3)	**(41)** Details of specified person as referred to Sec. 13(3) – (Tabular Format)	***Note*** – 1) Settlor or Founder even if not alive details should be provided since their relatives will continue to covered. 2) PAN of such person to be filled. The question arises if PAN is not there. This point will be cleared at the time of filing the annexure whether the system is allowing to proceed without PAN. 3) Aadhar number of such persons is to be filled if allotted. 4) There is practical difficulty and nearly impossible to comply with the providing list of the substantial donors (Code – 2) by old trusts who have donated any time in aggregate exceeds Rs. 50,000/-. (Inspite of various representation this limit is not increased)

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
		Therefore I suggest the trust should provide such details, if possible for last ten years to comply with as far as possible and accordingly the auditor should qualify about the not availability of earlier details. 5) As per tabular format at column 6 if code 2 is selected then the amount of contribution is to be specified. Now question arises whether total contribution till years is to be given or for current year. The problem is the aggregate amount is to be considered then for which year it is to be given is not clear. Moreover such details are filed in form 10BD which will be cross verified. Whatever decision is taken by auditor for the specifying said amount should be mentioned at observation or qualification in audit report. 6) There is a CBDT circular No. 143, dated 20-08-1974 in this regard which states that an auditor can accept a list of persons covered under section 13(3) and consider it as correct while certifying the erstwhile Form No. 10B along with its annexure.
	(42) Details of transactions referred to in section 13(2)	Yes/No
	There are 8 different situations are covered under point (a) to (h)	If yes, fill Sch. SP-a to SP-h (The facts of the matter is to be mentioned after auditor has to satisfy himself about the adequateness and reasonableness as provided by the auditee)
Specified Violation	**(43)** Specified Violation: Trust has incurred any specified violation There are 6 types of specified violations prescribed under sub clause (a) to (f)	Yes/No (Amount of such violation is to be provided) In case of violation under sub clause (f) for not complied with requirements of any other law, if yes then Schedule for other law violations is to be filled up. In case of order for such non-compliance has occurred by any order, direction or decree the information is to be provided as per schedule even if is challenged in appellate forum.

Particulars	*Sub points (Raw Number in Bold)*	*Remarks*
	(44) Whether there is any claim of depreciation	Yes/No Amount of depreciation which is not allowable as per explanation 1 to Sec. 10(23C) or Sec. 11(6) is to be mentioned
	(45) In view of provisions of nineteenth proviso to clause (23C) of section 10 or sub-section (7) of section 11, please specify	Yes/No Amount of claimed u/s. 10 is to be mentioned other than clause (1), clause 23C and 46 ***Note*** - According to this provision the trust/institution will be entitled to claim either Sec. 10(23C) or Sec. 11 (w.e.f. AY 2022-23). To make registration operative from 10(23C) to 11 may applied for registration once only.
	(46) Whether any loan or deposit or any specified sum, received in cash exceeding Rs. 20,000/-	Yes/No Amount If yes, fill Sch 269SS
	(47) Whether any amount accepted of Rs. 2 Lakhs or more in cash from person in a day or single transaction or for one event or occasion	Yes/No Amount If yes, fill Sch 269ST
	(48) Whether loan or deposit or any specified advance repaid in cash exceeding Rs. 20,000/-	Yes/No Amount If yes, fill Sch 269T
	(49) Whether TDS/TCS provisions are applicable	Yes/No Amount If yes, fill Sch TDS/TCS Statement of TDS/TCS/Interest on TDS/TCS as applicable

Form 10BB

Sr. No.	*Particulars*	*Sub points*	*Remarks*
1	Basic Details	**(1)** PAN **(2)** Name **(3)** Assessment year **(4)** Previous year **(5)** Registered address **(6)** Other address (if applicable)	Simple & Routine Point 6 of the Notes to Form 10BB – Other address as per resolution passed and intimated to AO within 7 days. Where other address is continue since before amendment. Advisable to pass resolution now and to intimate AO about continuation of such address (As per Note no–3 of form).
2	Legal Details	**(7)** Type of Auditee **(8)** Whether established under an instrument	Simple & Routine
4	Management Information	**(9)** (a) Details of all persons covered under sec13(3), Shareholding 5% or more & Office bearer (s) of the auditee at any time during the previous year.	*At column – 2 The codes given at note no 4 are to be written for each type of person. (Refer note – 4 of the Notes to Form 10BB) *At column – 5 ID code is to be provided (Refer note – 5 of the Notes to Form 10BB)
		(b) Beneficial owners (5% or more) at any time during previous year	At column – 4 ID code is to be provided (Refer note – 5 of the Notes to Form 10BB)
6	Commencement of activities	**(10)** (i) whether activities have commenced (ii) Date of commencement (iii) Whether regular reg. application is filed (iv) Date of application	Simple & Routine ***Note*** – As per CBDT Circular 6/2023 if the date of application is missed for regular registration from provisional reg. within six months from the commencement of activity, the date of filing of such application in form 10AB is extended up to 30-09-2023. Even cases where the application is rejected due to delay in filing of application in, form 10AB, can now be filed up to 30-09-2023.

Sr. No.	*Particulars*	*Sub points*	*Remarks*
7	Details of Place where books of accounts &other documents have been kept and maintained	**(11)** (i) Whether books of accounts and other documents kept and maintained - Rule 17AA	(Yes/No)
		(ii) If yes then, whether books of account maintained at reg. office?	(Yes/No)
		(iii) If no, provide details -	
		(a) Address	
		(b) Date of decision of BOT	(DD/MM/YYYY)
		(c) Date of intimation to Assessing Officer	(DD/MM/YYYY)
8	Voluntary Contribution	**(12)** Whether Form No. 10BD is filed	(Yes/No)
		(13) Sum total of donations reported in Form No. 10BD	***Note 1*** – Simply the amount of contribution received should be filled into as per the requirements ***Note 2*** – At point no. 13 donation reported in 10BD to be filled. At column no. 14 all other contribution including FCRA is to be filled to arrive at total voluntary contribution (Sr. 15). Then at point no. 16, 17, 18 & 19 are to be filled up out of total contribution stated in Sr. 15. ***Note 3*** – At Sr. no. 20 it will be 15 – (17+18+19) other than FCRA filled at Sr. 16. Since the contributions 17, 18 & 19 are either exempted or separately taxed at special rate.
		(14) Donations not reported in Form No 10BD/Not required to fill in 10BD	
		(15) Total voluntary contributions (13+14)	
		(16) Total Foreign Contribution out of Sr. 15	
		(17) Corpus Donation which are included Sr. 15.	
		(18) Anonymous donations out of Sr. 15	Rs.

Sr. No.	*Particulars*	*Sub points*	*Remarks*
		(19) Application outside India for which approval obtained out of Sr. 15	Rs.
		(20) Voluntary contributions required to be applied [(15-(17+18+19)]	
		(21) Income other than the contributions report in Sr.15	
		(22) Income required to be applied in India (20+21)	
9	Application of Income	**(23)** Application of income (Excluding application not eligible and reported under Sr. 27) Sr. No. (i) to Sr. No. (vi)	Simple &Routine only amount is to be filled as required.
		Amount to be disallowed from application	
		(vii) TDS Amount disallowable u/s. 40(a)(ia)	Amount Fill schedule TDS Disallowed
		(viii) Amount disallowable u/s. 40A(3) or (3A)	Amount Fill schedule 40A(3)/schedule 40A(3A)
		(ix) Donation to any other reg. trust towards corpus	Amount ***Note*** – Donation out of corpus to corpus (For similar objects) is not disallowable since no application of income has been claimed.
		(x) Donation to other reg. trusts not having same objects	Rs,

Sr. No.	*Particulars*	*Sub points*	*Remarks*
		(xi) Donation to any person other than registered trust	Rs.
		(xii) Application outside India for which approval not been obtained	Rs.
		(xiii) Application outside India for which approval has been obtained	Rs.
		(xiv) Applied for any purpose beyond the objects	Rs.
		(xv) Any other disallowance	Rs.
		(xvi) Total allowable application	Rs.
		(xvii) Amount deemed to have been applied under clause (2) of Explanation 1 to Sec. 11(1)	Rs. ***Note*** – As per amended provision Form 9A is to be uploaded by 31-08-2023. However, the CBDT circular 06/2023 has clarified that the accumulation will not be denied if form 9A is filed on or before filing of ITR.
		(xviii) Income accumulated under the provisions of Explanation 3 to the third proviso to Sec. 10(23C) and Sec. 11(2)	Amount ***Note*** – As per amended provision Form 10 is to be uploaded (Under both the regime) by 31-08-2023. However, the CBDT circular 06/2023 has clarified that the accumulation will not be denied if form 10 is filed on or before filing of ITR.
		(ix) Income accumulated not exceed 15 %	Rs.
		(24) Taxable income	Rs.

Sr. No.	*Particulars*	*Sub points*	*Remarks*
		(25) Specified income taxable under section 115BBI	Rs. ***Note*** – As per ITR 7 utility the taxable income remained which is even less than 2.5 Lakhs it is calculating tax @30% plus SC being income falling under specified income u/s. 115BBI. Therefore as on today the assesse should see that the net income should be Zero.
		(26) Anonymous donation, chargeable @ 30 % tax under section 115BBC	Rs.
10	Application of Income out of different sources	**(27)** Application of income out of the following sources	Rs.
		(A) Out of third proviso to Sec. 10(23C) or Sec. 11(2)	Total Amount applied out of such accumulation (Accumulated for 5 years)
		(B) out of income deemed to be applied under clause (2) of Expl. 1 to Sec. 11(1)	Total Amount applied out of such accumulation
		(C) Out of accumulated @15% income of earlier years	Total Amount applied
		(D) Out of Corpus	Total Amount applied
		(E) Out of Borrowed fund	Total Amount applied
		(F) Any other (please specify)	Total Amount applied
11	Person referred to in 13(3)	**(28)** Details of specified person as referred to Sec. 13(3) (Tabular Format)	***Note*** 1) Settlor or Founder even if not alive details should be provided since their relatives will continue to covered. 2) PAN of such person to be filled. The question arises if PAN is not there. This point will be cleared at the time of filing the annexure whether the system is allowing to proceed without PAN.

Sr. No.	*Particulars*	*Sub points*	*Remarks*
			3) Aadhar number of such persons is to be filled if allotted. 4) There is practical difficulty and nearly impossible to comply with the providing list of the substantial donors (Code – 2) by old trusts who have donated any time in aggregate exceeds Rs. 50,000/-. (Inspite of various representation this limit is not increased) Therefore I suggest the trust should provide such details, if possible for last ten years to comply with as far as possible and accordingly the auditor should qualify about the not availability of earlier details. 5) As per tabular format at column 6 if code 2 is selected then the amount of contribution is to be specified. Now question arises whether total contribution till years is to be given or for current year. The problem is the aggregate amount is to be considered then for which year it is to be given is not clear. Moreover such details are filed in form 10BD which will be cross verified Whatever decision is taken by auditor for the specifying said amount should be mentioned at observation or qualification in audit report. 6) There is a CBDT circular No. 143, dated 20-08-1974 in this regard which states that an auditor can accept a list of persons covered under section 13(3) and consider it as correct while certifying the erstwhile Form No. 10B along with its annexure.
		(29) Details of transaction referred to in section 13(2) There are 8 different situations are covered under point (a) to (h)	Yes/No If yes, fill Amount (The facts of the matter is to be mentioned after auditor has to satisfy himself about the adequateness and reasonableness as provided by the auditee)

Sr. No.	*Particulars*	*Sub points*	*Remarks*
		(30) Specified violation Whether the auditee has incurred any specified violation and amount of such violation. There are 6 types of specified violations each to be written under sub clause (a) to (f)	Yes/No Rs. As per the wordings aggregate amount of such violations is to be provided. (However, the aggregate figure of all such violations is to be written here or not is not clear however we will come to know it while actually filing form 10BB) Rs.
		(31) Whether there is any claim of depreciation	Yes/No Amount of depreciation which is not allowable as per explanation 1 to Sec. 10(23C) or Sec. 11(6) is to be mentioned
		(32) Whether auditee is required to deduct or collect tax as per provisions of Chapter XVII – B or Chapter XVII – BB?	Yes/No Amount If yes, fill Sch TDS/TCS Statement of TDS/TCS/Interest on TDS/TCS as applicable

Condonation of Delay – 10B & 10BB

As per Sec. 119(2)(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship, grant any other relief under this act. The CBDT has issued various circulars under this section for condonation of delay in submission of audit report in form 10B & 10BB.

As per earlier provision there were two independent separate audit reports were prescribed being form 10B for claiming exemption u/s. 11 and form 10BB for claiming exemption u/s. 10(23C)(iv)(v)(vi)&(via). Now as per recent CBDT notification dated 21st February, 2023 vide G.S.R. 118(E) and prescribed new audit report and new form 10B and 10BB common for all the trusts & institutions.

However the earlier circulars issued by CBDT for condonation of delay the question may arise since those circulars were issued separate for form 10B & 10BB whether those circulars will still be applicable after the new notification? According to me the earlier circulars issued for condonation of delay will continue to apply even after the issue of said notification since the forms and other situations are same and are in the nature of granting relief for the justice & in interest of charity therefore the earlier circular will hold good.

Delay in filing Form 10B

The CBDT has authorized the Principal Commissioner/Commissioner to admit belated applications under section 119(2) for condonation of delay in filing of Form 10B. Such belated application shall be admitted as per the provisions explained below.

(a) Up to 365 days delay filing of Form 10B for assessment year 2018-19 & onwards [Circular No. 02/2020, dated 03-01-2020]

In cases of delay of up to 365 days in filing of Form 10B, CIT can admit applications for condonation and decide on merit. While entertaining such applications, CIT shall satisfy himself that the assese was prevented by reasonable cause from filing such application within the stipulated time.

(b) More than 365 days delay in filing of Form 10B for assessment year 2018-19 & onwards [Circular No. 16/2022, dated 19-07-2022]

In cases of delay of more than 365 days and up to three years in the filing of Form 10B for AY 2018-19 or for any subsequent Assessment Years, the PCCIT/CCIT are authorized to admit such applications of condonation of delay and decide on merits.

The PCCIT/CCIT, while entertaining such applications for condonation of delay in filing of Form 10B, shall satisfy himself that the applicant was prevented by reasonable cause from filing such form within the stipulated time. Such application for condonation shall preferably be disposed of within three months of receipt of the application.

Delay in filing Form 10BB

The CBDT has authorized the Principal Commissioner/Commissioner to admit belated applications under section 119(2) for condonation of delay in filing of Form 10BB. Such a belated application shall be admitted as per the provisions explained below.

(a) Delay in filing of Form 10BB for years before assessment year 2018-19 [Circular No. 19/2020, dated 03-11-2020]

In cases of delay in filing of Form 10BB for years before the assessment year 2018-19, the Commissioners are authorized to admit applications for condonation of delay. While entertaining the applications, the Com- missioner shall satisfy themselves that the applicant was prevented by reasonable cause from filing such form within the stipulated time.

(b) Up to 365 days delay in filing of Form 10BB for assessment year 2018-19 & onwards [Circular No. 19/2020, dated 03-11-2020]

In cases of delay of up to 365 days in filing of Form 10BB, CIT can admit applications for condonation and decide on merit. While entertaining such applications, CIT shall satisfy himself that the assessee was prevented by reasonable cause from filing such application within the stipulated time.

(c) More than 365 days delay in filing of Form 10BB for assessment year2018-19 & onwards [Circular No. 15/2022, dated 19-07-2022]

In cases of delay of more than 365 days and up to three years in the filing

of Form 10BB for AY 2018-19 or for any subsequent Assessment Years, the PCCIT/CCIT are authorized to admit such applications of condonation of delay and decide on merits.

The PCCIT/CCIT, while entertaining such applications for condonation of delay in filing of Form 10BB, shall satisfy himself that the applicant was prevented by reasonable cause from filing such form within the stipulated time. Such application for condonation shall preferably be disposed of within three months of receipt of the application.

Conclusion

Whether submission of audit report is directive or mandatory?

The filing of audit reports become mandatory to be uploaded online with effect from AY 2014-15 vide amendment in rule 12(2) of IT rules. Further Finance Act, 2020 has explicitly mandated that the audit report to be obtained and furnished one month prior to due date of filing of ITR u/s. 139(1). In the light of recent amendments the filing of audit reports seems to be mandatory requirement which earlier use to be directory in nature prior to AY 2020-21. There are umpteen number of judgments of various High Courts and tribunals in this regard of the filing of audit report is directive in nature which are relevant for assessment year prior to AY 2020-21. Moreover by Finance Act, 2023 added 22nd proviso to Sec. 10(23C) and Sec. 13(10) for computation of income, in one of the case, not obtaining and filing audit report.

The auditee trusts & institutions are not prepared to provide extensive details required under Form 10B & 10BB which is notified on 21st February, 2023. Even the keeping and maintenance of books of accounts were also prescribed on 10th August, 2022. Therefore for all good reasons and providing sufficient time to the auditee trust the applicability of new audit report and annexures should be extended and applicable from next year.

"Do not criticise others, for all doctrines and all dogmas are good; but show them by your lives that religion is no matter of books and beliefs, but of spiritual realisation."

— *Swami Vivekananda*

"Man often becomes what he believes himself to be. If I keep on saying to myself that I cannot do a certain thing, it is possible that I may end by really becoming incapable of doing it. On the contrary, if I have the belief that I can do it, I shall surely acquire the capacity to do it even if I may not have it at the beginning."

— *Mahatma Gandhi*

Vaishali Jitendra Lund

THE DASTUR ESSAY COMPETITION 2023

To have smarter and success-oriented students should our school/college syllabi be changed and if so in what manner?

Abstract

India is in that phase where it has the highest potential to reap the demographic dividend that is available in the form of young population. In its "Amritkaal" or the 75th year of Independence, the country is looking forward to become a developed nation from the current developing one till it reaches its centenary year. To reap this demographic dividend, the young population or the millennials have to be having the requisite sagacity and the skill set to harness this opportunity.

India has been a land of learned scholars and academicians. The country is blessed to have abundance of knowledge in its citizens. India is known to have been a pioneer in many areas of development. The base of this development lies in the foundation stone known as the education. Education is that root which can hold the burden of the tree called development. It is not a hyperbole when it is said that education is more responsible for development of a nation than money is.

The importance of education has been relevant to our country since time immemorial. But few questions that need to be answered in today's times are whether our current education makes a learner ready to face the world? Has our education system evolved overtime to help a learner walk alongside his counterparts from the rest of the world? Is our education system alone capable of making individuals smart and successful?

These questions are a time sensitive issue and hence need urgent attention and immediate action. Since if the roots are not strong enough, the tree will not stand the test of time. To make the tree of development grow faster, the roots of education have to be nurtured and watered.

The syllabus taught in the schools and colleges includes the magnificent history, language. mathematics and science. But the syllabus should be capable of transforming minds of the learners and to equip them to not only change their future but also to change the future of the society and the nation for the good.

"A syllabus is like a treasure map that leads students on a journey of discovery and learning."

ML-633

This essay endeavors to enumerate the limitations of the present education system and the proposed possible measures to reform it. It also brings about the expectation of the industry from the academia. Based on the expectation of the industry, a list of measures that can be taken to bridge this gap between academia and the industry have been suggested. On a macroscopic approach, the essay has suggested measures to improve the education system as a whole. It has also suggested measures to change the syllabus of our schools and colleges to make it more contemporary.

To have smarter and success oriented students should our school/college syllabi be changed and if so in what manner?

Introduction

"Kamyab Hone ke liye Nahin,
Kaabil Hone ke liye Padho."

This one dialogue alone from the Bollywood movie "3 idiots[1]" ringed an alarming bell in the heads of all the people of India regarding the state of education in our nation. The people were compelled to think whether the engineers, doctors, lawyers being produced out of our education system with impressive grades were actually professionally capable. The movie very clearly reflected the reality that our current education system only produces "Chatur's" while the nation needs more of "Rancho's". Tracing back to the plot of the movie to critically analyse the situation of our education system, in the movie, Rancho was a curious and creative learner who questioned traditional teaching methods and sought to understand concepts on a deeper level, while Chatur was a student who simply memorized information to achieve good grades. The former possessed better problem-solving skills and the ability to think critically, while the latter struggled to apply his knowledge in real-life situations. Rancho had a more well-rounded education, as he was interested in subject beyond just academics and applied his knowledge to innovate, while Chatur only focused on his academic performance. The movie brought the reality to light that a true education should be one that encourages creativity, innovation, and critical thinking, rather than simply memorization and rote learning.

It is said that a child starts learning even before he or she takes birth on this planet. Indian mythologies have immense stories to prove that the child starts learning , when in the womb itself. There is a famous story from Indian mythology about Abhimanyu, the son of Arjuna and Subhadra, who learned the art of breaking the Chakravyuh while still in his mother's womb. According to the story, when Subhadra was pregnant, Lord Krishna explained to her the strategy to break the Chakravyuh, a circular military formation used in battle. However, before he could explain how to get out of the formation, Subhadra fell asleep. Abhimanyu, who was still in her womb, heard only the first part of the strategy and learned how to enter the Chakravyuh but not how to break out of it. Years later, during the Kurukshetra war, the Pandavas were faced with the Chakravyuh, and only Abhimanyu knew how to enter it. Despite being young and inexperienced, Abhimanyu bravely entered the formation and fought valiantly against the enemy forces. However, he was unable to break out of the formation and was eventually killed.

1. Title- 3 idiots, Director – Rajkumar Hirani, Producer- Vidhu Vinod Chopra, Year of Release -2009.

However, a formal education system is required to educate the masses. An education system and syllabus which can equip the learners to become ready to face the world once they have completed the education.

Is education the key to unlocking a world of endless possibilities?

"Education is the most powerful weapon which you can use to change the world"[2]

This beautiful quote given by Nelson Mandela highlights the transformative power of education. Education is the tool that develops critical thinking, analytical and problem solving skills in an individual. Education is that significant tool that helps an individual to transcend their limitations and contribute to society in meaningful ways. Education is important for an individual, for the society and for the nation at large. Education provides knowledge, skills, and values that help individuals to achieve personal growth, economic prosperity, and social mobility. It equips individuals with the ability to think critically, make informed decisions, and communicate effectively. Education is the key to unlocking individual potential and pursuing personal passions and goals. It also helps individuals to improve their health and well-being and live more fulfilling lives. Education is also important for the development and progress of the society It fosters social, economic, and political growth by creating an informed and engaged citizenry that can participate in the democratic process, hold their governments accountable, and contribute to the community. Education can also help to break down social barriers, promote equality and tolerance, and reduce poverty and crime rates. Moreover, education can drive innovation, creativity, and entrepreneurship, which can lead to economic growth and job creation. As far the macroscopic view of the nation is involved Education is a fundamental driver of national development and competitiveness. It is a critical component of a nation's human capital, which is essential for economic growth, innovation, and global competitiveness. Education can help nations to build a skilled workforce, increase productivity and efficiency, and attract foreign investment[3]. It can also improve the health and well-being of the population, reduce income inequality, and promote social stability and cohesion. Education can help nations to build strong and resilient democracies that can withstand political, economic, and social challenges.

Structure of Current education system and syllabi in India

The education system in India is currently divided into three parts, the primary, secondary and the tertiary education. Primary education covers the first five to six years of a child's education, followed by secondary education, which covers the next five to six years. Tertiary education includes undergraduate and postgraduate degree programs, as well as professional and vocational training.

- ***Primary education***

The primary education system in India primarily focuses on the development of basic literacy and numeracy skills, social and emotional development, and physical development. The curriculum includes

2. Nelson Mandela 1918-2013
3. ILO, Upskilling out of the downturn: Global Dialogue Forum on Strategies for Sectoral Training and Employment Security, Geneva, 29–30 March 2010.

subjects like language, mathematics, environmental studies, and arts and crafts. Apart from the academic curriculum, extracurricular activities, games, and sports are also an integral part of the primary education system in India. It is considered as the foundation of education and plays a critical role in shaping the intellectual and cognitive development of a child. The primary education system in India is designed to impart basic knowledge, skills, and values to children, which are essential for their personal and social development.

- ***Secondary education***

Secondary education is an important phase of education as it provides students with a deeper understanding of different subjects and prepares them for higher education or vocational training. The curriculum for secondary education includes subjects such as mathematics, science, social studies, languages, and vocational education.

- ***Tertiary education***

Tertiary education, also known as higher education, is the third level of education in India that follows primary and secondary education. Tertiary education in India is typically provided by colleges, universities, and other higher education institutions that offer undergraduate and postgraduate programs. Tertiary education in India is divided into two categories: undergraduate education and postgraduate education. Undergraduate education includes Bachelor's degree programs that typically take three to four years to complete. Postgraduate education includes Master's degree programs, Doctoral programs, and other specialized programs that typically take one to three years to complete.

The structure of tertiary education in India is similar to that of other countries. Universities and colleges offer a wide range of degree programs in various fields such as arts, science, engineering, medicine, law, and management. In addition to the traditional degree programs, there are also vocational and professional courses that provide specialized training in fields such as nursing, hospitality, and tourism.

The present structure intended to provide a progression based education. The approach is progressive , but the structure should also be such as to provide a holistic understanding of what is being learnt.

Is there a need to change the education system and syllabi in India?

The answer to this golden question is yes, there is a need to bring about a change in the education system in India. The current education system has several limitations and drawbacks that are hindering the development and growth of students. [4]The system is outdated, focuses too much on rote learning and memorization, lacks practical knowledge, and is not aligned with the requirements of the industry and profession. Moreover, the education system in India also suffers from issues of underfunding, inadequate infrastructure, and lack of access to quality education for students from disadvantaged backgrounds. Therefore, there is an urgent need to revamp the education system and bring about reforms that address these issues and prepare students for the future. The education system needs to focus on developing critical thinking, problem-solving,

4. OECD (2012), Equity and Quality in Education: Supporting Disadvantaged Students and Schools, OECD Publishing. http://dx.doi.org/10.1787/9789264130852-en

and creativity skills, and provide opportunities for students to gain practical knowledge and vocational training. It should also prioritize the development of soft skills, such as communication and teamwork, and foster a culture of innovation and entrepreneurship. The education system in India has been criticized since it fails to bridge the gap between academia and industry, leaving students unprepared for the demands of the workplace.

To address these issues and to keep up with the changing global landscape, it is believed that a change in the education system is necessary. This change should focus on imparting relevant and practical skills that will equip students for the real world, instead of just theoretical knowledge. It should also incorporate technology to enhance learning and ensure that students are up to date with the latest advancements.

Moreover, the education system should encourage creativity, critical thinking, and problem- solving skills. It should place more emphasis on soft skills, such as communication, teamwork, and leadership, as these are highly valued by employers. Furthermore, the system should offer more vocational training to equip students with specific skills that are in demand in the job market.

Limitations of the current education system and syllabi in India

The limitations of the current education system are described below:

- ***The textbook talks about introduction of 2G technology, but 4G technology is already used in simple mobile phones.***

The ***outdated curriculum*** is one of the significant limitations of the current education system in India. The curriculum followed in most schools and colleges is often outdated, which means it does not cater to the changing needs of the society and industry. The curriculum was created decades ago and has not been updated since then, leading to an inadequate understanding of modern concepts and technologies. For instance, the syllabus for science and mathematics has not changed much in the past few decades, even though there have been significant advancements in both fields. Similarly, the history and social studies curriculum focuses on the same events and concepts repeatedly, without taking into account the changing global scenario. Outdated curriculum also leads to a lack of practical knowledge, which is necessary for real- world application. For instance, most engineering courses in India focus on theoretical concepts, with little or no emphasis on practical applications. This limits the scope of the students and makes it challenging for them to keep up with the fast-paced advancements in technology. An outdated curriculum is also responsible for a lack of innovation and creativity among students. Since the curriculum does not cater to modern needs, students are not encouraged to think critically or come up with new and innovative ideas. This limits their potential and makes them unfit for today's competitive job market.

- ***A for apple, B for ball. Wait can it not be A for audit, B for bank etc.***

Rote learning is one of the significant limitations of the current education system in India. Rote learning is a memorization technique that involves repeating information over and over again until it is committed to memory. It is a common practice in Indian education and is often used as the primary mode of learning. The problem with rote learning is that it does not foster critical thinking or creativity. Instead, it encourages

students to focus on memorizing facts, figures, and formulas without understanding their underlying concepts. This approach limits students' ability to apply what they have learned in real-world situations, leading to a lack of innovation and creativity. Moreover, rote learning places a heavy emphasis on examinations and grades rather than learning itself. Students are trained to memorize information just to perform well on exams, which is not an effective method of learning. It creates a competitive atmosphere in which students are under constant pressure to perform well, leading to stress and anxiety. Another drawback of rote learning is that it does not promote independent thinking. Since students are taught to memorize information rather than think critically, they become dependent on their teachers and textbooks. This approach limits their ability to question, analyze, and evaluate information independently, hindering their intellectual growth.

- ***All sums of final accounts in the textbook had adjustments. But the client has not given any adjustments alongwith the books of accounts?***

Lack of practical knowledge is another major limitation of the current education system in India. The education system in India is primarily focused on theoretical knowledge, with little emphasis on practical applications. This approach creates a gap between what students learn in classrooms and how they apply it in the real world. Students in India are taught concepts and theories without understanding their practical implications. They often graduate without having the necessary skills to apply their knowledge in real-world situations. This results in a mismatch between the skills required in the job market and the skills possessed by graduates. This lack of practical knowledge is particularly relevant in technical fields such as engineering, where students are expected to apply their knowledge to solve real-world problems. Without practical experience, graduates struggle to meet the requirements of their jobs, leading to a skills gap in the job market.

- ***Only people getting more than 90% are intelligent.***

One of the major limitations of the current education system in India is the ***overemphasis on marks***. In India, marks are often seen as the sole measure of a student's academic success and intelligence. This has led to a culture of competition where students are encouraged to focus solely on scoring high marks in exams, rather than on developing a deep understanding of the subject matter. As a result, students are under immense pressure to perform well in exams, often at the cost of their mental and physical health. This pressure can lead to stress, anxiety, and even depression, which can have long-term effects on a student's overall well-being. Moreover, the emphasis on marks often results in a narrow focus on a few subjects, rather than a holistic approach to learning. Students are often forced to prioritize their time and effort towards subjects that are considered important, such as mathematics and science, while neglecting subjects such as art, music, and sports. This approach can limit students' potential and creativity and prevent them from developing a well-rounded skill set.

- ***Practical situation – Don't know how to deal since it is out of syllabus***

Another limitation of the current education system in India is the ***lack of innovation.*** Despite being the birthplace of some of the greatest innovations and discoveries in history, the current education system does not emphasize innovation and creativity. The

focus of the education system is often on rote learning and memorization, which leaves little room for creative thinking and innovation. This approach limits students' ability to think outside the box and come up with innovative solutions to problems. Furthermore, the current education system does not promote a culture of experimentation and risk-taking, which is essential for innovation. Students are often discouraged from taking risks and trying new things, as failure is considered a sign of weakness. This fear of failure can inhibit students' creativity and prevent them from taking risks and thinking creatively.

- ***Artist – What is that? Be an engineer or a doctor.***

The education system in India is largely theoretical and academic in nature, with ***very little emphasis on vocational or technical training***. This means that many students are not equipped with the practical skills required to succeed in the workforce. Vocational training involves developing practical skills and knowledge in a specific field, such as plumbing, electrical work, or carpentry. This type of training is essential for students who are not interested in pursuing academic careers and instead wish to enter the workforce immediately after completing their education. However, in India, there is very little emphasis on vocational training, and the curriculum is often focused solely on academic subjects. As a result, many students graduate from school or college without any practical skills or knowledge that can help them find employment. This lack of vocational training is a major limitation of the education system in India, as it creates a mismatch between the skills that employers require and the skills that students possess. This often leads to high levels of unemployment, especially among the youth.

- ***Lack of focus on soft skills***

Soft skills refer to a range of personal attributes that are essential for success in the workplace, including communication skills, teamwork, problem-solving, time management, leadership, and adaptability. These skills are highly valued by employers, and are often considered more important than technical skills in many industries. However, in India, the education system is heavily focused on academic subjects and technical skills, with very little emphasis on developing soft skills. As a result, many students graduate from school or college without the necessary soft skills required to succeed in the workforce. This lack of focus on soft skills is a major limitation of the education system in India, as it creates a mismatch between the skills that employers require and the skills that students possess. Employers are often forced to spend time and resources training new employees in soft skills, which can be a significant burden for businesses.

The above limitations bring about the need to change the current syllabus taught in schools and colleges. Only knowing and acknowledging the presence of limitations is not enough. The limitations need to be worked upon for overcoming them. In the words of Randy Paul Gage, an American author,

"Only acknowledge your limitations for the purpose of overcoming them."[5]

5. Randy Paul Gage : https://millyuns.com/quotes-gage/

What is the intended outcome of the education system on an individual?

The intended outcome of the education system on an individual is to provide them with the knowledge, skills, and values necessary to lead a successful and fulfilling life. Education is meant to equip individuals with the tools they need to navigate the complexities of modern society and to become productive and engaged citizens. The intended outcome of the education system on an individual is to provide them with the knowledge and skills necessary to enter the workforce and contribute meaningfully to the economy. A well-educated workforce is essential to the success of any industry or economy. Employers need skilled workers who can adapt to new technologies and changing market conditions, and who can think critically, solve problems, and work collaboratively. This is particularly true in today's globalized economy, where businesses must compete with firms from all over the world. The education system is expected to equip students with the skills and knowledge that are relevant and in demand in the job market. This includes not just technical skills, but also "soft" skills such as communication, teamwork, and adaptability. Employers are increasingly looking for workers who have these skills, as they are essential to success in today's workplace. Additionally, the education system is expected to foster innovation and entrepreneurship, which are key drivers of economic growth. By promoting creativity, critical thinking, and problem-solving skills, the education system can help individuals develop the tools they need to identify and capitalize on new business opportunities.

Qualities that the education system and the syllabi should imbibe in a student to make them smart and successful

The education system should help an individual to develop the following qualities,

- ***Critical thinking***

Critical thinking is a vital skill for students to develop as it enables them to analyze and evaluate information objectively and arrive at well-reasoned conclusions. This involves questioning assumptions, examining evidence, and evaluating arguments from different perspectives. Critical thinking is essential for problem-solving, decision-making, and developing new ideas and solutions.

- ***Problem solving***

Problem-solving is the ability to identify problems, analyze their root causes, and come up with effective solutions. This requires students to apply critical thinking skills, as well as creativity and analytical abilities. Effective problem-solving involves breaking down complex problems into manageable parts, gathering information, generating and evaluating options, and making decisions based on available evidence.

- ***Creativity***

Creativity is the ability to generate new ideas, approaches, and perspectives that can lead to innovative solutions. It involves thinking outside the box, challenging established norms, and embracing new and diverse ways of thinking. Creativity is not limited to the arts, but can be applied in many fields, including science, engineering, and business.

- ***Communication***

Communication is the ability to express oneself clearly and effectively in both written and verbal communication. It involves being able to articulate ideas and opinions in a compelling and persuasive way, as well as being able to listen actively and respond appropriately to feedback. Effective communication skills are essential for success in many fields, including business, law, education, and politics.

- ***Collaboration***

Collaboration is the ability to work effectively with others towards a common goal, including working in diverse groups and respecting different viewpoints. This involves building strong relationships, being able to negotiate and compromise, and being open to new ideas and perspectives. Effective collaboration skills are essential for success in many fields, including healthcare, education, and technology.

- ***Adaptability***

Adaptability is the ability to adapt to changing circumstances, learn new skills and knowledge, and apply them effectively. This involves being open to change, being able to learn from experience, and being able to adjust one's approach based on feedback and new information. Adaptability is essential in today's rapidly changing world, where new technologies, industries, and ways of working are emerging constantly.

- ***Empathy***

Empathy is the ability to understand and appreciate the perspectives of others, and to communicate and collaborate effectively with people from diverse backgrounds. This involves being able to put oneself in another person's shoes, being sensitive to their needs and feelings, and being able to build strong relationships based on mutual respect and trust. Empathy is essential for success in many fields, including healthcare, education, and social work.

- ***Leadership***

Leadership is the ability to inspire and motivate others towards a shared vision or goal, and to make effective decisions in complex situations. This involves being able to communicate a compelling vision, building strong relationships, being able to motivate and inspire others, and being able to make tough decisions based on available evidence. Effective leadership skills are essential for success in many fields, including business, politics, and the military.

- ***Ethical behavior***

Ethical behavior is the ability to act with integrity, honesty, and respect for oneself and others, and to make decisions that reflect these values. This involves being able to recognize and navigate ethical dilemmas, being able to act in accordance with one's values and principles, and being able to build strong relationships based on mutual trust and respect. Ethical behavior is essential for success in many fields, including law, healthcare, and education.

- ***Lifelong learning***

Lifelong learning is the willingness and ability to continue learning and growing throughout one's life, and to seek out new experiences and knowledge to enrich one's personal and professional development. This involves being open to new ideas and perspectives, being able to adapt

Only if the education system is capable of developing the basic qualities in a student, it shall be construed to be a strong and effective system.

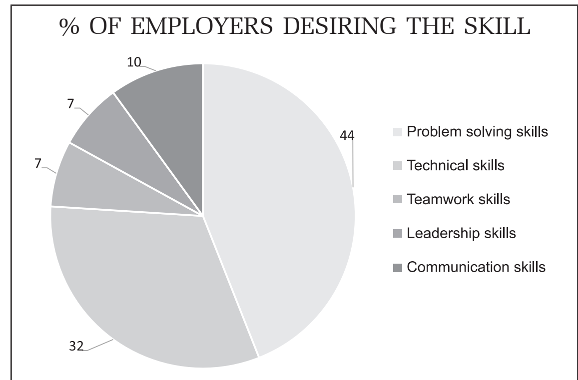
What does the industry want from the academia?

The gap between academia and industry is a significant limitation of the current education system in India. Academia refers to educational institutions such as universities and colleges, while industry refers to the various sectors of the economy that produce goods and services. The gap between academia and industry refers to the disconnect between the knowledge and skills that are taught in

educational institutions and the practical skills that are required in the workplace. One of the reasons for this gap is the lack of collaboration between academia and industry. Educational institutions often operate in isolation from industry, and do not receive regular feedback from industry about the skills that are in demand. As a result, educational institutions may not be able to keep up with the changing demands of the job market, and may not be able to provide students with the skills that are required for success in their careers. Another reason for this gap is the lack of focus on practical skills in academia. Educational institutions are often focused on academic subjects, which may not always be relevant to the needs of industry. As a result, students may not possess the practical skills that are required for success in the workplace.

Primary research was conducted to find out the expectations of the employers in respect of skills that the they expect the fresh graduates should possess. The 300 employers surveyed as a part of this study represented various fields like law, medicine, management, manufacturing and service industry. These employers were given to select the topmost skill that they expected the fresh graduates to possess. The outcome of the study is illustrated below:

Skill	% of employers desiring the skill
Problem solving skills	44
Technical skills	32
Teamwork skills	7
Leadership skills	7
Communication skills	10
Total	**100**



The data shows that problem solving skills are the most desired skill among employers with 44% of them wanting their fresh graduates to possess this skill. Technical skills come second with 32% of employers desiring it. Communication skills are also considered essential, with 10% of employers looking for this trait in their fresh graduates. In contrast, teamwork skills and leadership skills are less important, with only 7.5% and 6.5% of employers respectively looking for these skills in their new hires. This data suggests that students should focus on developing their problem solving and technical skills, as well as their communication skills, to meet the expectations of potential employers

The survey data indicates that employers in today's job market highly value graduates with strong problem solving and technical skills. This is likely due to the fact that many modern workplaces require employees to think critically and solve complex problems, and technical skills are becoming increasingly important in fields such as engineering, computer science, and healthcare. In addition, the emphasis on communication skills suggests that employers place value on employees who are able to effectively articulate their ideas and collaborate with others. Interestingly, the data suggests that teamwork and leadership skills are relatively less important to employers.

This could be due to the fact that many organizations place a greater emphasis on individual performance and output than on team dynamics or leadership potential. However, it is worth noting that teamwork and leadership skills are still important in many workplaces, particularly those that rely on collaboration or require employees to manage others.

How can the education system in India be changed?

Now that it is an established fact that the education system needs to be revamped, the next question to answer is how and what needs to be changed. The macroscopic of view of what needs to be changed is as under,

- ***Upgrading the curriculum***

The curriculum of the education system in India should be upgraded to keep pace with the changing trends and demands of the industry. It should be more practical and innovative, to make it more interesting and relevant to students.

- ***Teacher training and development***

Teachers are the backbone of any education system, and they need to be trained and developed in the latest teaching methodologies and technology. Regular training programs should be conducted to enhance their skills and keep them updated.

- ***Encouraging creativity and innovation***

The education system in India should encourage creativity and innovation among students, which will help them develop problem-solving and critical-thinking skills.

- ***Skill-based education***

The education system in India should focus on developing skills that are relevant to the industry and the job market. This will help students to become more employable and self-sufficient.

- ***Strengthening vocational education***

Vocational education should be given more importance in the education system in India, which will help students to develop practical skills that are essential for various industries.

- ***Making education accessible and affordable***

The government should take steps to make education more accessible and affordable to all sections of society, especially those from underprivileged backgrounds.

- ***Increasing the use of technology***

Technology should be integrated into the education system in India, to make learning more interactive and engaging. It can also help in reaching out to a larger number of students, especially those living in remote areas.

- ***Focus on soft skills***

Soft skills such as communication, teamwork, leadership, and adaptability are crucial for success in any profession. The education system in India should focus on developing these skills in students.

- ***Collaboration with industry***

The education system in India should collaborate with industries to bridge the gap between education and industry requirements. This will help in making the education system more relevant and practical.

- ***Encouraging research and development***

Research and development should be encouraged in the education system in India, which will help in generating new ideas and innovations that can benefit society as a whole.

What needs to be changed in the syllabus to make it more contemporary?

On a microscopic level, the syllabus needs to be revamped in the following manner:

- ***Emphasize practical and applied knowledge***

The syllabus should emphasize practical and applied knowledge, with a focus on real-life applications of concepts. This can be achieved through project-based learning, experiential learning, and internships.

- ***Introduce vocational training***

The syllabus should include vocational training programs that teach specific skills related to various industries. This will help students gain practical skills and increase their employability.

- ***Update the syllabus regularly***

The syllabus should be updated regularly to keep up with the changing trends in the industry and advancements in technology. This will ensure that students are prepared to enter the workforce with the latest knowledge and skills.

- ***Encourage innovation and creativity***

The syllabus should encourage innovation and creativity by incorporating design thinking, entrepreneurship, and critical thinking. This will help students become problem solvers and prepare them for the challenges of the future.

- ***Promote interdisciplinary learning***

The syllabus should promote interdisciplinary learning, where students can learn concepts from multiple disciplines and apply them in real-life scenarios. This will help students develop a broader perspective and become well-rounded individuals.

- ***Focus on soft skills***

The syllabus should focus on developing soft skills such as communication, teamwork, and leadership, which are essential for success in any industry. This can be achieved through activities such as group projects, public speaking, and team-building exercises.

- ***Reduce the emphasis on memorization***

The syllabus should reduce the emphasis on memorization and rote learning and instead focus on conceptual understanding and application. This will help students develop a deeper understanding of the subject matter and improve their critical thinking skills.

- ***Increase the use of technology***

The syllabus should increase the use of technology in the classroom to enhance learning and prepare students for the digital world. This can be achieved through the use of online tools, educational apps, and digital resources.

- ***Collaboration between education institutions and industry***

There should be regular interaction between education institutions and industry to identify the skills and knowledge required by the industry. Industry experts should be invited to participate in curriculum development and design.

- ***Internship and apprenticeship programs***

Education institutions should offer opportunities for students to gain hands-on experience through internships and apprenticeship programs. This will help students develop practical skills and gain exposure to industry practices.

- ***Industry-relevant training***

Education institutions should offer industry-relevant training to students, which can

include soft skills training, communication training, and leadership training.

- ***Industry certification programs***

Education institutions should collaborate with industry bodies to offer industry certification programs. These certifications will help students demonstrate their skills and knowledge to potential employers.

- ***Career guidance and counseling***

Education institutions should provide career guidance and counseling to students to help them make informed decisions about their career paths. This will help students align their skills and knowledge with the demands of the job market.

- ***Continuous learning***

Education institutions should encourage students to engage in continuous learning and professional development, even after they graduate. This will help students stay updated with the latest industry trends and technologies.

New Education Policy 2020

In order to make the Indian education system more contemporary and in an attempt to meet the global standards of education, the Union Cabinet the New Education Policy 2020. This policy is apparently a major reform to our 34-year-old education system. Some of the major reforms intended are governance by a single regulator, application and knowledge-based board examination, promotion and emphasis on regional language, common entrance exams, vocational education since sixth grade.

Conclusion

In light of the shortcomings in our existing education system, it is the need of the hour to have a more contemporary and relevant education system. The education system should have the potential to make each learner a smart individual who is ready to face the world and contribute significantly to the society and the nation at large. Education is the building block based on which the development of the entire country depends. Since the education sector shoulders such an important responsibility, it is imperative that it should have that strength and quality. The new education policy, 2020 promises to be a transformative move in the sector of education. It is the manner and mode of implementation that will prove its impact. India, a nation in its 75th year of Independence or the Amrit Kaal, is placing high bets on its young population to acquire the status of a developed nation. In order to harness this demographic advantage and to achieve the dream of India@100, the education sector needs a complete revamp. To conclude, a positive change is something that should be constantly thought about.

In the words of Benjamin Disraeli,

"Change is inevitable. Change is constant."

This quote very rightly explains the importance of constant change. Only a system that can evolve with the changing times will prove to be a good and robust system. Although, change is something that is said to be inevitable, progression is definitely a choice that needs to be consciously made. The academia, the law makers should ensure that the change that is required should lead to progression of the nation.

Further, it is inevitable that the reform measures will have to face some roadblocks and hurdles. But the real victory lies in creating a system after overcoming the hurdles since the system so created will be the one which has been tested in the worst-case scenarios. In the words of Roger Crawford,

"Being challenged is inevitable, being defeated is optional"

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DIRECT TAXES

Supreme Court

1 ***CIT(Central) vs. Kolhapur Zilla Sahkari Dudh Utpadak Sangh Ltd.; [2023] 454 ITR 434 (SC): Dated 26/04/2023***

Business expenditure — Co-operative societies of milk producers — Apex society purchasing milk from primary societies and others — Price of milk fixed by state government in march of every year — Assessee paying purchase price of milk provisionally — Final difference in rate paid at end of accounting year — Not paid to shareholders but only to milk suppliers, for quantity of milk supplied and in terms of quality supplied — Not payment out of profits — Deductible: S. 37 of ITA 1961

The assessee-society was a federal milk society and its members were primary milk co-operative societies. The business of the assessee was to purchase milk from its members and other producers of milk and sell the milk to various parties. The assessee-society fixed the rate of processing of milk at the beginning of the year on the basis of the price declared by the Government and the price which other buyers paid to the vendors. These rates were revised from time to time. The primary milk society also in turn made payment of the final rate difference to the individual milk producers around Diwali. The assessee claimed deduction of the final rate difference. The Assessing Officer made an addition of ₹ 1,55,81,519 treating the sum as appropriation of profits.

The Tribunal allowed the claim and deleted the addition. The Tribunal found that the amount paid was not out of the profits but was paid to the milk suppliers for the quantity of milk supplied and in terms of the quality supplied. The order passed by the Tribunal was affirmed by the High Court.

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

> *"Although paid at the end of the previous year the amount was paid only to the milk suppliers, for the quantity of milk supplied and in terms of the quality supplied. The amount was not paid to all the shareholders and was not paid out of the profits ascertained at the annual general meeting. The amount paid to the milk suppliers and to non-members could*

not be said to be an appropriation of the profits. Therefore, there is no error in the judgment of the High Court."

2 ***CIT vs. Narmada Chematur Petrochemicals Ltd.; [2023] 454 ITR 584 (SC): Dated 20/01/2023***

Business expenditure — Depreciation — Lease of assets — Lease rent taxed as business income in hands of company from which assets leased — Lease rent allowed as deduction in assessee's hands— Department not entitled to contend assessee was owner of asset: Lease rent deductible: Ss. 32 and 37 of ITA 1961

The assessee paid lease rent of ₹ 7.48 crores to its holding company G, in respect of certain assets taken on lease. The assessee claimed deduction of the lease rent. The Assessing Officer disallowed the claim holding that this was a financial transaction.

The Tribunal noted that G had shown lease rent as income under the head "Business income" and on the issue it had been consistently decided that the assets were owned by G, and therefore, the lease rent received was to be assessed as its business income.

The following question was raised before the High Court in the appeal filed by the Department:

> *"Whether on facts and in the circumstances of the case, the Tribunal was right in law in reversing the decision of the Commissioner (Appeals), in allowing the lease rent paid to Gujarat Narmada Valley Fertilizers of ₹ 7,48,28,546, even when the fact was that the same was a finance lease, which was towards cost of asset and the interest thereon, since the assessee was real owner of assets ?'"*

The High Court dismissed the Department's appeal.

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

"i) Once G was held to be the owner and entitled to depreciation, the Department thereafter could not be permitted to contend with respect to the same transaction, that the assessee was the owner and entitled to depreciation.

ii) We see no reason to interfere with the impugned judgment and order passed by the High Court."

3 ***CIT vs. Gujarat Alkalies and Chemicals Ltd.; [2023] 454 ITR 808 (SC): Dated 17/05/2023***

Capital or revenue receipt — Sales tax exemption/subsidy — Scheme requiring recipient of benefit to utilise substantial portion of subsidy for capital purposes — Capital receipt: S. 4 of ITA 1961

Capital or revenue expenditure — Expenditure on replacement of remembraning in membrane cell plant — No material to show membrane itself could be treated as separate and independent machine — Revenue expenditure: S. 37 of ITA 1961: A. Y. 1999-2000, 2000-01

On the question whether the expenditure incurred by the assessee on replacement of remembraning in the membrane cell plant was capital expenditure, the High Court held that there was no material leading to the conclusion that the membrane itself could be treated as a separate and independent

machine, and that the expenditure was deductible as revenue expenditure in the A. Ys. 1999-2000 and 2000-01.

The Supreme Court dismissed the special leave petition filed by the Department.

On the question whether the Appellate Tribunal was right in law in holding that the sales tax exemption granted by the Government of Gujarat was a capital receipt exempt from tax instead of a revenue receipt as held by the Assessing Officer, the High Court held in favour of the assessee.

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

> *"The terms of the scheme required the recipient of the benefit to set up a new unit or substantially expand the existing unit and utilise a substantial portion of the amount retained (at least 50 per cent. of the subsidy) for capital purposes. The view of the High Court did not call for interference."*

4 ***Maharishi Institute of Creative Intelligence vs. CIT(Exemptions); [2023] 454 ITR 533 (SC): Dated 18/04/2023***

Charitable purpose — Exemption — Condition precedent — Change of law — Assessee allowed exemption for all years up to A. Y. 2007-08 on basis of registration in 1987 — Revision denying benefit for A. Y. 2010-11 on basis of provision as amended in 1997 requiring assessee to produce certificate of registration — Not sustainable — Provision prevailing in year when assessee applied for registration applicable: S. 12A of ITA 1961: A. Y. 2010-11

The assessee applied for registration u/s. 12A of the Income-tax Act, 1961 in the year 1987 and continued to be granted the exemption u/s. 12A of the Act. In the year 1997 there was an amendment, which required the issuance of a certificate of registration u/s. 12A but in spite thereof, the assessee continued to avail of the exemption u/s. 12A of the Act till the A. Y. 2007-08. For the A. Y. 2010-11, the Assessing Officer, considering the facts in years up to 2007-08 and on the basis of the registration u/s. 12A in the year 1987 granted the benefit of exemption u/s. 12A. In revision u/s. 263 of the Act, the Commissioner suo motu set aside the assessment order.

The Tribunal set aside the order passed by the Commissioner, but the High Court, taking into consideration the amendment in the year 1997, set aside the order passed by the Tribunal holding that as the assessee had failed to produce the certificate of registration the assessee was not entitled to the exemption u/s. 12A.

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

"i) Taking into consideration that since 1987 from the date on which the assessee applied for registration u/s. 12A, the assessee continued to avail of the benefit of exemption u/s. 12A at least up to the A. Y. 2007-08 on the basis of its registration in the year 1987, the Assessing Officer was justified in granting the benefit of exemption u/s. 12A for the A. Y. 2010-11. For all these years after 1997 till the year 2007-08 it was never the case of the Department or even the Commissioner that in the earlier years there was any certificate of registration or the registration was not granted. Even from the material on

record, it was apparent that the assessee was granted registration on September 22, 1987. Therefore, it could not be said that there was no registration at all. The order passed by the Tribunal was to be restored.

ii) What was required to be considered was the relevant provision prevailing in the year 1987, namely, the day on which the assessee applied for the registration. At the relevant time there was no requirement of issuance of any certificate of registration."

5 *CIT vs. Industrial Development Bank of India Ltd.; [2023] 454 ITR 811 (SC): Dated 26/04/2023*

Revision — Limitation — Revision with respect to issues not covered in reassessment proceedings — Limitation to be reckoned from date of original assessment and not of reassessment: S. 263 of ITA 1961

The Tribunal held that the proceedings taken by the Commissioner u/s. 263 of the Act were barred by limitation and cancelled the order of the Commissioner.

The High Court dismissed the Department's appeal.

Dismissing the appeal filed by the Department, the Supreme Court held as under:

"i) Only in a case where the issues before the Commissioner at the time of exercising powers u/s. 263 of the Income-tax Act, 1961 relate to the subject matter of reassessment, would the limitation start from the date of the reassessment order. However, if the subject matter of the reassessment is distinct and different, the relevant date for the purpose of determination of period of limitation for exercising powers u/s. 263 of the Act would be the date of the original assessment order.

ii) The Commissioner had exercised powers u/s. 263 of the Act with respect to issues which were not covered in the reassessment proceedings. Therefore, the issues before the Commissioner while exercising the powers u/s. 263 of the Act related back to the original assessment order and, therefore, the limitation would start from the original assessment order and not from the reassessment order.

iii) In view of the above and for the reasons stated hereinabove no error has been committed by the Income-tax Appellate Tribunal or even the High Court in holding the proceedings u/s. 263 of the Act by the Commissioner as barred by limitation. Under the circumstances, the present appeal deserves to be dismissed and is accordingly dismissed."

■●■

Jitendra Singh
Advocate

Radha Halbe
Advocate

Harsh Shah
Advocate

DIRECT TAXES

High Court

Cash Credits – Section 68 of the Income Tax Act, 1961 - Capital gains earned on the sale of shares declared as Penny Stock by the revenue - DMAT account and contract note showed details of share transaction - AO had not proved said transaction as bogus - capital gain cannot be treated as cash credits. [S. 10(38), 45]

Facts

1. In the return of income, the assessee had declared long-term capital gains on the sale of shares of Ramkrishna Fincap Ltd. and had also claimed exemption under section 10(38) of the Act. The assessee had purchased this scrip at ₹ 3.12/- per share in the year 2003 and sold the same in the year 2005 for Rs.155.04/- per share.

2. The Assessing Officer ('AO') had issued a notice under section 148 of the Income-tax Act, 1961 ('the Act') to reopen the case of the Assessee. The notice for reopening was issued based on some investigation which alleged that shares of Ramkrishna Fincap Limited should be regarded as Penny Stocks. It was alleged that a broker had manipulated the prices through synchronized and cross-deals in the said scrip.

3. The AO finalised the assessment of the assessee by denying the exemption claimed under section 10(38) of the Act on Capital Gains earned in the scrip of Ramkrishna Fincap Limited and treated the same as unexplained cash credit under section 68 of the Act on the ground that transaction in penny stock was an accommodation entry.

4. On appeal, the first appellate authority allowed the claim of the assessee on the ground that the assessee had purchased the shares on the floor of the Kolkata Stock Exchange, the shares were in the demat account for more than one year, the purchase and sale transactions were carried out through banking channels. Hence, the capital gains cannot be treated as unexplained cash credit under section 68 of the Act.

5. The revenue being aggrieved by the order of the Ld. Commissioner of Income-tax (Appeals) ['CIT(A)'] filed an appeal before the Hon'ble Income Tax Appellate Tribunal. The appellate

Tribunal also upheld the order passed by the first appellate authority and dismissed the appeal of the department.

6. The revenue being further aggrieved by the order of the Hon'ble Appellate Tribunal preferred an appeal before the Hon'ble Bombay High Court under section 260A of the Act.

Decision of Hon'ble High Court

7. Hon'ble High Court dismissed the appeal of the department by observing that the Assessee had made transactions in the alleged penny stock through the broker. Independent enquiry was made against the said broker, however, the purchase, as well as the sale of shares, were made on the floor of the Kolkata stock exchange. Shares were held for more than a year. The payment for acquiring the shares and receipt on sale of shares were transacted through banking channels. The said broker had raised invoices/contract notes for sale/ purchase. The shares were transferred in/from the Demat account. Thus, the Tribunal had rightly upheld the order of the Ld. CIT(A) and deleted the addition made under section 68 of the Act.

Pr. CIT vs. Indravadan Jain HUF [Income Tax Appeal No. 454 OF 2018, Order dated 12.07.2023, Bombay High Court]

Reassessment - Section 148(A)(b) of the Income Tax Act, 1961 – Notice issued pursuant to decision of Hon'ble Supreme Court in the case of Ashish Agarwal – Notice issued beyond the period of 30 days from the date of Hon'ble Supreme Court order – invalid and bad in law. [S. 149 and CBDT Instructions No. 01/2022 dated 11.05.2022]

Facts

1. In the present case, on 08.06.2022 the AO had emailed notice dated 02.06.2022 issued under section 148(A)(b) of the Act pursuant to the directions of Hon'ble Supreme Court in the case of ***UOI vs. Ashish Aggarwal [2022] 444 ITR 1 (SC).***

2. As per the directions of the CBDT issued vide Instruction No 01/2022 dated 11.05.2022, the AO is supposed to issue the impugned notice under section 148 of the Act on or before 02.06.2022 along with relevant details/materials.

3. The notice issued by the AO under section 148 of the Act did not contain the name and designation of the concerned officer.

4. Under these circumstances, the Petitioner challenged the impugned notice issued under Section 148(A)(b) as well as the order passed Section 148A(d) before the Hon'ble Delhi High Court by way of Writ Petition.

Decision of the Hon'ble High Court

5. Hon'ble High Court was pleased to allow the Writ Petition filed by the assessee by observing that the CBDT Instruction No. 1 of 2022 provided the timeliness for complying with the Apex Court's decision in case of Ashish Aggarwal (supra), which was 02.06.2022. Thus, the impugned notice issued under section 148A(b) of the Act after 03.06.2023 is in contravention of directions issued by the CBDT Instruction No. 1 of 2022. Further, the notices were also not in accordance with Section 282A, as the name and

designation of the concerned officer was not mentioned. Therefore, the notice issued under Section 148(A)(b) and the consequential order passed under Section 148A(d) is bad in law and deserved to be quashed.

(Jindal Exports and Imports Pvt. Ltd. vs. DCIT, W.P.(C) NOS. 6183, 6217, 6884 AND 6891 OF 2023, order dated 26 July 2023)

Reassessment – section 148A of the Income Tax Act, 1961 – assessee subscribing to the shares of subsidiary company - shares allotted at premium – reopening of assessment for not providing the evidence to prove the source of assessment – invalid. [S.69 of the Act]

Facts

1. The assessee before the Hon'ble High Court was a company incorporated under the laws of USA. It had a 100% subsidiary in India by the name J.P. Morgan Services India Pvt. Ltd. ("subsidiary").

2. During the assessment year 2019-20, the assessee subscribed to the equity shares issued by the subsidiary. The assessee was allotted equity shares at a premium. The premium was ascertained based on a valuation report issued by the accredited valuers. The assessee also submitted necessary details to the Reserve Bank of India ('RBI') and RBI by an auto-generated email dated 23rd October 2018 approved the reporting form of the assessee.

3. The AO issued a notice dated 26th March 2023 under section 148A(b), calling upon the assessee to show cause as to why notice under section 148 should not be issued to the assessee. The assessee filed a detailed explanation before the AO and contended that it has no taxable income during the year under consideration and therefore there is no question of any income escaping assessment. The assessee to substantiate its contentions furnished a detailed account of its background and that of the subsidiary etc. and also furnished copies of the certificate of Foreign Inward Remittance, share certificates issued by the subsidiary in the name of Central Depository Services (India) Limited ('CDSL'), Valuation Report etc.

4. However, the AO without appreciating the facts and circumstances of the case passed the order dated 17th April 2023 under section 148A(d) and treated the present case as fit for issuing the notice under section 148 of the Act.

5. The assessee being aggrieved by the above order passed under section 148A(d) as well as notice issued under section 148 of the Act challenged the same before the Hon'ble Bombay High Court by way of Writ Petition.

Decision of Hon'ble High Court

6. Hon'ble High Court was pleased to allow the Writ Petition by observing that the AO has not applied mind to the matter at hand. The AO has not considered the fact that the assessee has the necessary permission from the RBI and if the RBI had any doubts about the assessee's genuineness or the source of funds, RBI would have red-flagged the assessee or the subsidiary. Further, at no stage AO even called upon the assessee to explain the source of the fund and straight away passed the impugned

order, saying that the assessee has not submitted any documentary evidence to verify the source of investment. Thus, the impugned order passed by the AO is quashed and set aside and the matter is remitted to pass a fresh order but by an officer who is different from the officer who has passed the impugned order.

J.P. Morgan Chase Holdings LLC vs. ACIT [WP (L) NO. 13891 OF 2023, order dated 11th July 2023, Bombay High Court]

Levy of Penalty - Section 271(1)(c) of the Income Tax Act, 1961 – furnishing of inaccurate particulars of income - excess depreciation claimed on land component suo moto withdrawn – Levy of penalty not justified.

Facts

1. The assessee had purchased a property in the year 2011-12 on which the assessee was claiming depreciation. The assessee under a mistaken belief was claiming depreciation on the land component of the property also.

2. For the assessment year 215-16, the assessee filed its return of income declaring total taxable income at ₹ 11721,80,75,240/-. Subsequently, the assessee filed a revised return declaring revised income at ₹ 11253,09,30,950/-.

3. The AO finalised the assessment order under section 143(3) of the Act determining total income at ₹ 11733,85,52,868/-.

4. The assessee being aggrieved by the assessment order preferred an appeal before the Ld. CIT(A). During appellate proceedings, the assessee suo motu withdrew the excess depreciation claim on the land component of the property. To align its books of accounts with MCA notification, the assessee had disclosed all the particulars relating to the excess claim.

5. The Ld. CIT(A) in the appellate order passed under section 250 of the Act charged the assessee with a penalty under section 271(1)(c) of the Income-tax Act, 1961 on the ground that the assessee had furnished inaccurate particulars of income.

6. The assessee being aggrieved by the order of the Ld. CIT(A) filed an appeal before the Hon'ble Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee and deleted the penalty levied under section 271(1)(c) of the Act by the Ld. CIT(A).

7. The department being aggrieved by the order passed by the Appellate Tribunal filed an appeal before the Hon'ble Gujarat High Court under section 260A of the Act.

Arguments of the assessee

8. The assessee contended before the Hon'ble High Court that the land in question was purchased in the year 2011-12 on which excess depreciation on land was claimed. The department failed to detect the same. Even for the year under consideration, the department failed to detect the said anomaly and the assessee suo moto before the Ld. CIT(A) withdrew the excess claim. The assessee itself, to align its books of accounts with the MCA notification disclosed all the particulars relating to the excess claim.

Departments argument

9. The revenue contended before the Hon'ble High Court that the Appellate Tribunal has erred in law and on facts in deleting the penalty levied under section 271(1)(c) of the Act. The department further argued that the Appellate Tribunal has without appreciating that the assessee had furnished inaccurate particulars of the income in the return of income, allowed the appeal of the assessee.

Decision of the Hon'ble High Court

10. The Hon'ble High Court was pleased to dismiss the appeal of the department by observing that the excess depreciation claimed was surrendered by the assessee to align its books with MCA notification and the assessee had itself disclosed all particulars relating to the excess claim. The revenue has failed to establish that the assessee had furnished inaccurate particulars of its income. Hence, no substantial question of law arose for consideration of the Hon'ble Court.

11. The High Court of Gujarat relied upon the decision of the Hon'ble Supreme Court in the case of ***Dilip N. Shroff vs. JCIT [2007 (6) SCC 329***] wherein the court explained the terms "concealment of income" and "furnishing inaccurate particulars" appearing in section 271(1)(c). The Supreme Court had held that to attract the penalty under section 271(1)(c), mens rea was necessary as the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. The revenue failed to establish that there was a concealment of particulars of the income of the assessee.

Authors Note

12. The Hon'ble High Court referred to the decision of the Apex Court in ***Principal Commissioner of Income Tax, Vadodara vs. M/s. Bell Ceramics Limited [dated 15.7.2021 in Tax Appeal No.162 of 2021***] to observe that, without insisting on the statement of a substantial question of law in the memorandum of appeal and finalizing the same at the time of admission, the High Court is not empowered to generally decide the appeal under Section 260A. Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with the law in force at the relevant time. The conditions mentioned in Section 260A must be strictly fulfilled before an appeal can be maintained under Section 260A. Such an appeal cannot be decided on merely equitable grounds. Therefore, the Court has to cautiously decide whether a substantial question of law is made out in order to admit an appeal.

Pr. CIT vs. Axis Bank Ltd [R/TAX APPEAL NO. 169 of 2023, order dated 22.07.2023 (Gujarat High Court)]

CA Viraj Mehta

CA Kinjal Bhuta

DIRECT TAXES
Tribunal

1 ***Abbasali Chinikamwalla vs. ITO [ITA No. 917/Mum/2023 dt. 10.07.2023 (Mum)(Trib.) (AY: 2017-18)***

Section 69A – Huge deposits during demonetisation period – added as undisclosed income – Held that transaction backed by all evidences – Not taxable as undisclosed income – addition deleted

Facts

The assessee was a non-resident and retired senior citizen who had returned to India in 2016, a few months before demonetisation period. The assessee has deposited ₹ 17,10,000/- in five different accounts. The explanation offered by assessee was that the source of cash deposits was pension and savings income and withdrawals made over the years. It was contended that, though assessee did not have family of his own, he was supporting his brothers family financially for household and medical expenses and that withdrawals were made in past for his relative's expenses. The AO was not satisfied with the explanation on the ground that it is improbable to hold such surplus inspite of cash expenses incurred by assessee. The cash deposits amount was added u/s. 69A. The CIT(A) upheld this addition and aggrieved by the same the appeal is filed before ITAT.

Held

Before Hon'ble ITAT, it was argued on behalf of the assessee, that the assessee had submitted all the details of bank statements and cash flow statements, details pertaining to cash withdrawals and expenses from 01.04.2010 till 31.12.2016. The amounts were withdrawn from NRE Bank accounts and therefore source was outside India. The Hon'ble ITAT held that the AO failed to accept the contention of the assessee that, the assessee retained the said cash and later deposited the same during demonetization period. The Hon'ble ITAT also held that huge withdrawals were made from assessees's accounts since FY 2010-11 and that assessee's only source of income was from his salary remitted from Qatar to his account held in India and pension received after retirement. It was held, after relying on certain co-ordinate benches decision, that revenue cannot contend that the assessee should have explained how he utilised the cash withdrawn and whether the same was still available with assessee or not and that addition is not sustainable and directed to be deleted.

2 *Aman Kumar Jain vs. ITO [ITA No. 267/Del/2023 dt. 30.06.2023] (AY: 2020-21) (Delhi)(Trib.)*

Section 10(13A) – Rent paid by husband to his wife - house was registered in wife's name- rental income was shown by wife in ITR - Held that – deduction of House Rent Allowance shall be allowed

Facts

The assessee paid rent to his wife which was claimed as a deduction of House Rent Allowance u/s. 10(13A). The said deduction was disallowed in the intimation u/s. 143(1). The CIT(A) upheld the decision of the CPC, holding that since his wife had no other income except rental income, the HRA cannot be allowed. Being aggrieved by the same, assessee filed an appeal before ITAT.

Held

The Hon'ble ITAT observed that it is evident from the ITR of the wife that she has declared apart from rental income, income from business and profession and income from income from other sources. The Hon'ble ITAT rejected the CIT(A)'s contentions that husband cannot pay rent to the wife. The ITAT observed that the rent paid by the assesse has been included by the wife in her total income, which has been accepted by the revenue conforming payment of taxes. Further, the house is registered in the name of the wife and she is also paying interest and loan instalments. Therefore, the rent paid by the assessee to his wife cannot be doubted and thus deduction of HRA u/s. 10(13A) shall be allowed. Appeal was decided in favour of assessee.

3 *DCIT vs. Mangal Bullion Pvt. Ltd. [ITA No. 1407/Mum/2021 & ITA No.331/Mum/2022] dt. 14.07.2023 (Mums.) (Trib.) (AY:2017-18)*

Section 68 – Jewellery/gold cash sales deposited during demonetisation – added u/s. 68 – Held that assessee provided PAN and complete address of buyers, with stock register – Lack of inquiry by AO u/s. 131 or 133(6) – Held that addition ought to be deleted as nothing proved against assessee

Facts

Assessee is engaged in business of Diamonds, Gold and Jewellery. Assessee during the year had made huge cash deposits in bank.. During the course of assessment proceedings, the assessee submitted that cash was from retail and wholesale of jewellery and gold bars respectively. It was also submitted that cash sales were accounted in books of account which was audited too. The AO rejected the contention and made an addition u/s.68 by holding that there was no history of cash sales in the past, also post demonetisation, there was no cash sales also. Therefore, sales are highly suspicious. The CIT(A) partly allowed the appeal of the assessee and deleted major cash additions. Against the order of CIT(A), both the parties are under appeal.

Held

It was argued on behalf of the assessee that, the assessee had submitted the complete details of cash sales made, PAN along with the complete address of the buyers. Stock register was also submitted before the AO which shows reduction of jewellery from the inventory. The assessee has also offered such income for taxation and stated there was no infirmity found in the stock register.

The department representative argued that the assessee had deposited cash after waiting for 20 days in the end of November and also that on same day the same customer has purchased gold from Mumbai as well as Surat Branch which is not possible and therefore the sales are bogus. The Hon'ble ITAT observed that none of the documents submitted by assessee have been denied by the lower authorities and that cash sales register and stock register are completely matching. It was also observed that the AO has failed to show that gross profit shown by the assessee is abnormally high or low and that cash sales have resulted in profit to the assessee which was offered to tax. The nature and source of cash sales have been explained by the assessee. The AO has not made any further inquiry with the customers of assessee by issue of summons u/s. 131 or inquiry u/s. 133(6). It was held that addition cannot be made in the hands of assessee merely for the reason that those customers have not transacted with the assessee post or pre demonetization. This could be the trigger point for investigation, but the AO, despite having complete address and PAN of customers did not make any such inquiry.

4 ***Shrikant Ghanshyam Shah vs. Int. Tax Ward [ITA No. 296/Mum/2023 dt. 04.07.2023] (AY: 2013-14) (Mum.) (Trib.)***

Section 45 – Assessee sold two house property – One house property was wrongly declared by wife and taxes were paid – Both assessee same tax bracket, and no loss to revenue – direction to re-assess wife's return of income and issue refund on tax paid and adjust that refund against the demand in case of assessee with no additional tax burden

Facts

The assessee, a non-resident had sold two house properties both owned by the Assessee. However, only one property was declared by the assessee in his return of income and the other property was shown in his wife's return and all relevant taxes on capital gains were paid by both of them respectively. The case was re-opened as though information received stated that assessee has two properties sold, only one was offered to tax in the return of income. It was submission of the assessee that due to some error, one of property was shown in his wife's return of income and that there is no loss of revenue as taxes are paid. The AO & DRP both rejected the contentions and added the capital gain on second property in hands of the assessee.

Held

Before Hon'ble ITAT it was argued that, the tax consultant who filed the returns by mistake declared the capital gain income of one house property in the hand of assessee's wife instead of assessee. Both the assessee and his wife fall under the same tax bracket. The Hon'ble ITAT held that, the case relates to AY: 2013-14, the ROI cannot be revised. It was observed that it is a peculiar case wherein the income has been declared and paid the due tax albeit in the hands of the wrong person. The Hon'ble ITAT held that said transaction cannot be taxed twice and directed the AO to revise the assessment in case of the assessee's wife and reject the capital gain declared and initiate refund along with interest. Such refund has to be adjusted against recovery of demand arising in the assessee's case. It was further directed that this issue needs to be resolved only by tax authorities and there should not be any burden on

the assessee of any tax or any additional interest as tax was already paid by the assessee's wife on time and that there is no absolutely no loss of revenue in this case.

5 ***ITO vs. Casa Grande Co-operative Housing Society [ITA No. 1259/ Mum/2023 dt. 14/07/2023 (Mum)(Trib.) (AY 2018-2019)***

Section 80P(2)(d) – Interest Income on FD and Savings Account – Parked in Co-operative Banks –100% deduction in respect of interest earned/received from Co-operative Banks – Deduction allowed

Facts

The assessee a co-operative housing society earned interest income of ₹ 1,62,98,358, on fixed deposits and saving bank accounts that are maintained in the Co-operative Banks. The same has been claimed as a deduction under section 80P(2)(d). During the assessment proceedings, it was submitted that the interest has been received from investments made with various Co-operative Banks. Ld. AO denied the deduction u/s 80P(2)(d). CIT(A) allowed the assesses claim and therefore department is in appeal before ITAT.

Held

There is no dispute that the assessee is a Co-Operative Housing Society. Thus, if any income as referred to in sub-section (2) to section 80P of the Act is included in the gross total income of the assessee, the same shall be allowed as a deduction. It is pertinent to note that since the assessee is registered under the Maharashtra Co-operative Societies Act, 1960, it is required to invest or deposit its funds in one of the modes provided in section 70 of the aforesaid Act, which includes investment or deposit of funds in the District Central Co-operative Bank or the State Co-operative Bank. Accordingly, the assessee kept the deposits in Co-operative Banks registered under the Maharashtra Co-operative Societies Act and earned interest, which was claimed as a deduction under section 80P(2)(d). The AO denied the deduction under section 80P(2)(d) on the basis that the Co-operative Bank is covered under the provisions of section 80P(4) . The Tribunal relied on the decision of the Hon'ble Supreme Court in ***Mavilayi Service Co-operative Bank Ltd. vs. CIT, Calicut, [2021] 431 ITR 1 (SC)*** wherein, while analysing the provisions of section 80P(4), it is held that section 80P(4) is a proviso to the main provision contained in section 80P(1) and (2) and excludes only Co-operative Banks, which are Co-operative Societies and also possesses a licence from RBI to do banking business. The Hon'ble Supreme Court further held that the limited object of section 80P(4) is to exclude Co-operative Banks that function at par with other commercial banks i.e. which lend money to members of the public. It was concluded by the Hon'ble ITAT that section 80P(4) is of relevance only in a case where the assessee, who is a Co-operative Bank, claims a deduction under section 80P. It is also pertinent to note that all Co-operative Banks are Co-operative Societies but vice versa is not true. The appeal of the Revenue was dismissed.

6 ***Anil Om Prakash Mishra vs. ITO [ITA No. 314/Surat/2023 dt. 03/07/2023 (Surat)(Trib.) (AY 2011 – 2012)***

Section 271B – Penalty for no Tax Audit – No Books of Accounts were maintained and

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hence no occasion for assessee to get books audited u/s 44AB – No penalty can be levied

Facts

Assessment was completed under Section 143(3) r.w.s. 147 on 10/12/2018. The AO initiated penalty for failure to comply with the provisions of Section 44AB of the Act. The AO levied penalty of ₹ 1,50,000/- under Section 271B. Before levying penalty, the AO recorded that in response to notice under Section 148 , the assessee filed his return of income declaring income of ₹ 4,76,200/-. The assessee was engaged in the business of job work in the name of M/s Shree Ji Weaves and trading in shares and derived brokerage income, dividend from shares and bank interest. The assessee was having job work receipt of ₹ 3.08 lacs and sales of shares of ₹ 4.27 crores. The gross receipt/sales of assessee exceed ₹ 60.00 lacs, thus the assessee was required to get his books of account audited as per provisions of Section 44AB.. The assessee failed to get his books of account audited despite exceeding gross receipt of ₹ 60.00 lacs. On the said basis, penalty was levied. On further appeal to CIT(A), appeal was dismissed. Hence appeal filed before ITAT.

Held

There is no dispute that the AO has levied penalty only under Section 271B.. Admittedly, no penalty is imposed under Section 271A for not maintaining books of account. The case of assessee right from the beginning is that the assessee is not maintaining books of account, as income is shown on the basis of entry in the bank account and TDS reflected in Form 26AS. Once it is shown that the assessee was not maintaining books of account, there was no occasion for assessee to get the books of account audited under Section 44AB.. Hence, imposition of penalty for non-furnishing of audit report would not arise as has been held by the Coordinate Bench of Bangalore Tribunal in ***Marahaikana Halli Jayashella Shetty Pradeep Kumar vs ACIT in ITA No. 1136/Bang/2022*** by following the decision of Hon'ble Guwahati High Court in ***Surajmal Parsuram Todi vs. CIT (1996) 222 ITR 691 (Gau)*** and Allahabad High Court in ***CIT Vs. Bisauli Tractors 299 ITR 0219/(2008) 165 Taxman 0001(All)***. Where the assessee was not maintaining books of account, then there was no occasion for assessee to get the books of account audited under Section 44AB.. Thus, no penalty can be levied.

7 ***ITO vs. Hindustan Breweries and Bottling Ltd [ITA No. 1673/Pune/2019 dt. 01/06/2023 (Pune)(Trib.) (AY 2013-2014)***

Section 68 – No amount credited during the year – since no amount received as share capital no addition can be made as unexplained credit – Addition cannot be sustained

Facts

Assessee filed its return declaring Nil income, after set off of brought forward loss of ₹ 41,39,617/- against the current year's income. The AO issued various notices, which remained unresponded. Eventually, the assessment order was passed u/s.144 of the Act. The AO observed that the assessee received fresh share capital amounting to ₹ 6 crore. In the absence of the assessee participating in the assessment proceedings or furnishing any evidence in support of the claims, the AO made the addition of ₹ 6 crore u/s.68 of the Act. The Assessee subsequently appeared before the CIT(A) and made submissions, the CIT(A) deleted the

addition by accepting the assessee's contention that the credit to share capital was only through journal entries. Hence, appeal before ITAT has been filed by Department.

Held

It is apparent that the assessee company converted unsecured loans into Equity share capital worth ₹ 6 crore. From the share application money account it was evident that transfer of ₹ 6 crore to share application money account was made through 7 entries passed on 31.3.2013. Assessee transferred ₹ 6 crore to share application money account from various accounts and all the transfers were made out of respective opening balances. Once the position is such no addition u/s.68 can be made on mere passing of transfer entries. It is abundantly clear that the transfer to share capital account was only by means of transfer entries, which, obviously, cannot lead to addition u/s.68 of the Act.

8 ***ITO vs. Sanjay Mahabir Maheshka [ITA No. 6168/Mum/2019 dt. 20/07/2023 (Mumbai)(Trib.) (AY 2011 – 2012)***

Section 68 – Sale of Shares – All documents available – No penny Stock Transation - Exemption cannot be denied

Facts

Assessee had purchased 2000 shares of M/s. Global Capital Market Ltd. @ ₹ 63 per share on 8.9.2009. The above said shares were split into 1:10 ratio. Accordingly, the assessee received 20000 shares of the above said company. The assessee sold 10000 shares @ ₹ 14.75 per share in A.Y. 2011-12. Based on the report given by the Investigation Wing, the Assessing Officer took the view that the share transactions shown by the assessee are bogus in nature and hence the sale value of the shares needs to be assessed as unexplained income. CIT(Appeals) allowed the appeal and hence appeal was filed by department before ITAT.

Held

There is no dispute with regard to the facts that the assessee has purchased the shares through a broker by paying the consideration in cheque. The said shares were split and were sold through a broker in a recognized stock exchange. The said shares have been held for more than one year. Assessee has furnished all the documents in support of purchase and sale of shares. However, the AO did not examine those documents and find fault with them. It is the finding of Ld CIT(A) that the shares have entered and exited his demat account of the assessee. There is also no allegation made that the assessee was part of ring which indulged in the alleged price rigging. The AO has placed reliance on the report of Investigation wing to hold that the assessee has availed accommodation entries by way of long term capital gains. We notice that an identical case of allegations that the assessee has availed accommodation entries for bogus capital gains was examined by the Hon'ble jurisdictional Bombay High Court in the case of ***Shyam Power (2015) 55 taxman.com 108(Bom)***. Hence, on above basis addition was deleted and appeal filed by department was dismissed.

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INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1 ***CIT vs. Citicorp Investment Bank (Singapore) Ltd. [(2023) 151 taxmann. com 510 (Bombay HC)]***

Where, assessee FII, a tax resident of Singapore, in its return, declared a capital gain on the sale of debt instruments and claimed exemption under Article 13(4) of India-Singapore DTAA and placed on record certificate given by Singapore authorities to the effect that capital gain income would be brought to tax in Singapore without reference to the amount remitted or received in Singapore, the assessee was entitled to benefit of Article 13(4)

Facts

i. The assessee, a tax resident of Singapore, is registered as a Foreign Institutional Investor (FII) in the debt segment with the Securities and Exchange Board of India (SEBI). The assessee had invested in debt securities in India during the year in consideration, i.e. A.Y.-2010-2011.

ii. In its return, the assessee inter alia declared a capital gain of ₹ 86,62,63,158/- on the sale of debt instruments and claimed exemption under Article 13(4) of the India-Singapore Double Taxation Avoidance Agreement (DTAA).

iii. During assessment proceedings, the assessee was asked to explain as to how the provisions of Article 24 of DTAA stood complied in order to claim capital gain as an exemption in India. Article 24 provides:

Article 24

1. Where this Agreement provides (with or without other conditions) that income from sources in a Contracting State shall be exempt from tax, or taxed at a reduced rate in that Contracting State and under the laws in force in the other Contracting State the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the exemption or reduction of tax to be allowed under this Agreement in the first-mentioned Contracting State shall apply to so much of the income as

> *is remitted to or received in that other Contracting State.*

......

iv. The assessee submitted that being a FII, it was liable to tax in Singapore on its worldwide income (irrespective of the amount repatriated to Singapore). It further submitted that even Singapore Revenue Authority had confirmed the above tax position vide their certificate dated 4th April 2012. The assessee further submitted that Article 13(4) of DTAA provides for the taxation of capital gain in Singapore and if, the assessee is offering its worldwide income for taxation in Singapore then the remittance of such income to Singapore has no relevance for the purpose of claiming benefit under the DTAA.

v. AO rejected this contention of the assessee on the ground that provisions of Article 24 of DTAA provide for restriction of exemption under Article 13(4) of such capital gains to the extent of repatriation of such income to other country, i.e., Singapore.

vi. The DRP also rejected the objections filed by the assessee.

vii. The Hon'ble ITAT held that the assessee was entitled to the benefit of Article 13(4) of DTAA between India and Singapore and allowed the appeal of the assessee.

viii. Aggrieved by the order of the Hon'ble Tribunal, the Revenue filed appeal before the Hon'ble Bombay High Court.

Decision

i. The Hon'ble High Court noted that as the property alienated were debt instruments, the assessee would come under Article 13(4) of DTAA (relevant extract reproduced below), whereby gains from the alienation of any property (debt instrument in this case) would be taxable only in Singapore, of which the alienator (the assessee) was a resident. Therefore, the entire capital gain of ₹ 82,58,83,330/- was taxable in Singapore.

Article 13 - Capital Gains

....

> *2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, maybe taxed in that other State.*
>
> *3. Gains from the alienation of ships or aircraft ....*
>
> *4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned In paragraphs 1, 2 and 3 of this Article shall be taxable only in that State.*"

ii. Further, w.r.t Article 24 of the DTAA, the Hon'ble High Court held that the exemption or reduction of tax to be allowed under the DTAA in India should only apply to so much of the

income as was remitted to or received in Singapore where the laws in force in Singapore provided that the said income was subject to tax by reference to the amount which was remitted or received in Singapore. When under the laws in force in Singapore, the income was subject to tax by reference to the full amount thereof, whether or not remitted to or received in Singapore, then in that case Article 24(1) would not apply.

iii. The Hon'ble High Court noted that the AO had held that the assessee had not produced any evidence to show the required repatriation as mandated by Article 24 of DTAA for entitlement of exempted income. It held that this was an incorrect statement as rightly held by the Hon'ble Tribunal. The assessee had placed on record even before the AO a certificate dated 16th April 2012 from Singapore Tax Authorities certifying that the income derived by the assessee from buying and selling of Indian Debt Securities and from Foreign Exchange transactions in India would be considered under Singapore Taxes Law as accruing in or derived from Singapore and such income would be brought to tax in Singapore without reference to the amount remitted or received in Singapore.

iv. The Hon'ble High Court concluded that therefore, Singapore authorities had themselves certified that the capital gain income would be brought to tax in Singapore without reference to the amount remitted or received in Singapore. It further added that as per circular no. 789 dated 13th April, 2000 and also as held in the judgement of ***CIT vs. Lakshmi Textiles Exporters Limited [(HC Mad) 245 ITR 522***] it was clear that such certificates issued by the Singapore Tax Authorities constitute sufficient evidence for accepting the legal position.

v. Thus, the Hon'ble High Court dismissed the appeal filed by the Revenue.

2 ***CIT(IT) vs. Springer Nature Customer Services Centre GMBH [(2023) 152 taxmann.com 277 (HC - Delhi)]***

Where assessee, a German-based company entered into a commissionaire agreement with an I Co whereby the assessee was appointed as a non-exclusive sales representative of I Co for the promotion, sale and distribution of print and electronic books and journals published by I Co, commission for providing said services could not be taxed as FTS since assessee only rendered support to business operations and there were no special skills or knowledge that assessee's personnel were required to possess to render the said services, furthermore assessee also did not render any professional advice, or service concerning a specialized field. (AY 2013-14)

Facts

i. The assessee, a German company, was part of Springer Science + Business Media Group [in short, "The Springer Group"]. The Springer Group was engaged in the business of publishing books, and academic journals, in the field of natural sciences, technology and medicine. As part of the Springer Group's business model, the assessee functioned as a non-exclusive sales representative globally, except in America, of the Springer Group's affiliated publisher entities, which included Springer India Pvt. Ltd. ('SIPL').

ii. Pursuant to its appointment as a Commissionaire by SIPL, the assessee promoted, sold and distributed, print

and electronic books and journals published by SIPL. Besides this, under the very same Commissionaire Agreement, the assessee provided sales and marketing services, customer services, order handling, delivery invoicing, debtor and subscription management, and processing of return copies, amongst other services. Resultantly, the assessee collected subscription and other revenue/fees from the sale of electronic books and journals to third-party customers, which it ultimately paid to SIPL, albeit after retaining its commission, as agreed under the Commissionaire Agreement. It also provided services to its affiliate publishers.

iii. The Assessing Officer (AO), via order, passed under Section 143(3) read with Section 144C(3)(a) of the Act, inter alia made the following additions to the income of the assessee.

    i. The first addition concerned an amount equivalent to Rs. 24,84,114 paid to the assessee by SIPL against a Commissionaire Agreement which consisted of two components viz i) commission fee, amounting to ₹ 22,89,835 classified in the Form 3CEB report filed by SIPL as "production and editorial charges". ii) ₹ 1,94,279, which, as per the Form 3CEB report filed by SIPL, was categorized as "service charges" for the sale of "Indian journals in printed form".

    ii. The second addition made by the AO was of ₹ 16,67,83,110 which represented the subscription fees received by the assessee against e-journals from two Indian entities, namely, Informatics Publishing Private Ltd. and ZS Associates.

iv. The AO treated the aforementioned three additions as royalty u/s 9(1)(vi) of the Act and Article 12 of the India-Germany Double Taxation Avoidance Agreement (in short, "DTAA").

v. The CIT(A) deleted the second component of the first addition, i.e., the amount equivalent to ₹ 1,94,279, which had been categorized as "service charges" for the sale of "Indian journals in printed form". Further, the CIT(A) categorized the first component of the first addition, i.e., ₹ 22,89,835, as a fee for technical services ('FTS') instead of a royalty. The CIT(A), accordingly, took recourse to the provisions of Section 9(1)(vii) of the Act and Article 12(4) of the DTAA.

vi. W.r.t to the other additions, the CIT(A) upheld the order of the AO i.e. considered them as Royalty. Aggrieved, the assessee filed an appeal before the Hon'ble Tribunal.

vii. The Hon'ble Tribunal relying on the decision of its coordinate bench dated 23.08.2022, passed in ITA Nos. 434 and 3826/DEL/2019 in the matter of ***Springer Verlag GmbH vs. DCIT*** deleted the first component of the first addition, which was confirmed by the CIT(A).

viii. The Hon'ble Tribunal deleted the other additions and held that subscription fees could not be treated as Royalty by following the decision of the Supreme Court in ***Engineering Analysis Center of Excellence (P.) Ltd. vs. CIT, [2021] 432 ITR 471 (SC)***.

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

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Decision

i. The Hon'ble High Court noted that Section 9 creates a deeming fiction as regards income accruing or arising in India, which, inter alia, involves FTS paid by a person who is a resident. 9(1)(vii)(b) r.w. Explanation 2 appended to the said provision defines FTS to mean any consideration, (including any lumpsum consideration), for rendering any managerial, technical or consultancy services. It held that thus for the first component to be treated as FTS, the services rendered by the respondent/assessee would have to fall under one or more of the following categories, i.e., managerial, technical or consultancy services which is evident upon a plain reading of the provisions of Section 9(1)(vii)(b) read with explanation 2 of the Act and Article 12(4) of the DTAA.

ii. It quoted Article 12(4) of the India-Germany DTAA which defines FTS as follows:

"The term "fees for technical services" as used in this Article means payment of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel, but does not include payment for services mentioned in Article 15 of this Agreement."

It added that therefore, for the consideration received by the assessee against services rendered as per the Commissionaire Agreement to be construed as FTS, the services would have to fall under one or more categories mentioned above, i.e., managerial, technical or consultancy services.

iii. It noted that it was not disputed by the Revenue that the assessee under the Commissionaire Agreement, was required to promote, sell and distribute books and journals published by SIPL in print and electronic form and also that the following services were rendered by the respondent/assessee: (i) Global sales and marketing services (ii) Customer services (iii) Order-handling (iv) Address maintenance (v) Stock keeping and inventory management (vi) Invoicing (vii) Delivery (physical as well as online) (viii) Debtor management services (ix) Subscription management (x) Return copies processing and that for rendering the aforementioned services, the respondent/assessee was paid a commission, at the rate of 9.9%, on the net revenue amount of "any and all" sales commissioned through the intermediary of the assessee (Article 4a of the Commissionaire Agreement).

iv. It further noted that the assessee was empowered to retain the commission when transferring the revenue to SIPL, (or via any other payment of commission agreed upon between SIPL and itself) and the title in the publications remained with SIPL (which the assessee could assign "property/licenses" to third parties, albeit on behalf of SIPL).

v. The Hon'ble High Court added that there was nothing in the Commissionaire Agreement which was suggestive of the fact that the respondent/assessee was required to discover, develop, or define/evaluate the goals that SIPL had to reach, or even frame policies that led to these goals, or supervise or execute or change policies that were already adopted. The assessee was

not performing, as it were, executive or supervisory functions. All that the assessee was obliged to do was render support to business operations.

vi. W.r.t to the criteria (for a service) to be termed as FTS, the Hon'ble High Court concluded that there was no reference to any special skill or knowledge that the respondent/assessee personnel brought to bear in rendering the services encapsulated in the Commissionaire Agreement. Promotion, sale, or distribution of SIPL's publications, or rendering support services of the nature referred to in Article 3 of the Commissionaire Agreement, although involving human intervention, did not fall in the category of technical and/or consultancy services.

vii. The Hon'ble High Court also added that there were no special skills or knowledge that the respondent/assessee's personnel were required to possess to render the services that were contemplated under the Commissionaire Agreement. The respondent/assessee also did not render any professional advice, or service concerning a specialised field. As indicated above, for a service to be categorised as a technical service, it had to be concerned with applied science, i.e., using scientific knowledge for practical applications, or industrial science concerning, relating to or derived from industry.

viii. Thus, the Hon'ble High Court held that the contention of CIT(A) that the said amount received by the assessee had attributes of FTS was erroneous. It also relied on the judgement of ***IT vs. Panalfa Autoelektrik Ltd [(2014) 227 taxmann.com 351 (Delhi)***]. [In this judgment this issue has been extensively dealt with after considering the order of the Authority for Advance Ruling (AAR) rendered in ***Wallace Pharmaceuticals (P.) Ltd [2005] 278 ITR 97 (AAR)***].

ix. W.r.t to the second addition, the Hon'ble High Court held that the submission of Revenue that the subscription fee should be treated as FTS could not be accepted, as this was not the stand of the Revenue before the Tribunal. This was a flip-flop which the assessee would do well to abjure.

x. It further added that the subscription amount could not be treated as royalty, having regard to the fact that there was nothing on record to suggest that the assessee had granted the right in respect of copyright to the concerned subscribers of the e-journals. All that the assessee did was to sell the copyrighted publication to the concerned entities, without conferring any copyright in the said material.

xi. The Hon'ble Tribunal thus upheld the order of the Tribunal and held that the Tribunal was right in deleting the addition made under this head, given the judgment rendered by the Supreme Court in the case of Engineering Analysis.

3 ***CIT(IT) vs. Alibaba.Com Singapore E-Commerce (P). Ltd. (IT) [(2023) 152 taxmann.com 110 (HC- Bombay)]***

Where assessee, a Singapore-based company, provided website facilities to Indian suppliers to do online business through a global trade marketplace for which assessee charged subscription fees, it was held that the arrangement between assessee and subscribers was for the provision of a standard facility and not for "rendering of

any technical, managerial or consultancy services" as provided in section 9(1)(vii) and thus subscription fees could not be taxed as FTS. Further, I Co who provided to assessee customer support, after-sales support and payment collection services from subscribers in India etc., could not be treated as DAPE as it had entered into several collaborations with other partners like assessee and assessee did not have any financial, managerial or any other type of participation in it

Facts

i. The assessee, Alibaba.com Singapore E-Commerce Private Ltd. was a company incorporated under the laws of Singapore which was evidenced by the certificate of incorporation. The document indicated that the entire control and management of the assessee is from Singapore. Thus, in terms of Article 4 of Indo-Singapore DTAA, it was a tax resident of Singapore, holding a valid 'tax resident certificate'.

ii. The entire structure of various holding companies of the 'Alibaba.com Group' showed that the immediate holding company was 'Alibaba.com International (BVI) Holding Ltd.', a company incorporated in British Virgin Island and the ultimate holding company was 'Alibaba.com Ltd.', a company incorporated in Cayman Island.

iii. During the years under consideration, the assessee had transacted with 'Alibaba.com Hong Kong Ltd.' (Alibaba Hong Kong) by way of availing of Web Hosting and related services. Alibaba Hong Kong was not the parent company of the assessee which was wrongly so mentioned and presumed by the A.O. in the impugned assessment order.

iv. The Alibaba website, i.e., www.alibaba.com, was commonly used by the entire Alibaba Group and services were being provided to the suppliers from all across the countries including India but excluding China, Hong Kong and Macau. The website facilitated Indian suppliers to do business online through a global trade marketplace. Indian subscriber subscribed to the assessee's service/facility offering under the "International Trust Pass" (ITP) and "Gold Suppliers Services Arrangement" (GSS) for which it charged a service fee.

v. The assessee had entered into a 'Co-operation Agreement' with Infomedia, an Indian Listed Company that provided the assessee customer support, after-sales support and payment collection services from subscribers in India etc. for which it was paid remuneration ranging between 40% to 50% plus cash bonus depending upon the target achieved by Infomedia as per the terms of the Co-operation Agreement.

vi. The service fee from Indian subscribers earned by the assessee and received via Infomedia was not offered to tax (as there was no business connection/permanent establishment of the assessee in India, nor the said payment was in the nature of Royalty or FTS).

vii. The AO held the service/subscription fee to be taxable considering the following points –

   i. Alibaba Singapore was not eligible to avail the benefits of the India-Singapore Tax Treaty on the grounds that, firstly, the assessee has no presence in Singapore and that the entire management of the assessee was based in Hong Kong; secondly, the Services to the Indian Subscribers were provided

by Alibaba Hong Kong, since it was the owner of the Website; and lastly, the Website was a trade mark of Alibaba Hong Kong;

ii. Information constitutes a 'business connection' for the assessee in India since the definition of business connection is an inclusive one;

iii. The subscription fees earned are partly in the nature of business income, royalty and fees for technical services;

iv. Business income:- The term 'source' does not mean the location of the payer, but the place where profit-making activities are carried out. In other words, the source is a 'profit-making apparatus', and since the Website constitutes a profit-making apparatus for which payments are made to the assessee by the subscribers, therefore, income is deemed to accrue or arise in India under section 9(1)(i) of the Act.

v. Fees for Technical Services:- The subscription fees earned were in the nature of fees for technical services on the ground that the scope of the term 'fees for technical services' is very wide and needs to be interpreted very broadly.

vi. The AO eventually assessed the total taxable income of the assessee as business income and taxed the assessee accordingly

viii. The DRP upheld the conclusion of the AO that the assessee was ineligible to claim the benefit of India Singapore DTAA, on the ground the assessee was only an intermediary between Indian subscribers and Alibaba Hong Kong. It further added that Infomedia was a dependent agent permanent establishment (DAPE) of the assessee and accordingly there was a permanent establishment/business connection of the assessee in India and its income was taxable in India as a business profit/business income. The DRP accordingly directed that income attributable to the business connection shall be interalia, 50% of the remittance received by the assessee from Infomedia.

ix. The assessee and the department filed Cross-Appeals before the Hon'ble ITAT.

x. The issue of taxability under Royalty had been rejected by the DRP and the department did not challenge this aspect. Therefore, this issue was not a dispute before the Hon'ble ITAT.

xi. The Hon'ble Tribunal noted the submission of the assessee that the servers which host the website were located in California USA. In a nutshell, it had been pointed out that, firstly, Alibaba.com Ltd. was the owner of the IPR and of the domain name Alibaba.com; secondly, the website was operated by Alibaba Hong Kong; and lastly, the server was located in California USA. The assessee was doing online business providing business-to-business services (B2B services and providing the same kind of facility as that of yellow pages by providing a portal for giving information about the different products and services in the electronic form.

xii. The Hon'ble ITAT concluded that the assessee had a limited role as its role was confined to facilitating the posting of the advertisement or displaying of the information about the product and services in the electronic form into the web portal.

xiii. After considering the Co-operation Agreement between the assessee and Infomedia, the Hon'ble ITAT gave a finding that Infomedia had entered into several collaborations with other partners like the assessee and that the assessee did not have any financial, managerial or any other type of participation in Infomedia. Infomedia carried out a host of other activities for other clients and it was an independent entrepreneur. The Hon'ble ITAT concluded on facts that the activities of Infomedia under the "Cooperation Agreement" with the assessee were in the ordinary course of business and in no way it was dedicated wholly or almost wholly to the assessee and consequently it could not be treated as DAPE.

xiv. The Hon'ble ITAT concluded that the assessee could not be reckoned to have any kind of business connection in India in the form of Infomedia u/s 9(1)(i) r/w Explanation 2.

xv. W.r.t to FTS, the Hon'ble ITAT held that the arrangement between the assessee and the subscribers was for the provision of services for standard facility and not for "rendering of any technical, managerial or consultancy services" as provided in section 9(1)(vii) r/w Explanation 2 of the Act. It also relied on the judgment of the Apex Court in the case of ***Commissioner of Income-tax-4, Mumbai vs. Kotak Securities Ltd. [(2016) 383 ITR 1 (SC)*]** and held that constant human endeavour or human intervention is an essential requirement for treating the rendering of services as "technical".

xvi. Accordingly, the Hon'ble Tribunal dismissed all the appeals filed by the revenue and allowed all the appeals filed by the assessee.

xvii. Aggrieved by the order, the Revenue filed an appeal before the Hon'ble High Court.

Decision

i. The Hon'ble High Court noted that the Hon'ble ITAT, after hearing the rival submissions, had given extensive factual findings as to why the conclusion of the AO, as well as DRP, were erroneous.

ii. Agreeing with the conclusion of the Hon'ble Tribunal, the Hon'ble High Court observed that in the orders passed by the AO and the DRP, the entire focus was on the fact that the website www.alibaba.com was registered in Hong Kong and was the trademark of Alibaba Hong Kong. AO had completely denied the existence of the assessee as an independent entity as if the assessee was only a front or a shadow entity of Alibaba Hong Kong. If the AO was so convinced that the entire activity in India to various subscribers was actually carried out by Alibaba Hong Kong and not by the assessee, then we would have expected him to do something to Alibaba Hong Kong and not the assessee.

iii. The Hon'ble ITAT had considered various documentary evidences, including the Tax Residency Certificate of the assessee, and had come to a factual finding that it could not be held that the assessee was either a non-existent entity or some kind of conduit of Alibaba Hong Kong which was not even the parent company. The Hon'ble ITAT had even reproduced a group structure of Alibaba.com and had come to a conclusion that Alibaba.com Hong

Kong was a separate entity from the assessee.

iv. The Hon'ble High Court held that the tax residency and residence status of the assessee was also established by filing the certificate of incorporation of the assessee. It showed it was incorporated in Singapore on November 06, 2007. Audited financial statements and the return of income of the assessee for the relevant years, which were filed before the Singapore Authorities, showed that the subscription fees were received by the assessee from the subscribers all over the world, including from India, as its own income

v. Accordingly, the Hon'ble ITAT had concluded that these facts showed that the assessee alone was the economic owner of the subscription fee it received from Indian subscribers and it received the revenue in its own right and not on behalf of Alibaba Hong Kong.

vi. It added that the Hon'ble ITAT also came to a finding that only the alibaba.com logo was registered in Hong Kong and that assessee only used the website of alibaba.com. It further held that the Hon'ble Tribunal had appreciated many other facts (which were not being mentioned in the order for the sake of brevity,) proving that the conclusions derived by the AO and the DRP were erroneous.

vii. It agreed with the conclusion of the Hon'ble Tribunal that the tax residency certificate was sufficient to determine the proof of residency and that the income-tax authorities could not ignore the valid tax residency certificate issued by the Government authority of the other contracting state, i.e., Singapore.

viii. It also rejected the Revenue's reliance on SC ruling in Vodafone International and argument that the Revenue had blanket powers to negate or ignore the TRC, holding that SC only observed that the TRC did not prevent the Revenue to enquire into a possible tax fraud, which was not alleged in the present case.

ix. On the issue of as to whether the assessee had any business connection in India in the form of Infomedia and whether Infomedia constituted a dependent agency PE for the assessee in India, it held that Indian Company i.e. Infomedia 18 Pvt. Ltd. with which the Assessee had a cooperation agreement was not its dependent agent permanent establishment (DAPE) as it was an independent entrepreneur which was compensated for its services and entered into several collaborations with others like Assessee. Further, the Assessee did not have any financial, or managerial participation in Infomedia. Also, the Assessee had a limited role in facilitating the posting of the advertisement/information on the web portal and the subscribers and the buyers would reach out to each other from the information provided by the Assessee without any participation or involvement of the Assessee.

x. It concurred with the finding of the Hon'ble ITAT given in light of the documents, facts and provisions of section 9(1) (i) r/w Explanation 2 and the proviso to the explanation, that the assessee could not be reckoned to have any kind of business connection in India in the form of Infomedia.

xi. It noted that the Hon'ble ITAT had also relied upon Circular 7 of 2003 dated May 09, 2003, issued by CBDT

which clarified that the term "business connection" would not include the cases of business activities being carried out through, inter alia, any independent agent if any such independent agent is acting in the ordinary course of its business. Therefore, it held that this was also a factual finding of ITAT.

xii. The Hon'ble High Court agreed that the income of the assessee could not be held to be deemed to accrue or arise in India in terms of section 9(1)(i) of the Act. Once the income of the assessee cannot be taxed as business income in India under 9(1)(i) then it is not necessary to go into the DTAA.

xiii. The Hon'ble High Court agreed with the conclusion of the Hon'ble Tribunal that activities highlighted by the AO were not carried out by the assessee at all and that the services provided by the assessee to the Indian Customers were merely that of displaying/storing data of Indian Subscribers, being limited to the provision of an E-commerce platform for advertising of products or services in India.

xiv. It held that the Hon'ble ITAT had rightly concluded that arrangement between Assessee and the subscribers was for the provision of services for standard facility and not for 'rendering of any technical, managerial or consultancy services' as provided in section 9(1)(vii), relying on SC ruling in Kotak Securities wherein it was held that if any technology or a process had been put to operation automatically without much human interface or intervention, then such technology per se cannot be held as rendering of technical services by human skills.

xv. The Hon'ble High Court concluded that the entire subject matter of the appeal was fact-based. Hence, it upheld the order of the Hon'ble Tribunal and dismissed Revenue's appeal.

B. TRIBUNAL (SPECIAL BENCH)

4 | *Star India (P.) Ltd. vs. ACIT [(2023) 151 taxmann.com 77 (ITAT- Mumbai)]*

Held that where assessee made payments to AE(ESPN) for the acquisition of bundle of sports broadcasting rights (BSB rights) which ESPN had acquired from International Sport Bodies (ISBs), merely because the price paid by assessee was less than that what was agreed to be paid by the AE to ISBs, the same could not be said to be at ALP by applying CUP as MAM – since the said payment was part of a controlled transaction. Thus, in the instant case, 'Other Method' would be MAM to benchmark international transaction

Facts

AY 2014-15 [Background]

i. The assessee made payments to its AE i.e. ESPN Star Sports Ltd. (ESS) for the acquisition of a bundle of sports broadcasting rights (BSB rights) that ESS had acquired from International Sport Bodies(ISBs). The transaction of acquiring the BSB Rights (rights to broadcast through television/internet/mobile various sports events like ICC Tournaments including Cricket World Cup, Champions League T20 cricket, Formula-1 GP2 and Wimbledon Championships etc.) from ESS was thus concluded for 1211 USD million (by means of Master Rights Agreement (MRA) entered on 31-10-2013) in the financial year relevant to AY 2014-15.

ii. The assessee adopted as CUP, the price paid by ESS for acquiring such BSB Rights for a total sum of 1388 USD million. Since the overall purchase price of 1211 USD million agreed between ESS and the assessee was 9.5% less than the agreed price between ESS and third parties [International Sport Bodies (ISBs)], the assessee claimed that the international transaction was at ALP.

iii. As the payment schedule was of 5 years, the assessee had claimed a deduction of ₹ 1013.26 crore on this score for AY 2014-15. It applied the Comparable Uncontrolled Price (CUP) method for demonstrating that the international transaction of acquiring the BSB Rights was at Arm's Length Price (ALP).

iv. To substantiate the agreed price of 1211 USD million, the assessee furnished the report of the independent valuer. Such value was determined by adopting Discounted Cash Flow (DCF) method.

v. The TPO found some errors in the independent valuer's report and consequently determined the ALP of the overall international transaction at 411 USD million instead of 1211 USD million as determined by the assessee.

vi. This resulted in a variation between actual consideration (1211 USD million) and ALP consideration (411 USD million) at 800 USD million, being, 66.06% [800(1211-411)/1211*100] of the actual consideration.

vii. The assessee had reported the value of this international transaction for the A.Y. 2014-15 at ₹ 1013.26 crore. By applying 66.06% to the value of the transaction, the TPO proposed a transfer pricing adjustment of ₹ 669.36 crore for AY 2014-15.

viii. DRP provided no relief.

ix. For AY 2014-15, the Hon'ble Tribunal noted that the assessee submitted an expert's opinion as well as another valuation report before the DRP for the first time supporting its earlier valuation, which was again contradicted by the TPO during the remand proceedings.

x. On consideration of the entire conspectus of the case, Tribunal held that the valuation of BSB Rights was a highly technical matter, which could be done only by a person having expertise in the field. It, therefore, set aside the assessment order and remitted the matter with a direction to the Revenue to ascertain the correctness of the assessee's valuation reports by getting the valuation done through an expert in the field.

AY 2015-16

xi. For the given AY i.e. AY 2015-16, the assessee claimed deduction towards the value of the international transaction of 'Purchase of the BSB Rights'. It filed Form No.3CEB containing a list of international transactions, including, payment of ₹ 3075,24,15,714/- for acquiring Bundle of Sport Broadcasting Rights (BSB Rights) hitherto held by its US-based AE i.e. ESS [which in turn was acquired by ESS from ISBs (i.e. International Sport Bodies)]. The assessee claimed the said payment to be at ALP by applying the 'Other Method' on the basis of the report of an independent valuer. However, during assessment proceedings, it changed its MAM to CUP claiming the said payment to be at ALP since it was less than the third-party cost paid by AE (ESS) to ISBs. TPO extensively discussed and

reproduced its order for immediately preceding AY in its order for the given year, determining excess payment on an overall basis at 66.06% towards full terminal value and the part finite period value. Finding the facts of this year identical to the preceding year, the ALP of the transaction was determined at ₹ 1043 crores thereby recommending TP adjustment. AO notified the draft order with TP adjustment at ₹ 2031.50 crore.

xii. No reprieve was provided by DRP which relied on its own order for the AY 2014-15.

xiii. The assessee filed an appeal before the Hon'ble Tribunal and a Special Bench was constituted for the same.

Decision

PER Hon'ble VP

W.r.t Change in MAM by Assessee

i. The assessee adopted the `Other method' as the most appropriate method ('MAM') as per its Transfer Pricing Study Report for the determination of the ALP of the international transaction of Purchase of BSB Rights. Then it advocated for the CUP as the MAM before the TPO. The ld. DR contended that a method once chosen as the most appropriate in its TPSR cannot be changed by the assessee in further proceedings

ii. On-going through the prescription of sub-sections (1) and (2) of section 92C read with section 92, it gets highlighted that the legislature has used the word `shall' for determining the ALP under the most appropriate method and the most appropriate method is to be applied having regard to the nature of transaction or class of transaction etc.

iii. The ultimate aim of Chapter-X of the Act was to determine the arm's length price of the transaction. The methods prescribed are only the means of achieving the object of the ALP determination. Technicalities of the assessee having selected a wrong comparable or adopted a wrong method cannot come in the way of determining the correct ALP.

iv. Just as the TPO has the right to change the method applied by the assessee as per what he feels was right, if an assessee applies a particular method as most appropriate and thereafter realizes, during the course of the proceedings, that the method applied by it was not the most appropriate having regard to the nature and class of transactions etc., he can also back-out from the method earlier selected provided the new method is actually the most appropriate having regard to the nature of the transaction under consideration.

v. In both scenarios, viz., where either the TPO rejects the assessee's selection of the method or the assessee itself realizes its mistake in the selection of the method, it is for the Tribunal (the next appellate authority in the hierarchy) to examine the correctness of the newly selected method as the most appropriate in the facts and circumstances of the case. If the Tribunal holds that the change in the method by the TPO or the assessee resiling from its earlier selection is correct, then there can be no impediment in switching over to the new method because the legislature stipulates that the most appropriate method shall be applied for determining the ALP.

vi. The selection of the actual most appropriate method in the facts of the case was essential and not the perception of the assessee or the TPO to this effect. It thus follows that there can be no estoppel to the change of a method so long as the new method is, in fact, most appropriate for determining the ALP. (Reliance was placed on the judgment of the Hon'ble Delhi High Court in ***Pr. CIT vs. Matrix Cellular International Services Pvt. Ltd. (2017) 100 CCH 0191 Delhi High Court)***.

W.r.t to CUP vs Other Method as MAM

vii. The manner of determination of ALP under section 92C had been set out in rule 10B, which stated that: `For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction … shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely'.

viii. W.r.t to the correct method, the first method (CUP) and the last method (`other method') were price-based, whereas the remaining methods (RPM, CPM, PSM and TNMM) were profit-based.

ix. Ongoing through the mandate of the CUP method, it follows that the benchmark price is the actually transacted price (charged or paid and not some theoretical price) in a comparable uncontrolled situation; and the benchmark property is the property transferred (that is the same and not some similar) property.

x. In the definition of arm's length price, the preference and the first mention is of the price applied and then the price proposed to be applied. Here, it is pertinent to note that the definition of ALP is applicable to all six methods. The first part of this definition of the price which is applied applies to the first five specific methods and the latter part of the price proposed to be applied, in addition to the price which is applied, fits into the description of the last 'other method'.

xi. Narrowing down the proposition, if the CUP method was pitted against the `other method', then there was no prize for guessing that it was the former which would prevail over the latter provided the comparable uncontrolled data required for it was available. The ensuing discussion would demonstrate that the data required for the application of the CUP exists and was on record.

xii. Though the statute does not give priority to any method for selection as the most appropriate method, the ambit of the 'other method' in contrast to the specific methods makes it a method of last resort because of its relatively lesser exactitude and meticulousness.

xiii. Thus, CUP was the most appropriate method in the facts and circumstances of the case.

xiv. W.r.t to the ALP as determined by the assessee under the CUP method, it was noted that the nature of the transaction of `Purchase of Bundle of Sports Broadcasting Rights' was purchase on an aggregate basis by the assessee from ESS at a consideration lower than the third party costs payable by ESS.

xv. Thus, there is no need to examine the ALP based on valuation report(s) or expert opinions submitted by the assessee under the `Other method' and

also the deficiencies pointed out by the TPO in the valuation report, forming the bedrock of the transfer pricing adjustment. Therefore, the ALP of the international transaction of `Purchase of Bundle of Sports Broadcasting Rights' determined by the assessee is correct under the CUP method and does not warrant any interference.

PER Hon'ble AM

W.r.t to the Change in MAM

xvi. The Hon'ble AM held that every assessee, transfer pricing officer, Dispute Resolution Panel or any appellate authority determining the arm's-length price or adjudicating the same are duty-bound to follow the mandate of rule 10 C to hold what is the most appropriate method out of the method prescribed under section 92C of the act. Therefore, The MAM is a single method selected out of 6 methods prescribed under that section.

xvii. Reliance was placed on the judgement of ***Principal Commissioner of Income Tax vs. Metrix Cellular International Services Private Limited [2018] 90 taxmann.com 54 (Delhi)*** for the above mandate.

xviii. One has to consider the nature and class of the international transaction, parties to the transaction and functions performed by them with respect to the assets employed and risks assumed and the most important was the availability, coverage, and reliability of data necessary for application of that method.

xix. Thus, it is always possible that during the journey of determining the Arm's length price, MAM already considered is not appropriate, one can resiling from the most appropriate method adopted in its transfer pricing study report with a caveat that provided the earlier method selected by the assessee or for that matter any assessing authority or appellate authority, does not fulfil the requirement of rule 10C(2) of the rules and new MAM selected fulfils it.

xx. Therefore, there was no bar to any of the parties in concluding the most appropriate method by reselling the earlier method selected by it, if it is confirming the requirement of rule 10C(2) of The Income Tax Rules. The Hon'ble AM agreed with this part of the view expressed by the Hon'ble VP.

W.r.t to CUP vs Other Method as MAM

xxi. It was apparent that the assessee undertook to fulfil all risk and to earn the reward of these contracts as per these novation agreements or sublicenses according to the master rights agreement. Thus, the assessee had stepped into the shoes of ESS so far as all the liabilities of the various contracts entered into as well as reward of those contracts.

xxii. The price paid to ESS was not comparable to the prices paid to sports bodies (Third Parties) and would not constitute CUP. CUP Method compares the price charged with regard to a controlled transaction for the transfer of goods or services to the price charged for the transfer of goods or services in a third-party scenario having comparable circumstances. Necessarily, there have to be two prices for CUP to succeed and in the current scenario, no evidence was available that a third party had purchased such sporting rights from another party.

xxiii. After considering various aspects of the valuation report prepared by the various valuers as well as expert report, the MAM to determine the arm's-length price of the international transaction of sale of a bundle of rights was the 'other method', the ALP of this international transaction was to be determined applying the 'other method'.

PER Hon'ble JM

W.r.t to Change in MAM

xxiv. Agreed with both the Hon'ble VP and Hon'ble AM that the assessee, in principle, can resile from the most appropriate method as was adopted in the TPSR, provided that the new method confirms the requirement of Rule 10C(2) of the Income-tax Rules, 1962.

xxv. The tribunal being the last fact-finding authority was duty bound to ascertain the correct facts, nature & class of transactions, the FAR analysis, reliability of data and thereafter arrive at the Most Appropriate Method to benchmark the impugned international transaction, which might resile from the Method adopted by the assessee in the TPSR.

W.r.t to CUP vs Other Method as MAM

xxvi. Agreed with the Hon'ble VP that CUP Method when pitted against Other Method would prevail, provided reliable data under uncontrolled conditions is available.

xxvii. However, agreed with the Hon'ble AM that in the given facts of the present case, the 'Other Method' and not the 'CUP Method' was the most appropriate method as the agreed prices paid by the assessee to various sports bodies by virtue of the liabilities assumed under the agreements entered into with ESS represented only the discharge of liabilities and was a part of the controlled transaction which was paid to non-AE [Sports Bodies]at the instance of the AE [ESS]. It therefore did not represent uncontrolled price/transaction under uncontrolled conditions and hence did not constitute reliable data to undertake CUP analysis.

xxviii. If the assessee's manner of application of the CUP Method was to be taken to its logical conclusion, then the benchmark price ought to have been the value of the contracted liabilities i.e. USD 1338.03 million and there would not have been any reason for ESS under uncontrolled circumstances to give a discount of 9.5% and bear loss on this count. The very fact that the independent consideration agreed by the assessee and ESS of USD 1210.65 million was different than the value of contracted liabilities of USD 1338.03 million showed that the market conditions had indeed gone a change and an independent party would not have acquired these designated rights in 2013 for the same price which ESS had negotiated with ISBs.

xxix. Thus, the 'Other method' and not CUP was to be adopted as MAM.

Conclusion

xxx. Finally, the Hon'ble Members in majority directed to place the matter before the Division Bench for disposal having regard to the decision of the Special Bench on the issue that the arm's-length price of the international transaction is required to be determined by adopting 'Other Method' as MAM.

CA Naresh Sheth

CA Jinesh Shah

INDIRECT TAXES
GST – Recent Judgments and Advance Rulings

A. WRIT PETITIONS

1 *Thirumalakonda Plywoods – Andhra Pradesh High Court [W. P. No. 24235 Of 2022]*

Facts and issue involved

The petitioner, engaged in the business of plywood and hardware, had claimed ITC in Form GSTR-3B for the month of March 2020 which was filed on 27.11.2020 i.e. beyond the time limit provided u/s 16(4) of CGST Act. The said return was filed along with the late fee of ₹ 10,000.

Petitioner was served with show cause notice ('SCN') dated 16.12.2021 u/s 74(1) of CGST Act which sought to disallow the ITC claimed by petitioner along with consequential interest and penalty. Petitioner replied to the above SCN vide its email dated 17.01.2022. Subsequently, petitioner was served with the order vide email dated 14.03.2022 wherein ITC of ₹ 4,78,626 was disallowed resulting in total demand of ₹ 11,24,994 along with consequential interest and penalty. Hence, the petitioner has preferred the present writ petition.

Petitioner's submission

As GSTR-3B was accepted with late fee, it shall be deemed that the department has exonerated the delay for claiming ITC beyond the period provided u/s 16(4) of CGST Act.

ITC is a statutory right. Placing stumbling blocks by way of imposing time limit u/s 16(4) of CGST Act will tantamount to violation of Article 14, 19(1)(g) and 300A of the Constitution of India.

Section 16(2) of CGST Act commences with non-obstante clause and hence will override section 16(4) of CGST Act i.e. if the conditions of section 16(2) of CGST Act are complied with by an assessee, he will be entitled to claim ITC without reference to the time limit prescribed u/s 16(4) of CGST Act.

Revenue's submission

Collection of late fees can never immune a taxpayer from other aspects such as output tax payment, demand for interest on belated payment as well as claiming of ITC beyond the stipulated time period.

ITC is only a concession or rebate and the legislature in its wisdom has imposed certain conditions including time limit u/s 16(4) of CGST Act. Hence, neither conditions provided

u/s 16(2) of CGST Act nor the time limit u/s 16(4) of CGST Act can be attributed illegal or unconstitutional. Reliance was placed on following judicial pronouncements in this regard:

- ***Jayam and co. v.s Assistant Commissioner [2016 (15) SCC 125];***
- ***USA Agencies vs. The Commercial Tax Officer [2013(5) CTC 63]; and***
- ***ALD Automotive Private Limited vs. Commercial Tax Officer [(2019) 13 SCC 225]***

Discussions by and observations of High Court

Non-obstante clause is a legislative device usually employed in a statute to give overriding effect to certain provisions over some other contradictory provisions in the same or other statute.

Section 16(2) of CGST Act does not appear to be a provision which allows input tax credit, rather ITC enabling provision in section 16(1) of CGST Act. On the other hand, section 16(2) of CGST Act restricts the ITC which is otherwise allowed to only such cases where conditions prescribed in it are satisfied. Therefore, section 16(2) of CGST Act in terms only overrides the provisions which enable the ITC i.e. section 16(1) of CGST Act.

Non-obstante clause in Section 16(2) of CGST Act is followed by a negative sentence "no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless". This negative sentence pellucidly says that unless the conditions mentioned in Section 16(2) of CGST Act are satisfied, no credit will be eligible. This stipulation manifests that Section 16(2) of CGST Act is not an enabling provision but a restricting provision. What it restricts is the eligibility which was otherwise given u/s 16(1) of CGST Act.

In the present case both Section 16(2) and 16(4) of CGST Act are two different restricting provisions, the former providing eligibility conditions and the latter imposing a time limit. However, both these provisions have no inconsistency between them.

Therefore, Section 16(4) of CGST Act being a non-contradictory provision and capable of clear interpretation, will not be overridden by non obstante provision U/s 16(2) of CGST Act. As already stated supra 16(4) of CGST Act only prescribes time restriction to avail credit. For this reason, the argument that 16(2) overrides 16(4) of CGST Act is not correct.

Conditions stipulated in Section 16(2) and 16(4) of CGST Act are mutually different and both will operate independently. Therefore, mere filing of the return with a delay fee will not act as a springboard for claiming ITC. Collection of late fees is only for the purpose of admitting the returns for verification of taxable turnover of the petitioner but not for consideration of ITC.

ITC is a mere concession/rebate/benefit but not a statutory or constitutional right and therefore imposing conditions including time limitation for availing the said concession will not amount to violation of constitution or any statute. The operative spheres of Section (16) and constitutional provisions under Article 14, 19(1)(g) and 300-A are different and hence infringement does not arise.

High Court took note of decision in case of ***ALD Automotive Pvt. Ltd [(2019) 13 SCC 225***] wherein it was held as under:

"In event, it is accepted that there is no time period for claiming input tax credit as contained in Section 19(11), the provision becomes too flexible and gives rise to large number of difficulties including difficulty in verification of claim of input credit. Taxing statutes contain self-contained scheme of levy, computation and collection of tax. The time

under which a return is to be filed for the purpose of assessment of the tax cannot be dependent on the will of a dealer. The use of the word "shall" in Section 19(11) does not admit to any other interpretation except that the submission of input claimed cannot be beyond the time prescribed."

Decision of High Court

i. The time limit prescribed for claiming ITC u/s 16(4) of APGST Act/CGST Act, 2017 is not violative of Articles 14, 19(1)(g) and 300-A of the Constitution of India.

ii. Section 16(2) of APGST/CGST Act, 2017 has no overriding effect on Section 16(4) of the said Act as neither are not contradictory with each other. They will operate independently.

iii. Mere acceptance of Form GSTR-3B returns with late fee will not exonerate the delay in claiming ITC beyond the period specified U/s 16(4) of APGST/ CGST Act, 2017.

2 ***Renuka Sugars Limited - Gujarat High Court [R/Special Civil Application No. 22339 of 2022]***

Facts and issue involved

Petitioner is engaged in manufacturing and trading of sugar and allied products in domestic as well as foreign markets. The petitioner regularly discharged its GST liability on the domestic sales made by it. Exports made by the petitioner are made under Letter of Undertaking (LUT) without payment of IGST. Therefore, ITC availed by the petitioner of input supplies used by it to make the said exports gets accumulated in its credit ledger.

According to Section 54(3) of the CGST Act and Section 16(3) of the IGST Act, the petitioner is entitled to claim a refund of such unutilized ITC. Rule 89(4) of the CGST Rules provides a formula for the purpose of calculating the maximum refundable amount that can be claimed in respect of inputs used in making zero-rated supply. The petitioner has been regularly claiming refund of the unutilized ITC in accordance with the provisions under GST Law.

In the instant case, due to an inadvertent arithmetical error, the petitioner claimed a refund for a lower amount than was actually available to it. On becoming aware of the miscalculation, the petitioner filed for an additional refund in respect of the differential amount which was rejected by the GST authorities. Therefore, the petitioner approached the High Court to seek a remedy for the same.

Petitioner's submissions

The petitioner submitted that the refund claim for the lower amount had already been sanctioned by the authorities after conducting suitable due diligence for the same. Further, the GST Portal does not accept refund application for the same category of accumulated ITC (LUT) for the same month and hence the petitioner had no choice but to upload the supplementary refund application under the 'any other' category. It is emphasized that the purpose of the supplementary application was only for correcting a clerical and arithmetical error made by the petitioner while filing the refund application.

Also, the petitioner submitted that there is no bar or prohibition under the GST law with regard to supplementary refund claim filed by any assessee due to erroneously claiming lesser refund while filing refund application on the portal.

Additionally, the petitioner submitted that the application was rejected without receiving an opportunity to be heard.

Respondent's submissions

The respondents (GST authorities) rejected the supplementary refund application of the petitioner on the grounds that the application made under 'any other' category is invalid. They also submitted that the petitioner is solely responsible for the error since the petitioner had already claimed and received refund for the relevant period and hence, the supplementary application has been rightly rejected by them.

Discussions by and observations of High Court

The respondents had not disputed the fact that the maximum amount admissible for refund was higher than was claimed by the petitioner. The court observed that the claim of the petitioner cannot be rejected solely on the basis of a technical error without examining the same on its merits and in accordance with the law. It is settled law that the benefit which otherwise a person is entitled to, once the substantive conditions are satisfied, cannot be denied due to a technical error or lacunae in the electronic system. Thus, the claim of the petitioner cannot be rejected outright merely on technicality.

Decision of High Court

High court directed the respondents to allow the petitioner to furnish the refund application with the right to scrutinize it and then take appropriate action in accordance with the law.

3 ***Ambey Mining Pvt Ltd vs. Commissioner of State Tax – Jharkand High Court [(2023) 152 Taxmann.com 516 (Jharkhand)]***

Facts and issue involved

Petitioner had belatedly filed Form GSTR-3B for the tax periods April 2019, May 2019, June 2019, August 2019 and November 2019 (impugned period). The petitioner has already paid interest of ₹ 23,95,500 for delayed payment of tax.

Deputy Commissioner of State Tax (Respondent 2) passed the adjudication order (without issuing the show cause notice) demanding interest for delay in filing of GSTR-3B for the impugned period. Petitioner preferred an appeal to Joint Commissioner of State Tax (Appeals) against the aforesaid adjudication order. The said appeal ('first appellate order') was allowed by appellate authority with NIL interest liability. The matter for impugned period had attained finality.

After more than 20 months of appellate order, Respondent 3 as well as Respondent 2 through show cause notice dated 16.09.2022 and 22.10.2022 initiated fresh proceedings respectively for demand of interest for same impugned period and for the same cause of action, which was already adjudicated, and petitioner's appeal was allowed by the first appellate authority.

The petitioner has filed the present writ requesting the court to quash and set aside the impugned show cause notices issued without jurisdiction.

Petitioner's submission

Petitioner submits that initiation of fresh proceedings by Respondent No. 3 and Respondent No. 2 for the same cause of action even after the first appellate order dated 16.01.2021 decided in favour of the Petitioner which had attained finality is wholly without jurisdiction and bad in law and procedure. Further, it is also against the principles of res judicata contemplated in Section 11 of the Code of Civil Procedure, 1908.

The petitioner relied on decision of ***UOI vs. Vicco Laboratories reported in [(2007) 218 ELT 647 (SC)***] wherein it was held that reopening concluded assessment amounts

to abuse of the process of law. Further, it was held that when there is abuse of the process of law, writ under Article 226 would be maintainable. The petitioner also relied on the decision of Honorable Apex Court in the case of ***Duncans Industries Ltd. vs. CCE [(2006) 201 E.L.T 517(S.C)***] wherein it was held that for the same period two assessments are not permissible in law.

Discussions by and observations of High Court

Section 107(16) of the JGST Act provides that every first appellate order passed thereunder shall be final unless subjected to revision under Section 108 or to an appeal to tribunal under Section 113 or an appeal to High Court under Section 117 or an appeal to Supreme Court under Section 118 of the JGST Act.

Honorable Apex Court in the case of ***CCE vs. Prince Gutkha Ltd. [(2015) 15 SCC 775]*** held that adjudicating authority, dropping earlier demand by accepting explanation of assessee, cannot issue second show cause notice on same cause of action.

Honorable Apex Court in case of ***CCE vs. Gujarat State Fertilizers and Chem. Ltd. [(2008) 15 SCC 46***] held that the order of the Tribunal attains finality due to non-filing of appeal by the department.

As per Section 107(11), the first appellate authority does not have power to remand the matter back to the assessing authority that passed the order. The restarting of fresh proceedings by lower authorities amounts to doing something indirectly which cannot be done directly.

The respondents, in the instant case, not being aggrieved by the first appellate order dated 16.01.2021, did not challenge the same or availed remedies available under the law but accepted the same and allowed the same to attain finality. Therefore, now, they cannot be allowed to turn around and re-agitate a matter afresh which has already come to an end by due process of law.

Decision of High Court

Writ petition is allowed and both the impugned show cause notices are quashed and set aside..

4 ***Tagros Chemicals India Pvt Ltd vs. Union of India – Ahmedabad High Court [WPA 647 of 2022]***

Facts and issue involved

The petitioner had received purchase order from registered exporter viz., Quality Biz Chem India Pvt. Ltd, Mumbai (‘Buyer’) to supply the goods at the concessional rate of 0.1% IGST in terms of Notification No. 41/2017-IGST (Rate) dated 23.10.2017 as they intended to export the goods. The petitioner by mistake supplied the goods to the buyer on payment of full duty of IGST at the rate of 18% instead of concessional rate of 0.1%. The petitioner raised the Tax Invoice dated 30.06.2019 by charging IGST at the rate of 18% [₹ 23,22,000] on the taxable value of ₹ 1,29,00,000. The said tax invoice was declared in GSTR-1 and GSTR-3B for the relevant month.

The buyer exported the goods under a shipping bill dated 06.07.2019, which contained the details of the petitioner's GSTIN and tax invoice.

In the month of March 2020, the petitioner realized that they had paid tax at the full rate of 18% instead of 0.1%. Therefore, the petitioner issued a credit note dated 16.03.2020 for the excess amount of tax collected from the buyer. The details of the credit note were duly mentioned in GSTR-1 return for the month of March 2020. However, the petitioner could not reduce the turnover and GST liability in Form GSTR-3B as there

were no outward supplies during the said month and subsequent month.

The petitioner, therefore, filed a refund claim on 03.09.2020 for IGST of ₹ 23,09,100 the amount paid in excess in terms of the clarification issued under Circular No. 137/07/2020-GST dated 13.04.2020.

The respondent issued a deficiency memo in respect of the refund application to which the petitioner filed all relevant documents and uploaded claim through GST portal. The respondent did not accept the explanation furnished by the petitioner and issued show cause notice dated 15.04.2021 as to why the refund claim of ₹ 23,09,100 should not be rejected.

The petitioner submitted its explanation, however, without recording proper finding on each submission, the respondent rejected the refund by passing an order in original dated 07.05.2021.

The petitioner has preferred the present writ against the refund rejection order passed by the adjudicating authority.

Petitioner's submissions

The respondent has committed an error in denying the benefit of concessional rate of duty as provided under notification No. 41 of 2017-IGST (Rate) on the inter-State supply of taxable goods, which were ultimately exported which was one of the conditions prescribed under the notification. Clause 2 of the said Notification provides a specific bar in claiming the benefit of the notification if the goods are not exported within a period of 90 days from the date of issue of tax invoice. On fulfillment of this condition, the respondent has no authority and jurisdiction to deny the benefit of concessional rate of duty for any reason. It is settled law that substantial benefit cannot be denied on the ground of technicalities or procedural lapses.

Observations and Discussion by Court

The duty is cast upon the registered recipient to export the goods within a period of 90 days from the date of issue of tax invoice by the registered supplier. The petitioner raised the invoice on 30.6.2019 and thereafter the buyer exported the goods under a shipping bill dated 6.7.2019. Hence, the condition no.(ii) as mentioned hereinabove has been fulfilled. The conditions mentioned in the notification clearly envisage that all the conditions are not to be fulfilled or complied with by the petitioner, but the conditions are to be complied with by the exporter.

Honorable Apex Court in case of ***Bonanzo Engineering & Chemical Pvt. Ltd. vs. Commissioner of Central Excise reported in [2012(4) SCC 771***] held that if the assessee paid duties on the goods which are exempted from payment by mistake, it does not mean that the goods would become liable for the duty under the Act. Hon'ble Apex Court in case of ***Share Medical Care vs. Union of India reported in [2007(4) SCC, 573***] held that even if an applicant does not claim benefit under a particular notification at the initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage.

Decision of High Court

The order dated 22.6.2021 passed by the respondents is quashed and set aside. The respondents are directed to refund the amount of ₹ 23,09,100/- with applicable interest as per law within a reasonable time from the date of receipt of copy of this judgment.

B. RULINGS BY AUTHORITY OF ADVANCE RULING

1 *Hilti Manufacturing India Private Limited – Gujarat AAR [GUJ/GAAR/R/2023/26]:*

Facts and issue involved

Applicant had entered into agreement with its foreign principal HAG on following terms for providing R&D services on the product samples provided to it:

- Applicant is required to conduct R&D, testing & engineering activities for developing of new products and processes;
- Prototypes required for performance testing are manufactured by the applicant;
- Applicant shall purchase raw materials and consumables as well as hire personnel for undertaking R&D activities;
- Certain materials (which are not substantial) such as consumables, capital goods including tools, reference material such as competitor products, showpiece products, batteries are provided by HAG.

The result of R&D activity is then provided to HAG in the form of report comprising of findings, performances, parameters, know-how, inventions, developed processes, objects and programs. Applicant receives consideration in convertible foreign exchange on which it discharges IGST at 18% on inclusive basis. Applicant wishes to seek advance ruling as to whether R&D services provided by it amounts to export of services under GST.

Applicant's submissions

All the conditions provided u/s 2(6) of IGST Act are satisfied and hence R&D activity carried on by them amounts to export of service on following grounds:

- R&D activity carried on by applicant amounts to supply of service under GST;
- No service is being performed on the consumables, tools, reference material supplied by HAG. They are getting consumed in the process of R&D activities.

  Prototypes on which testing activity is carried out get exhausted in the process of R&D and is not supplied back to HAG.
- Section 13(3)(a) of IGST Act provides that place of supply of services supplied in respect of goods which are required to be made physically available by the recipient of service to the supplier of service shall be the place where such services are performed.

  Where goods ceased to exist in the form in which they have been supplied, it cannot be said that services have been provided in respect of goods even if such services have been rendered on goods. Reliance was placed on following judicial pronouncements in this regard:

  o ***Indeus Life Science Private Limited [2019 (370) ELT 678];***

  o ***BA Research India Limited [2010 (18) STR 439];***

  o ***KSH International Private Limited [2010 (18) STR 404];***

  o ***TNS India Private Limited [Final order No. 30064-30065/2022]; and***

  o ***Bayer Bio Science Private Limited [2019 (25) GSTL 230]***
- Place of supply of services provided by applicant does not fall under sub-section (3) to (13) of section 13 of IGST

Act and hence the place of supply of R&D services provided by it shall be determined u/s 13(2) of IGST Act i.e. location of service recipient.

- Location of applicant is in India and location of service recipient is outside India.
- Applicant receives consideration in convertible foreign exchange.

Discussions by and observations of AAR

Applicant is engaged in following three kinds of R&D activities:

a. Testing activities related to items provided by HAG;

b. Product development and engineering related to HAG items, specified by HAG;

c. Product development, testing and engineering activities related to OEM items.

Section 13(3) of IGST Act primarily covers the following:

- Services supplied in respect of goods which are to be made available to the service provider so that services can be rendered;
- Goods temporarily come into the physical possession or control of the service provider because without this the service cannot be rendered.
- To fall under this sub-clause, the service involves movable objects or things that can be touched, felt or possessed.

Activities undertaken by applicant are not covered under sub-section (4) to (13) of section 13 of IGST Act.

Observations in respect of activity (b) and (c) above:

- Materials gets consumed in the process of R&D activity;
- Prototype is developed by the applicant and is not supplied by HAG;
- Hence, R&D activity of applicant does not fall under sub-section (3) to (13) of section 13 of IGST Act.
- Said services shall get covered u/s 13(2) of IGST Act.

Observations in respect of activity at clause (a) above:

- Testing activities related to HAG items are performed on the goods provided by HAG and hence as far as this portion of the service is concerned, it would fall u/s 13(3)(a) of IGST Act.

Ruling of AAR

Following services rendered by applicant to foreign principal HAG shall qualify as export of services:

- Product development and engineering related to HAG items, specified by HAG;
- Product development, testing and engineering activities related to OEM items.

Testing activities related to HAG items cannot be covered u/s 13(2) of IGST Act and hence does not qualify as export of service.

2 *Chamundeswari Electricity Supply Corporation Limited – Karnataka AAR [KAR ADRG 24/2023]*

Facts and issue involved

Applicant is engaged in the business of sale, transmission and distribution of electricity which are all exempt supply as provided under Notification No. 12/2017- Central Tax (Rate). Additionally, the applicant also provides ancillary services like meter testing, testing of installation, inspection of

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installations and so on, which are all taxable services, hence, appellant regularly discharges its liability in respect of the same.

Applicant plans to set up various public charging stations (PCS) to facilitate charging of batteries of Electric Vehicles (EVs). For this purpose, applicant will provide electricity to these charging stations. Applicant plans to charge its customers a fee which would be divided into two parts:

(a) Energy Charge (for number of units of energy consumed); and

(b) Service Charge (for using the infrastructure of the charging station).

The Ministry of Power has clarified that charging of an EV battery by a charging station involves a service requiring the consumption of electricity by the charging station. The activity does not amount to the sale of electricity.

It is also clarified that charging stations do not require a license to operate since charging stations are not involved in sale, transmission or distribution of electricity.

In light of above, applicant sought an advance ruling in respect of the following questions:

(1) Whether consideration for charging the battery of an EV can be bifurcated into 'supply of electricity' and 'service provided'? If so, will the 'supply of electricity' be exempted and under which SAC will the 'service charges' be taxable?

(2) Whether the entire transaction shall be treated as a supply of service? If so, what will be the SAC and rate applicable for the same?

(3) Whether the GST collected (output tax) be set-off against input credit availed?

Discussions by and observations of AAR

The activity of charging the battery of EV involves conversion of electrical energy (electricity) to chemical energy for the purpose of storing the energy in the battery. Therefore, in essence, consumers do not receive any electricity, rather, it is converted to chemical energy in the premises (charging station) of the applicant itself.

Further, the applicant measures the 'Energy charges' in number of units of energy used and not the amount of electricity transmitted.

It was also observed that as per the Electricity Act, 2003, it is mandatory to have a license to supply electricity and the premises of the consumer, including land, building or structure should be connected for the purpose of receiving electricity. In the instant case, PCS do not have any such license and the consumer lacks any premises for transmission of electricity. Moreover, it was clarified that PCS do not require a license to operate and therefore the activity cannot be termed as supply of electricity.

Ruling

Since there is no supply of electricity, the question of availing any exemption does not arise. The whole transaction will be treated as a supply of service and will be taxable under SAC 998714 (Maintenance and repair of transport machinery and equipment, which includes electrical system repair and battery charging services for motor cars). The prescribed rate for the above-mentioned SAC is 18%. Output tax collected can be set off against the input paid on inputs consumed by the applicant.

CA Rajiv Luthia

CA Keval Shah

INDIRECT TAXES

Service Tax – Case Law Update

1 *CST vs. Gujarat Industrial Development Corporation 2023-149-taxmann.com 260 – SC*

Backgrounds and facts of the case

- The assessee had filed an appeal before Gujarat Tribunal challenging the service tax liability on the maintenance charges collected from the industrial plot owners, being statutory function.
- The Tribunal allowed the appeal of the assessee relying upon the decision of the Bombay High Court in the case of 'Maharashtra Industrial Development Corporation, reported in 2018 (2) TMI 1498/2018 (9) G.S.T.L. 372 (Bom.),
- Therefore, aggrieved by order of tribunal, the appellant-Revenue has preferred the present appeals.

Decision of the Hon'ble SC

- The revenue relied upon decision of this court subsequently held in case of ***Krishi Upaj Mandi Samiti (2022) 5 SCC 62/2022 (58) G.S.T.L. 129 (SC)***, which reads as under:

  "As per the exemption circular only such activities performed by the sovereign/ public authorities under the provisions of law being mandatory and statutory functions and the fee collected for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute and it is deposited into the Government treasury, no service tax is leviable on such activities. In Para 3, it is also specifically clarified that if such authority performs a service, which is not in the nature of a statutory activity and the same is undertaken for consideration, then in such cases, service tax would be leviable, if the activity undertaken falls within the ambit of a taxable service. Thus, the language used in the 2006 Circular is clear, unambiguous and is capable of determining a defined meaning."

- The effect of the decision of this Court in the case of ***Krishi Upaj Mandi Samiti (supra)*** vis-a vis the functioning of the Gujarat Industrial Development Corporation under the Gujarat Industrial Development Act, 1962 are required to be considered by the Tribunal in light of the law laid down by this Court in the case of ***Krishi Upaj Mandi Samiti (supra).***
- Therefore, the matter is remanded on the aforesaid limited aspect only and the

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Tribunal is directed to consider the effect of the judgment of this Court in the case of Krishi Upaj Mandi Samiti.

2 *Central GST vs. Delhi International Airport Ltd 2023-152-taxmann.com 324 – SC*

CASE REVIEW

- ***Commissioner vs. GMR Hyderabad International Airport Ltd***
- ***Commissioner vs. Mumbai International Airport (P.) Ltd. [2017] (51) STR 280 (Trib.)***
- ***Delhi International Airport Ltd. vs. Commissioner [2019] (24) GSTL 37 (Trib.)***

Backgrounds and facts of the case

- The present appeals discuss service tax leviablity on the 'user development fee' charged by and collected from the passengers by the various airports.
- All the assessees had entered into joint venture arrangements/agreements with the Airports Authority of India (hereafter "AAI"). Under OMDA, the assessees agreed to undertake some activities enjoined upon the AAI, by the AAI Act. The assessees were authorised, by various notifications (dated 27th February 2009) issued by the Central Government under section 22A of the AAI Act to collect a "development fee" @ ₹ 100/- for every departing domestic passenger and ₹ 600/- for every departing international passenger at the concerned airports for a period of 48 months.

Arguments putforth by

Appellant (Revene)

- That user development fees are nothing but amounts collected for extending or enhancing various services like providing passenger lounges, passenger amenities, toilets, restrooms and other facilities inside airports. Even the agreement entered by the assessees with AAI, indicates that UDF is to enhance passenger amenities, services and facilities. Those amounts are to be used for development, management, maintenance and operation and expansion of facilities at the airport.
- The amounts collected is nothing but development fee, meant to be used for funding and financing specific renovation, maintenance, development and upgradation of airports. These are necessary due to cost escalation. These amounts are for services rendered and providing access by the airport. Such amounts are taxable.
- Also relied on the circular No. 106/ Commr (ST)/2009 dated 8-7-2011, which specifically stated that service tax is paid by the various airports on passenger services fee and UDF but no tax is paid on development fees. It was argued that CBEC has clarified that passenger service fee, user development fee and development fee are different and development fee is to be taxed under "airport services".

Respondent (Assessee)

- that by Section 22A of the AAI Act, the authority "may", after the previous approval of the Central Government "levy on, and collect from, the embarking passengers at, an airport, the Development Fees". It was contended that such levy cannot be called a tax because it is discretionary and subject to the approval of the Central Government, meant for funding or financing the costs of upgradation, expansion or development of the airport.

- Also, the amounts cannot be termed as levy, because they are not deposited with the government treasury.

- The assesses entered into agreements for the purpose of its operation, management and development of airports (OMDA). In terms of such OMDAs, assessees are responsible for the development, design, upgradation of airport. It is for this purpose that they have been permitted to collect UDF from the passengers.

- That the ruling of the Kerala High Court in ***Cochin International Airport Limited vs. Collector Central Excise 2009 (16) STR 401 (Ker.)*** has held that UDF is collected to fulfil the funding gap for development of airports and cannot be termed as service. This ruling was upheld by this court in 2010 (17) S.T.R. J79 (S.C.). In these circumstances, there is no merit in the revenue's submission that development fee is collected for rendering services.

- Service should be rendered to a person by a specifically described service provider in an airport. The scope of activities of the assessee vis-a-vis passengers who bear the burden of development fee needs a closer look. Passengers in an airport intend to travel by an airline which has the said airport as a scheduled port of call. The contractual nature of this relationship is enshrined in the ticket which provides access to the airport, process through check-in and security, space for waiting and necessary amenities and provision for boarding an aircraft. There is nothing to show that passengers have to make payments for any of these activities. These facilities were available without any additional charge before the imposition of 'development fee'. Such services continue to be available after its quashing. No additional benefit accrues to the passenger during the period of levy of 'development fee.' All facilities are basic facilities inherent in the civil aviation sector in which the appellant, a non-public sector entity, is a recent entrant.

- That Section 22 of the AAI Act enables AAI to charge for the facilities it provides. However, the levy under section 22A [of the AAI Act] is compulsorily charged from passengers; it is placed in an escrow account owing to the restricted purpose for which such fee collected can be used. Hence, there isa substantive difference between a charge under section 22 and levy under section 22A. The charge under section 22, paid by any passenger, may be a consideration for a service and subjected to service tax. However, the same principles are not applicable to a levy under section 22A, which is independent of Section 22 and is not for any service rendered.

- That in the case of ***Consumer Online Foundation vs. Union of India 2011 (5) SCR 911*** has ruled that there is no nexus between the amounts charged under section 22A of the AAI Act and any service provided. In the absence of a nexus between the amount charged as DF/UDF and any service rendered, such amounts cannot be liable to service tax.

Decision of the Hon'ble SC

- The observations and findings extracted in the case of Consumer Online Foundation are decisive about the nature of development fee, collected under section 22A; they are statutory exactions and not fees or tariffs, as was contended by the Union of India. In fact, the court even underlined that the "nature of the levy under section 22A of the 2004 Act,

in our considered opinion, is not charges or any other consideration for services for the facilities provided by the Airports Authority."

- This court, in ***Bhayana Builders (supra),*** ruled that to attract service tax levy, a taxable service has to be provided to a recipient, by a service provider, for a consideration and in the absence of any nexus to any service rendered, an amount charged, or value of service or goods provided without a consideration, would not be a taxing incident.

- The assesses, in the case of Delhi International Airport Ltd, has placed on the record, a letter issued to it, by AAI which imposes controls on the utilization of amounts collected as development fee; apart from the fact that the amounts are deposited in an escrow, any plan for utilization has to be approved. Unlike fees, rent, charges etc., provided under section 22 of AAI Act, assessee companies are authorized on behalf of the AAI to levy and collect 'development fee' under section 22A of the AAI Act on behalf of the AAI and was applied for generating revenue for utilization of the same for the specific purpose provided under sub-clauses (a), (b) and(c) of section 22(A) of the AAI Act.

- The UDF collected by the assessee is to bridge the funding gap of project cost for the development of future establishment at the airports. There is nothing on record to show that any additional benefit has accrued to passengers, visitors, traders, airlines etc., upon levy of UDF during the period in question in the present case.

- There is a distinction between the charges, fee and rent etc. collected under section 22 of the AAI Act and the UDF levied and collected under Section 22A of the AAI Act. It is that the UDF is in the form of 'tax or cess' collected for financing the cost of future projects and there was no consideration for services provided by the assessee to the customer, visitors, passengers, vendors etc. The aggregate of collections in the bank accounts do not form part of profit and loss account.

- It is also useful to notice that by a circular issued by the CBEC Circular No. 89/7/2006- ST dated on 18-12-2006, it was clarified that collection of amounts, by way of taxes, sovereign or statutory dues, would not be subjected to service tax levy.

- In the present case, undoubtedly, neither is there any compulsion to levy development fee nor is the collection conditional upon its deposit in the government treasury. However, the absence of these features in this Court's opinion, does not render UDF any less a statutory levy.

    - o Firstly, the ruling in Consumer Online Foundation (supra) is conclusive that UDF is a statutory levy.

    - o Secondly, the collection is not premised on rendering of any service.

    - o Thirdly, the amounts collected are deposited in an escrow account, not within the control of the assessees.

    - o Fourthly, the utilization of funds, is monitored and regulated by law

- In view of the foregoing reasons, this court is of opinion that the impugned orders cannot be faulted. The revenue's appeals therefore fail and are dismissed.

CS Makarand Joshi

CORPORATE LAWS
Case Law Update

Companies Act – Case 1

ROC, NCT of Delhi & Haryana Adjudication order dated 27th June 2023, for non-compliance of Section 149(8) in the matter of PTC India Financial Services Limited

Facts of the case

1. PTC India Financial Services Limited ('PFS/the Company') is a listed Company and is a subsidiary of PTC India Limited.

2. On 19th January 2022, 3 independent directors ('IDs') of the Company resigned from the Company, citing some governance lapses in the Company.

3. As per the resignation letters of the IDs filed by the Company to stock exchanges, one such governance laps was that, the Company had taken a legal opinion in respect of the appointment of a director on the board, but the relevant backup documents including the Background note shared for the purpose of taking legal opinion was not shared with the IDs. This is non-compliance with Section 149(8) r/w schedule IV of the Companies Act, 2013.

4. Pursuant to the said resignations, the Ministry of Corporate Affairs ordered the inspection of the matter, as a result, the Registrar of Companies sent show cause notices to the Company, its Managing Director ('MD'), Chief Financial Officer ('CFO') and the Company Secretary ('CS').

5. The CFO and CS of the Company replied independently to the show cause notice. Whereas the Company and its MD gave a common reply.

Arguments from CFO

1. Shri. Sanjay Rustagi, the CFO of the Company replied to the show cause notice by saying that, neither he was holding any Board level position, nor was he concerned in the selection process of the Director (Finance). Further, he was not aware of any communication that has been marked by any Director (including erstwhile IDs) in this regard. He came to know about this matter only after going through the resignation letter of the erstwhile IDs.

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Arguments from CS

1. CS through his reply informed ROC that, in the Board meeting held on 8th November 2021, the management placed the opinion of Ld. ASG relating to the joining of a new director (Finance). He was not aware about the existence of the legal opinion until the same was placed before the Board. Even he was not privy or informed about any documents/information which was provided to the Ld. ASG for framing his opinion.

2. IDs in their communication had desired that suitable authorization/instruction be given to the Company Secretary to provide necessary assistance to them. But the same was never given to him by the MD.

3. On receipt of the information/documents from PTC India Limited on 15th January 2022 and on receipt of instruction/approval from MD&CEO, the documents/information related to the appointment of Director (Finance) as provided by PTC India Limited (holding company) were provided to the IDs on 15th January 2022 itself. These facts were also duly captured by the forensic auditor (CNK & Associates) in their report which is available on the stock exchanges

Arguments by Company and the MD

1. The Company and its managing director through their common reply stated that the erstwhile IDs vide email dated 7th December 2021 asked for whole documents pertaining to the appointment of the Director (Finance) and back-up papers in connection with the same. The legal opinion of the Ld. ASG along with the document/information shared with him during the discussion was shared with the erstwhile IDs independent directors vide email dated 15th January 2022.

2. For obtaining such a legal opinion, no background note had been shared with the Ld. ASG. Since no background note existed, the same could not be shared with the erstwhile IDs.

3. On receiving the email dated 12th July 2021 from IDs asking for documents relating the appointment of a Director (Finance), the Chairman of the Company reached out to the holding Company for the said information, as the same was not available with the Company. The information along with all supporting documents was received from the holding Company through email dated 15th January 2022 and was immediately provided to the IDs.

Submissions by the independent directors

1. As the matter had come to light through the resignation letter of the independent directors, the ROC had asked for their comments on the reply received by ROC. In their written reply IDs submitted as follows:

   a. The Company's submission that there was no Background note submitted to ASG is incorrect and this can be observed from the minutes of the board meeting dated 8th November 2021.

   b. Moreover, this was not the only one instance of non-sharing of information or sharing skewed

information. The Company has ignored the requests of the IDs for the documents sought by the IDs on one pretext or the other. This is evident from the various emails sent to the management by the IDs, collectively as well as individually, which have been neither acknowledged nor responded to.

ROC held

1. The reply of the Company insofar as it states that necessary documents were not provided to them is misconceived. To say that the Company is not privy to the documents does not hold any water. In any case, the right of representation and natural justice was solemnly adhered to in this matter.

2. Schedule IV places such requisition for clarification or additional information from the IDs, on the pedestal of a "duty" of the ID. By discharging this duty, an ID is supposed to protect the "rights" of the stakeholders of the Company.

3. Concomitantly, once such a requisition is made by an ID, it is also the "duty" of the Company and its concerned officer to attend to such request as soon as possible. If the Company fails in its duty, the flow of information to the IDs would be impeded, and the ultimate repercussion of this information asymmetry would befall on the stakeholders.

4. The Company is duty bound under Schedule IV to render such information to the IDs and Company did not give due regard and supplied documents with considerable delay.

5. On perusal of the minutes of the 142nd Board meeting, it is evident that the Chairman had clearly requested that the brief given to the Ld. ASG along with the queries put to him be shared. No rebuttal has been recorded in the minutes to convey that no such brief was ever shared at the time of obtaining the legal opinion. Thus, the preponderance of the probabilities clearly points out to the existence of a briefing document which was not shared with the erstwhile IDs.

6. It is quite clear that Company has failed to comply with the provisions of Section 149(8) of the Companies Act, 2013 r/w sub-para (2) of para (III) of Schedule IV.

7. As far as Shri Sanjay Rustagi, CFO is concerned, his submission is satisfactory. He was not able to undertake any act of omission or commission with respect to alleged violation on the part of the Company.

8. As far as Shri Vishal Goyal, CS is concerned, his submissions are satisfactory. Comments of the Company, MD&CEO and erstwhile IDs were called on the reply submitted by Shri Goyal. No one refuted the submissions made by the CS and accordingly, the ROC said that it had sufficient cause to believe that he is not a party to any act of omission or commission with respect to the alleged violation on the part of the Company.

Penalty on Company and its MD

1. The ROC found the reply given by CFO and CS of the Company to be satisfactory and did not impose any

penalty on them. But at the same time, he noted that the Company and its managing director have failed to comply with the requirements of Section 149(8) read with Schedule IV.

2. Therefore, ROC, NCT of Delhi & Haryana imposed a penalty on the Company and its MD under Section 172 of the Companies Act 2013.

3. The penalty on the Company and its managing director was ₹ 70,000 each. (Fixed penalty of ₹50,000 plus continuous penalty of ₹ 500 per day for the delay of 40 days).

Companies Act – Case 2

In the matter of *Jaiprakash Associates (Appellant) vs. Neena Somani (Respondent).* NCLAT New Delhi, order dated 9th December 2022.

Facts of the case

1. Jaiprakash Associates (Appellant/Company) is a company registered under the Companies Act 1956. Whereas, Neena Somani (Respondent) is an investor/depositor who has invested in fixed deposits of the Appellant company.

2. The Respondent had invested her money in the Fixed Deposit Receipts (FDRs) issued by the Company as per the provisions of the Companies Act 1956. However, the Appellant Company failed to refund the said FDRs on the maturity date and did not pay interest on the deposit amount after the period of maturity.

3. The Respondent sent some claim letters to the Appellant-Company about non-payment of due interest after the maturity period of FDRs and approached the Appellant-Company many times, but the Respondent had not received any satisfactory response from the Company.

4. The Respondent filed a petition before NCLT, Allahabad Bench, under Section 73(4) of Companies Act, 2013 seeking direction to Appellant-Company to make repayment of the interest due. As a result, NCLT passed an Order dated 13th September 2019 and directed the Appellant to make the payment to the Respondent at the rate of 12/12.5 percent per annum from the date of maturity till the date of actual payment was released to the depositors.

5. The Appellant Company challenged the above Order passed by the NCLT, Allahabad Bench which is the subject for discussion in this article.

6. In this appeal, the Appellant has challenged the said NCLT order on the grounds that the deposits in question were accepted before the commencement of the Companies Act, 2013. Therefore, the petition under Section 73(4) of the Companies Act, 2013 is not maintainable.

7. Parallelly, when the Company was not able to repay deposits on the maturity date, it had already filed an application for an extension of time for repayment of deposits under Section 74 Companies Act, 2013. While the petition under Section 73(4) Companies Act, 2013 was pending before NCLT, one of the investors filed an appeal before NCLAT against the extension of time granted to

the Company. Accordingly, NCLAT had issued certain directions in the favor of the said depositor (investor).

8. Aggrieved with that NCLAT order, the Company had preferred a statutory appeal before the Hon'ble Supreme Court, which directed for making payment of interest even after the date of maturity till the date of actual payment.

9. This Order of Hon'ble Supreme Court was one of the reasons which persuaded NCLT in the parallelly going case of the Respondent, to order payment of interest to the Respondent, as it also related to a similar matter. Then the Appellant Company challenged this NCLT Order also (as mentioned in point 5 above) and the following were the arguments:-

Questions of law

1. Whether Ld. NCLT has committed an error in entertaining a petition filed under Section 73(4) Companies Act, 2013 by the Respondent?

2. Whether the NCLT has committed an error in issuing direction to make payment of interest even after the date of maturity till the date of actual payment?

Appellant Company's contentions

1. Impugned NCLT order is firstly liable to be set aside on the ground that once the proceedings which were initiated by the Appellant Company under Section 74 Companies Act, 2013 was concluded, there was no reason for the NCLT to again entertain the petitions filed under Section 73(4) of the Act which were filed by the Respondents.

2. It was clarified that whatever deposits were accepted by the Company, were cleared with interest up to the date of maturity.

3. Petition filed under Section 73(4) Companies Act, 2013 by the Respondents were not maintainable, since it was not a case that deposits were accepted after the commencement of the new Companies Act, 2013.

4. Section 73 was applicable in the case of accepting deposit after the commencement of the new act, whereas in the present case, it is not in dispute that all the deposits were accepted while the old Act i.e., Companies Act, 1956, were in operation. Accordingly, it has been argued that the NCLT order impugned is liable to be set aside. Even though the Order was passed by Hon'ble Supreme Court in which there is a reference of payment of interest @ 12/12.5% p.a., but the Respondents may not get any benefit from the said order since the order of the Hon'ble Supreme Court was a consent order and no reliance can be made on the said order by the Respondent.

Respondent's contentions

1. Deposits though were matured in the year 2015, payment was not made, however much belatedly payments were made in the month of July, 2017. The said Respondents were not paid interest after the maturity date till the date of actual payment.

2. It has been argued from the Appellant

side that section 73(4) of the Companies Act 2013 is not applicable, in cases of deposits accepted prior to the commencement of the Companies Act, 2013, but the fact remains that the Ministry of Corporate Affairs (MCA) had issued a circular dated 18th June 2015, wherein it was clarified that depositors were free to file application under Section 73(4) of the Companies Act, 2013 regarding repayment of deposits which were accepted prior to the commencement of the Companies Act, 2013.

3. In the appeal which was filed by one of the investors (depositors) against the extension of time granted by the NCLT, NCLAT had taken a serious view of the matter and clarified that till the date of payment, the depositors were entitled to claim the interest. Even the Hon'ble Supreme Court had directed for making payment of interest @ 12/12.5% p.a. till the date of actual payment.

Held

1. It is not in dispute that the Appellant Company had accepted deposits from the Respondents which were treated as Fixed Deposits with a condition to repay the amount with interest @ 12/12.5% on maturity. It is also not in dispute that even after the date of maturity payments were not made immediately to the depositors particularly the Respondents herein.

2. Merely filing of such Petition under Section 74 for an extension of time with the NCLT for clearing payment, does not debar the depositors from claiming interest or even claiming maturity amount from the Appellant Company.

3. There was no connection of the Petition filed by the Respondent under Section 73 and the Petition filed by the Appellant under Section 74. Both are on different footings and as such the plea of Ld. Sr. Counsel for Appellant, that pendency of petition filed by the Appellant under Section 74 of the Act entertaining was a bar to Petition under Section 73(4) of the Act before the NCLT, appears to have no force.

4. So far as, the Order of Hon'ble Supreme Court is concerned, the NCLAT said that we are conscious of the fact that the said order was passed on consent given by the Ld. Counsel for the Appellant Company before the Hon'ble Supreme Court, even thereafter we are of the opinion that once in a case of some of the depositors as per the Order of the Hon'ble Supreme Court they were granted liberty to get interest till the date of actual payment, if we pass a different order it will amount to passing a discriminatory order. We may not place reliance on the said Order but the fact remains that in respect of the same Appellant Company, some of the depositors had received payment of interest till the date of actual payment.

5. Even otherwise if a person who accepts deposits fails to make payment after maturity and delay is on the part of the person accepting deposit, in that event such person would be liable to make payment of interest till the actual payment.

6. In view of the aforesaid facts and circumstances, NCLAT held that we are of the opinion that Ld. NCLT has committed no error in passing the

impugned order. We do not find any error in the order.

7. The Appeal stands dismissed.

SEBI - Case 1

SEBI Adjudication order in the matter of Havells India Limited

Facts of the case

1. The securities and Exchange Board of India ('SEBI') conducted an investigation into the trading of the scrip of Havells India Limited ('Havells'/'HIL'/'the company') to ascertain if Company was in contravention of provisions of the Securities and Exchange Board of India Act, 1992 ('SEBI Act') and the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 ('PIT Regulations') for the investigation period from December 01, 2020, to February 26, 2021. A show cause notice was issued to Mr. Surjit Kumar Gupta (Noticee No. 1), Mr. Ajay Kumar Gupta ('Noticee No.2') and Mr. Sadhu Ram Gupta ('Noticee No.3'). The relationship of these Noticees was as follows:

   - Noticee no. 1 was the promoter and one of the directors of HIL whereas
   - Noticee 2 was son in law of Noticee no. 1 and
   - Noticee 3 was the father of Noticee 2.
   - Mr. Ameet Kumar Gupta was the son of Noticee no. 1 and also the promoter director of HIL.

2. On January 20, 2021, HIL disclosed its unaudited financial results for the quarter ended December 31, 2020 through a corporate announcement to the National Stock Exchange ("NSE") and Bombay Stock Exchange ("BSE") at 16:40 and 16:43, respectively i.e. after close of market hours. Further on January 21, 2021, there was price movement in the scrip of HIL which was positive by 10.96%. SEBI considered "Unaudited Financial Results of the company for quarter ending December 31, 2020" as UPSI in terms of provisions of Regulation 2(1)(g) of PIT Regulations. It was further alleged that this UPSI came into existence on January 01, 2021. The period of UPSI was considered from January 01, 2021 to January 20, 2021. SEBI further alleged that the Noticee No.1, through a mobile call, communicated UPSI to the Noticee No.2, who along with his father i.e. the Noticee No.3 traded on basis of the UPSI.

3. Mr. Manoj Arora who was Asst. Vice President (Accounts) of HIL had shared a flash report regarding the financials of HIL for the month ending December 2020 with certain designated individuals including the Noticee No.1 and Mr. Ameet Kumar Gupta. The said flash report contained **figures of the revenue and profit of HIL for** the month of December 2020. The **flash report dated January 01, 2021** showed that figures of revenue and profits of HIL for the quarter ending December 31, 2020. Prior to January 01, 2021, similar monthly flash reports for previous months were

shared with top company officials of HIL on the first day of every subsequent month.

4. SEBI further alleged that Noticee No 1 and Mr. Ameet Kumar Gupta were connected persons in terms of regulation 2(1)(d) of the PIT Regulations and Insider in terms of Regulation 2(1)(g) of the PIT Regulations. Noticee no 2 was Founder, Promoter and Director of Svarn Infratel Pvt Ltd ('SIPL'), an unlisted company engaged in the business of manufacturing of electric cables and allied products. SIPL was also one of the clients of HIL as SIPL purchased raw materials/finished goods from HIL. In view of the contractual relationship of SIPL with HIL, Noticee No. 2 was alleged to be a "connected person" in terms of Regulation 2(1)(d)(i) of the PIT Regulations and insider in terms of Regulation 2(1)(g) of the PIT Regulations. Noticee No.3 shared close relationship and common address with the Noticee No.2, thus, he was also alleged to be an insider in terms of regulation 2(1)(g)(ii) of PIT Regulations.

Charges Levied

- Noticee No. 1 violated provisions of Sections 12A(d) and (e) of SEBI Act and Regulation 3(1) of PIT Regulations, 2015
- Noticee No.2 violated provisions of Sections 12A(d) and (e) of SEBI Act and Regulation 3(1), 3(2) and 4(1) of PIT Regulations
- Noticee No. 3 violated provisions of Sections 12A(d) and (e) of SEBI Act and Regulation 3(2) and 4(1) of PIT Regulations

Contentions by Noticees

1. **Flash Report dated January 01,2021 was not UPSI**
   - Noticees submitted that there was nothing extraordinary in the financial results and performance of HIL for the quarter ended December 2020. Noticees further stated that there was no correlation between the financial results and the share price of HIL. Their contention was that the financial results of quarter ended September 2020 were extraordinary still share price of HIL dipped right after the announcement of the results. This shows a lack of correlation between the share price of HIL and its continued performance.
   - Further, Noticees submitted that for an information to be treated as UPSI, the material impact that it may have on the share price has to be determined at the time that the information becomes available to the "insider". The information contained in the flash report was not an information that would have materially impacted the share price of HIL and hence does not fulfill the requirement set out in Regulation 2(1)(n) of the PIT Regulations. Noticees hence contended that financial results may not always be considered as UPSI and should be considered on case-to-case basis as to whether the financial results were price sensitive or not.

2. **Whether there was unusual pattern of communication and communication of UPSI by the Noticee No.1 to Noticee No.2?**

The Noticee No.1 contented that he would speak generally on Sunday and periodically every 10-15 days with his son-in-law. Such a pattern of general communication extended not only in the period immediately prior to, during and post the period of UPSI, but for several years. To support the said contention, the Noticee No.1 submitted call data record. Hence Noticee no.1 contended that there was nothing unusual in his call record with Noticee no. 2.

3. **Whether the pattern of trading of the Noticee No. 2 and 3 during and post UPSI was unusual?**

- Noticee No.2 submitted that the corresponding figures of purchase and sale of equity shares by him for FY 2021-22 and FY 2022-23 were approximately ₹44 Crore (purchase) and ₹ 41 Crores (Sale), ₹ 81 Crores (Purchase) and ₹ 49 Crore (Sale), respectively. Total purchases made by the Noticee No.2 in the derivative segment for FY 2020-21, 2021 22 and FY 2022-23 was approximately ₹ 84 Crore, ₹ 34 Crores and ₹ 16 Crore, respectively.

- Noticee No.3 further had submitted that he had been taking exposure for an amount of approximately ₹ 120 Crores in the derivative segment every year since FY 2017-18. He had taken exposure in the scrip of HIL in the derivative segment in FY 2017-18, 2018-19, 2019-20, 2020-21 for the amount of ₹ 9.3 Crore, ₹ 11 Lakh, ₹ 6.5 Lakh, ₹ 4.5 Crore, respectively. Noticee no. 2 and no.3 submitted that the impugned transactions in 2021 in the scrip of HIL were neither unusual, unique nor isolated.

Submissions by SEBI

1. **Flash Report dated January 01, 2021 was not UPSI**

- SEBI noted that for determining any information as UPSI it has to fulfill two criteria i.e. (1) it must not be generally available (2) Upon coming in the public domain, it is likely to materially affect the price of the securities. Thus, information which is not likely to materially affect the price of the securities cannot be treated to UPSI.

- SEBI further noted that HIL had made profit in the quarter ending June 2020, September 2020, and December 2020. Change in revenue and profit before tax of HIL was significant in the quarter ending September 30, 2020, in comparison to the quarter ending December 31, 2020. Therefore, it can be reasonably expected that the market must have already consumed and digested the significant change in the financial results of the company through the publication of the September 30, 2020, quarterly results.

- SEBI noted that financial results are presumed to be UPSI as per PIT Regulations. It is common knowledge that such

a presumption is rebuttable by the Noticees. Hence SEBI would usually get the advantage, protection and cover of such rebuttable presumptions initially till adequately defended or rebutted by the Noticees. Once the Noticees brings out defence to this presumption, the said protection vanishes. SEBI relied on the decision of Hon'ble Supreme Court in ***Rangappa vs. Sri Mohan (2010) 11 SC 441*** wherein it was held that, "*In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of "preponderance of probabilities". Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own*"

- SEBI further stated that Noticees have raised defence as to how the impugned UPSI cannot be treated as such which shatters the statutory presumption. In light of the arguments of the Noticees and on the basis of Doctrine of preponderance of probabilities, SEBI was of the view that protection guaranteed by the statute has been wiped away in the matter. Further having considered quarterly results of HIL for quarter ending September 30, 2020 and December 30, 2020, flash reports for the month of October 2020, November 2020 and December 2020 and share price movements of HIL post-declaration of quarterly results for September 30, 2020 and December 30, 2020, SEBI was of the view that flash report dated January 01, 2021 cannot be treated to UPSI.

2. **Whether there was unusual pattern of communication and communication of UPSI by the Noticee No.1 to Noticee No.2?**

   Based on call records of the Noticee No.1 for the period April 2022 to March 2023, SEBI was of the view that Noticee was in frequent communication particularly on Sundays with the Noticee No.2. Hence communication of the Noticee No.1 with the Noticee No.2 was not unusual. Therefore there was no cogent material on record to evidence communication of UPSI from the Noticee No.1 to Noticee No.2 during the period of UPSI.

3. **Whether pattern of trading of the Noticee No. 2 and 3 during and post UPSI was unusual?**

   SEBI took note of the submission of Noticee no.2 and no.3 with respect to submissions on the trading pattern. SEBI was of the view that dealings of the Noticee No.2 and 3 in the securities

market were not confined to trading during or near to UPSI period. Further Noticee No.2 and 3 were dealing in the scrip of HIL in the derivative segment even post UPSI period i.e. January 21, 2021 to April 22, 2021. Hence after considering the trading details of the Noticee No.2 and 3 for the period prior to, during and post UPSI period, SEBI concluded that there was no unusual pattern of trading in trades of the Noticee No.2 and 3.

Penalty

SEBI in exercise of powers under Section 11(4A) and 11B of the SEBI Act read with Section 19 of the SEBI Act, disposed of the SCN against the Noticee No.1, 2 and 3 without any directions.

Link to the order

https://www.sebi.gov.in/enforcement/orders/jun-2023/final-order-in-the-matter-of-havells-india-limited_73270.html

IBC – Case 1

In the matter of *Ravi Shankar Vedam - Appellant vs. Tiffins Bartyes Asbestos and Paints Limited – Respondent-1* and *Vasudevan Respondent -2 Embassy Property Development Private Limited - Respondent - 3* in the order passed by National Company Law Appellant Tribunal (NCLAT) dated 13 June 2023

Facts of the Case

- The application was filed u/s 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) against the Tiffins Bartyes Asbestos and Paints Limited who is Corporate Debtor(CD) by Udhyaman Investments Private Limited – the Financial Creditor (FC). The application was approved and Corporate Resolution Insolvency Process (CIRP) was initiated. And Mr. Vasudevan was appointed as Resolution Professional (RP).
- RP filed an application with NCLT to approve the Resolution Plan submitted by Embassy Property Development Private Limited - Respondent 3.
- Another application was filed with NCLT by Mr. Ravi Shankar Vedam - the appellant who was 38 % shareholder of the CD seeking for a forensic audit of the books of account of the CD and not to approve the resolution plan till disposal of the application.
- The appellant being a major shareholder of the CD claimed that Udhayaman Investments Private Limited was not a FC of the company and their inclusion in this category had influenced insolvency proceedings.
- It was also stated that the directors were suspended directors and that the company took action beyond board approvals and in such a situation, it was necessary to conduct a forensic audit to ascertain the actual financial creditors.
- NCLT approved the Resolution Plan vide Order dated 12 June 2019 which was also approved by the Committee of Creditors (CoC) and dismissed the application of the appellant on the following grounds
  - — IBC doesn't prescribe any role for the shareholders of the CD during CIRP as there is no requirement for any approval of the shareholders to implement actions under the resolution plan except to the

explanation u/s 30(2) of the IBC and such approval shall be deemed to be given and it shall not be a contravention of that Act or Law.

— Any objection raised by the shareholder cannot be considered by the NCLT while approving/rejecting the resolution plan.

— *Reliance is placed on the judgement given by Hon'ble NCLAT in J M Financial Asset Reconstruction Company Limited us. Well-Do Holding and Exports Pvt. Ltd, and Ors., wherein, it has been held that the* ***Shareholders and Promoters being ineligible to file the Resolution Plan under Section 29A, has no right to raise their grievances In view of it this Authority is not legally required to entertain any kind of objection pertaining to the Resolution Plan approved by the CoC. Therefore, the objections raised by the shareholder are hereby rejecte****d."*

- Aggrieved by the order of NCLT – an appeal was filed with NCLAT.

Arguments of the Appellant

- It was argued that CIRP was initiated fraudulently and with a malicious intent for a purpose other than the Resolution of Insolvency; that the Successful Resolution Applicant (SRA) was admittedly the Co-Subsidiary of the CDs;
- The RP was duty bound under Regulation 35A of the Corporate Persons Regulations' read with Section 25(2)(j), 43, 45, 49, 50 and Section 66 of the IBC to form an opinion on whether the CD has been subjected to any of the Transactions covered therein;
- That the RP was duty bound under the provisions of the Code to protect and preserve the value of assets of the CD;
- It was highlighted that during the CoC meetings - a proposal for conducting the Forensic Audit was placed before the CoC, which was rejected; that the decision by the CoC was taken by 91.90% voting share, out of which 46.20% voting share was by ineligible persons;
- Further, RP gave a report stating that he was not taking any responsibility about the authenticity of the Financial Transactions that occurred prior to his engagement;
- The account of the CD after 'CIRP' commenced was inconsistent when compared with the 'Tax Audit Accounts' before 'CIRP';
- The Impugned Order was a non-speaking Order and that approval of the Resolution Plan has no nexus with the Appellant's prayer for a Forensic Audit in the interest of Justice;
- NCLT failed to consider that the three claimants, who were termed as Financial Creditors by the RP in the 2nd CoC Meeting which were directed to be deleted as Financial Creditors from the list of CoC by the NCLT, and therefore the Resolution Plan filed by the SRA should not have been approved, without directing the RP to reconstitute the CoC;
- It was also submitted that there was a material irregularity in the exercise of power by the RP and that the CD

was sold at a throwaway price of ₹ 89 Crores, despite the fact that the CD had assets to the tune of ₹ 150 Crores, and that the refusal of RP to conduct the Forensic Audit despite specific remarks made by the erstwhile Auditors, was in contravention of the provisions of the law for the time being in force;

- NCLT ought not to have admitted the Application for initiation of CIRP by FC in so far as the Application was in clear violation of Section 65 of the Code for suppression of material facts as the presence of Mr. Poobalan and his aides were involved in the functioning of the Company till 2018 and thereafter being a member of CoC, was in violation of Section 29A of the Code;
- It was submitted that Mr. Poobalan was in charge of the day-to-day affairs of the CD Company and was working hand in glove with the RP for their personal benefits and the RP was determined to undervalue the Company;
- It was further stated that the Company had paid advances to various third parties and had not given details of these advances and that the RP had kept these documents confidential;
- There was 'Material irregularity' in the conduct and exercise of the powers of the RP and that had the Forensic Audit been done, CIRP would not have been triggered against the CD and that the NCLT ought not to have approved the Resolution Plan without reconstituting the CoC.

Arguments of the Respondents

- It was contended that a 'shareholder' does not have locus to challenge a Resolution Plan which has already been approved; that the Code recognizes 'stakeholders' only in the Liquidation process;
- In 'CIRP', stakeholders had no role to play and further drew the attention to the family tree explaining the relationship between the brothers and their wives and the number of shares held by each, for a better understanding of the case;
- It was highlighted that the Application seeking Forensic Audit in which it was submitted that the Applicant's, father, played a significant role in building the business of the CD and was actively involved in the management of the business till the financial year 2011-2012, but unfortunately due to deterioration in health in the second half of 2012, his involvement was greatly reduced and the Applicant's brother, who was appointed as the Managing Director of the Company was looking after the management along with his wife Mr. Geetha Vedam and two other Directors;
- It was not the debtors who were managing the Company and from 2011-2018, the 'Appellant'/'Applicant' did not raise any issue, that various Creditors have approached different Courts seeking other reliefs, the MoU was entered into with the FC on 16 April 2016, where by 'M/s Udhyaman Investments' had given a loan of ₹ 11,50,00,000/-, at the request of the CD;
- It was submitted that the MoU was entered into between the CD and FC keeping in view, the mutual interest

of both the parties. It was consented that the CD would pay to FC, a sum of ₹ 11,50,00,000/- with interest of 18% p.a. as recorded in the 'Joint Memo of Compromise';

- It was stated before the NCLT by the FC, who had filed the Section 7 Application, that the CD had given a cheque to the FC for an amount of ₹ 8,82,68,439/-, on 3 April 2014, which was dishonoured due to lack of funds;
- That the CD had raised all the issues through its Managing Director and also preferred an Appeal, which was dismissed by NCLT;
- When 'EOI' was published, the Appellant had approached the RP stating that he was intending submitting a Resolution Plan, and stepped in when the CoC was finalising the Plan;
- None of these issues were ever raised during 'CIRP' and that the Appellant was the Director at that point of time and was aware of the Statutory Applications as he was active till 20 November 2012 and thereafter his brother had become the Managing Director;
- Also, it was highlighted that the Resolution Professional had acted based on the Valuation Report of the registered valuers.

Findings

- **Right of Shareholders during insolvency proceeding – a Shareholder has no locus standi to challenge the Resolution Plan- i**n an Insolvency process, when an insolvency of Debtor is imminent, the fiduciary duty of the directors and managers, who are agents of the shareholders, shifts to the creditors to preserve the value of the enterprise for maximising the returns for creditors. The legislature in its wisdom, has curtailed the 'Rights of the Shareholders' based on the established 'Principles of Creditors' in the control framework. The Court provides the shareholders the right to file a claim only in the Liquidation Process as stakeholders and the advances of stakeholders as stated in Regulation 2(k) includes shareholders only because unlike CIRP, in Liquidation, distribution to stakeholders is in accordance with the waterfall mechanism. Shareholders are excluded from representation, participation or voting in the CoC and are represented in the CoC only through the directors and can speak only through the directors.
- Once the CIRP is triggered, the Management of the affairs of the CD lies with the IRP and the shareholders do not have a right to file any claim in the CIRP but can only do so in the Liquidation Process.
- The Explanation to Section 30(2) of the IBC contemplates for '*Deemed Approval*' of the shareholders of the resolution plan and its implementation and even a shareholder, is deemed to have given its approval for implementation of the resolution plan, and such '*Deemed Approval*' cannot be taken away or undone by objecting to the resolution plan. NCLAT held that giving the shareholder a right to challenge the resolution plan or raise objections against its Approval, would '*render the Explanation redundant*'.

- The CIRP proceedings are proceedings *in rem* to the extent that once a petition filed by a Financial Creditor/Operational Creditor against the CD is admitted, it becomes a collective Creditors Proceedings and all Creditors, pool their Security Interest, in a common manner and the same is distributed as provided for, under Section 30(4) of the IBC, subsequent to the approval of the plan by the CoC.

- From the observations of the High Court of Delhi in the matter of *ICP Investments (Mauritius Ltd.) vs. Uppal Housing Pvt. Ltd. & Ors., it is clear that once the affairs of the CD was handed over to the IRP, any action taken by Shareholder, even if a Majority shareholder, would not be maintainable.*

- Keeping in view, the scope and intent of the Legislature, and that IBC is a distinct shift from 'Debtor in Possession' to 'Creditor in Control' Insolvency System, where the Shareholders have a limited role and are only confined to co-operate with the Resolution Professional as specified under Section 19 of the Code, are entitled to receive the Liquidation value of its equity, if any, in accordance with Section 53 of the Code, hence ***a Shareholder has no locus standi to challenge the Resolution Plan.***

- The Hon'ble Supreme Court judgment in *Arunkumar Jagatramka V. Jindal Steel & Power Ltd. & Anr.* , it is *clear that the Foundational Principles of the Insolvency and Bankruptcy Code, cannot be disturbed and NCLT is of the considered view that giving the Shareholder the locus to challenge the approval of the Resolution plan tantamount to disturbing the Foundational Principles of the Insolvency and Bankruptcy Code.*

- From the decision rendered by the Hon'ble Supreme Court *in **Kalparaj Dharamshi vs. Kotak Investment Advisors Ltd.** it is crystal clear that the discretion of the Tribunals is circumscribed by Section 31 limited to scrutiny of the Resolution Plan, if it is in violation of Section 30 of the IBC.*

- *Judgment of the Supreme Court states that the Commercial Wisdom of the CoC has been given paramount importance and that there can be judicial intervention only when there is any material irregularity or if the Plan is not in adherence to Section 30(2) of the IBC.*

- The Hon'ble Apex Court, in the matter of *Ebix Singapore Pvt. Ltd. vs. CoC of Educomp Solutions Ltd. & Anr., has clearly laid down that subsequent to the approval of the Resolution Plan of the CoC and before the approval by the NCLT, no modifications/alterations can be called for as IBC is a time bound process.*

Held

- NCLAT was of the earnest view that there was no material irregularity in the approval of the Resolution Plan and to the fact that the Resolution Plan was successfully implemented and we do not find it a fit case to interfere in the well-reasoned orders of the NCLT and hence appeal failed and was accordingly dismissed.

CA Hardik Mehta

CA Tanvi Vora

OTHER LAWS

FEMA – Update and Analysis

In this article, we have discussed rules and regulations under Foreign Exchange Management Act, 1999 for Acquisition or Transfer of Immovable Property.

Acquisition or transfer of immovable property by Indian residents outside India and Non-residents in India is regulated by Section 6(2)(a), Section 6(4) and Section 6(5) the FEM Act, 1999. The framework for acquisition of immovable property outside India by a PRII is provided in Rule 21 of Foreign Exchange Management (Overseas Investment) Rules, 2022 dated August 22, 2022 and paragraph 25 of the Foreign Exchange Management (Overseas Investment) Directions, 2022 dated August 22, 2022. The framework for acquisition of immovable property in India by PROI is provided in Rule 24 to 32 of Foreign Exchange Management (Non-debt Instruments) Rules, 2019, dated October 17, 2019. RBI has further issued updated FAQs on 6th April 2023.

We have provided below an overview and analysis on the provisions and highlighted some of the issues and challenges that may be faced:

A. Acquisition or Transfer of Immovable Property outside India by a person resident in India

The regulations were originally issued as FEMA 7/2000-RB on 3rd May 2000 and was superseded by Notification FEMA 7(R)/2015-RB on 21st January 2016. It has now once again been superseded and merged into the FEMA (OI) Rules, 2022.

The FEMA OI Rules have largely remained the same in comparison to FEMA 7(R) with a few amendments/ clarifications that are now available and listed below:

a. The rule now clarifies through a specific exemption that the FEMA OI rules shall not apply to a property acquired outside India by a person resident in India i) who is a national of a foreign State; ii) acquired on or before the 8th day of July, 1947 and continued to be held by such person with RBI permission; iii) on a lease not exceeding five years.

b. **PRII to PRII**: General permission is granted to a person resident in India to acquire immovable property outside India from a person resident in India by way of inheritance or gift or purchase.

PRII transferring said immovable property should have acquired the property in accordance with the applicable provisions of FEMA.

c. PROI to PRII: General permission is now granted to a person resident in India to acquire immovable property outside India from a person resident outside India in the following ways–

- by way of inheritance – *while this provision was also present at the time of FEMA 7(R) the restriction with respect to 'from a person referred to in Section 6(4) and pre partition is removed. This could be considered a liberalization.*
- by way of purchase out of foreign exchange held in RFC account – *No change in comparison to erstwhile 7(R).*
- by way of purchase out of the remittances sent under LRS instituted by RBI. Provided that such remittances under the Liberalised Remittance Scheme may be consolidated in respect of relatives[1] if such relatives, being persons resident in India, comply with the terms and conditions of the Scheme – *While consolidation of LRS was permitted, the same was not permitted for capital transactions. Specific insertion of this provision along with proviso allowing consolidation of LRS limits of the resident individuals would permit joint owning of property aboard. However, in our view, it should be interpreted that each person should remit and own a portion of the property due to LRS remittance. A person should not merely be able to 'own'/'acquire' immovable property without LRS remittance (as sometimes followed in India as a matter of convenience)*
- jointly with a relative who is a person resident outside India – *Under FEMA 7®, while it was permitted to jointly acquire property outside India with a relative resident outside India, it was only permitted if there were no outflow of funds from India. In the new FEMA OI rules, the restriction of no outflow of funds has been done away with.*
- out of the income or sale proceeds of the assets, other than ODI, acquired overseas under the provisions of the Act – *newly inserted as a liberalization measure permitting persons resident in India to reinvest income or sale proceeds in order to buy immovable property outside India. This brings out the question if a person resident in India can hold money outside India in an account opened under LRS and accumulate money in the account in order to buy an immovable property in the future. It should be read in conjunction with Para 16 of Master Direction on LRS which has also been recently amended to provide that any unspent, unused forex, unless reinvested, should be repatriated to India within 180 days.*

1. the term 'relative' was earlier restricted to mean husband, wife, brother or sister or any lineal ascendant or descendant of that individual. In the new OI regime this has been changed to the 'relative' definition assigned to it in clause (77) of section 2 of the Companies Act, 2013.

d. The RBI FAQs has further also clarified that due to the application of section 6(4) of the FEM Act, 1999, a person resident in India can hold, own, transfer or invest in any immovable property situated outside India if such property was acquired, held or owned by him/ her when he/ she was resident outside India or inherited from a person resident outside India.

The above provisions can be summarized as below:

Mode	*Transferor*	*Transferee*
Inheritance	PRI	PRI
Gift	PRI	PRI
Purchase	PRI	PRI
Inheritance	PROI	PRI
Purchase	PROI	PRI

e. Similar to erstwhile regulations, a separate rule has been provided for an Indian entity having an overseas office to acquire immovable property outside India for the business and residential purposes of its staff. These directions have been provided in the FEM (Overseas Investment) Directions, 2022 wherein total remittances should not exceed the following limits as laid down for initial and recurring expenses, respectively:

- 15 per cent of the average annual sales/income or turnover of the Indian entity during the last two financial years or up to 25 per cent of the net worth, whichever is higher;
- 10 per cent of the average annual sales/income or turnover during the last two financial years.

f. No reporting requirements are prescribed for acquisition of immovable property outside India. A resident Indian would anyway be required to comply with LRS reporting in Form A2.

B. Acquisition or Transfer of Immovable Property in India by a person resident outside India

The regulations were originally issued as FEMA 21/2000-RB on 3rd May 2000 and was superseded by Notification FEMA 21(R)/2015-RB on 26th March 2018. It was once again superseded and merged into the FEMA (NDI) Rules, 2019.

Various provisions related to immovable property in India have now been consolidated in one place under NDI Rules. Overview of the rules are explained below:

a. Acquisition by NRI/OCI

Permitted modes of acquisition have been provided below in a tabular format:

Particulars	*From*
Purchase (other than agricultural land/ farmhouse/ plantation etc)	Resident/NRI/OCI • By inward remittance through banking channels • Fund in NRE / NRO /FCNR (B) account • Foreign currency or Travelers cheques not permitted

Particulars	*From*
Acquire as gift (other than agricultural land/ farmhouse/ plantation etc)	Resident/NRI/OCI – Relative[2] only
Acquire (any IP) as inheritance	A person resident outside India who acquired it as per laws in force or acquired it from a person resident in India.

b. *Transfer[3] by NRI/OCI*

Permitted modes of transfer have been provided below in a tabular format:

Particulars	*To*
Sell (other than agricultural land/ farmhouse/ plantation etc)	Resident/NRI/OCI
Sell (agricultural land)	Resident only
Gift (other than agricultural land)	Resident NRI/ OCI - Relative[4] only
Gift (agricultural land)	Resident
Gift residential/ commercial property	Resident NRI/ OCI - Relative[4] only

c. Repatriation of sales proceeds of immovable property is also regulated under Rule 29 of NDI Rules, 2019. The following options are available:

- A person who has acquired the property U/s 6(5) of FEMA or his successor cannot repatriate the sale proceeds of such property without RBI approval.
- USD 1 Million Scheme per financial year
- NRIs/PIOs have an additional option to remit ale proceeds of immovable property (other than agricultural land/ farm house/ plantation property) in India subject to certain conditions. This benefit is available only to two residential properties in a lifetime.

d. A person resident outside India, not being a NRI or OCI, who is a spouse of a NRI or OCI may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse subject to:

2. the ‘relative’ definition assigned to it is as per clause (77) of section 2 of the Companies Act, 2013
3. as per section 2(ze) of FEMA transfer means, sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.
4. the ‘relative’ definition assigned to it is as per clause (77) of section 2 of the Companies Act, 2013.

- Consideration should be received by inward remittance through banking channels or funds in NRE / NRO /FCNR (B) account. Foreign currency or Travelers cheques is not permitted.
- The marriage should be registered and substituted for a continuous period of not less than two years immediately preceding the acquisition of property.
- The non-resident spouse is not otherwise prohibited from acquiring such property.

e. ***Acquisition by a Long-Term Visa holder***
Citizen of Pakistan, Bangladesh or Afghanistan belonging to minority community (Hindu, Christian, Sikh, Parsi, Buddhist, Jain) in that country and residing in India who has been granted an LTV by the Central government can purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment. The following conditions shall be applicable:

- The property should not be located in and around restricted/ protected areas so notified by the Central Government and cantonment areas.
- The person should submit a declaration to the Revenue Authority of the district where the property is located specifying the source of funds and that he/ she is residing in India on a LTV.
- The registration documents of the property should mention the nationality and the fact that such person is on a LTV.
- The property of such person may be attached/ confiscated in the event of his/ her indulgence in anti-India activities.
- A copy of the documents of the purchased property shall be submitted to the DCP/ FRO/ FRRO and to the Ministry of Home Affairs (Foreigners Division).
- Sale of the immovable property so acquired is permissible only after such person has acquired Indian citizenship or with prior approval.

f. ***Acquisition of immovable Property by Foreign Embassies/ Diplomats/ Consulate Generals***
Foreign Embassy/ Diplomat/ Consulate General, can purchase/ sell immovable property (other than agricultural land/ plantation property/ farm house) in India provided –

- Clearance from the Government of India, Ministry of External Affairs is obtained for such purchase/sale, and
- The consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through banking channels.

g. ***Acquisition of immovable property by person resident outside India for carrying on a permitted activity:***
Similar to a separate rule applicable to branch office outside India, Rule 26 provides that a Branch office or any other place of business in India of a PROI may acquire immovable property in India which is necessary for or incidental to the activity carried on in India by such branch or office. A liaison office is NOT allowed to acquire

immovable property in India. It should be noted that:

- Form IPI is required to be filed within not later than ninety days from the date of acquisition of immovable property by a BO or place of business in India.
- Immovable property can be mortgaged to an AD as a security for any borrowing.
- acquisition of immovable property in India by a branch, office or other place of business of persons of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea origin/ nationality/ ownership requires the prior approval of the Reserve Bank.

h. Unless they hold an OCI card, citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau, Hong Kong and Democratic People's Republic of Korea cannot acquire or transfer immovable property in India, other than on lease, not exceeding five years without prior permission of RBI. Foreign nationals of non-Indian origin resident in India (except 11 countries listed above) can acquire immovable property in India. Foreign nationals including 11 countries listed above can acquire immovable property in India by way of inheritance from a resident.

i. The rules do not apply to acquisition or transfer of immovable property in India by a person resident outside India on a lease not exceeding five years.

j. The RBI Master Direction has further also clarified that due to the application of section 6(5) of the FEM Act, 1999, a person resident outside India can hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by him/ her when he/ she was resident in India or inherited from a person resident in India.

k. In order to avoid mis-use of the FEMA provisions, the Government has advised the state registration authorities to be extra vigilant and have advised verification of travel documents and the nature of visa. This was done to curb illegal acquisition of immovable property in India, especially Goa, where it was observed that foreign nationals were coming to India and staying beyond 182 days on a tourist or other visa meant for a certain period and acquiring immovable property stating residential status in India.

l. To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the course of preceding financial year) but also his purpose of stay as well as the type of Indian visa granted to him to clearly indicate the intention to stay in India for an uncertain period. In this regard, to be eligible, the intention to stay has to be unambiguously established with supporting documentation including visa.

m. Transactions involving acquisition of immovable property by a person resident outside India shall be subject to applicable tax laws and other duties/ levies in India.

Rahul Hakani
Advocate

Niyati Mankad
Advocate

Best of The Rest

PASCHIMANCHAL VIDYUT VITRAN NIGAM LTD VS. RAMAN ISPAT PRIVATE LIMITED & ORS. – ORDER DT 17/07/2023 PASSED IN CIVIL APPEAL NOS. 7976 OF 2019 [SUPREME COURT]

Insolvency and Bankruptcy Code 2016 – Liquidation – Waterfall Mechanism Under Section 53- Electricity Dues Owed To Statutory Corporation shall be Treated as Secured Operational Creditor

Facts

The parties had entered into an agreement on 11.02.2010 for supply of electricity wherein Clause 5 provided for a charge on the assets of the company towards outstanding dues.

The Appellant, Paschimanchal Vidyut Vitran Nigam Limited (PVVNL) raised bills for supply of electricity to the Respondent - Raman Ispat Pvt. Ltd. (RIPL) i.e. corporate debtor from time to time. Since the dues remained unpaid, PVVNL attached RIPL's properties on 12.01.2016. The Tehsildar, Muzaffarnagar by Order dt. 23.01.2016, restrained transfer of property by sale, donation or any other mode, and also created a charge on the properties.

On failure of resolution process, RIPL underwent liquidation under IBC. Under the final bill dt 27.01.2017, the total arrears due were ₹ 4,32,33,883/-. Of this, the District Collector issued notice for recovery of outstanding dues to the tune of ₹ 2,50,14,080/-, by auction of movable and immovable properties located at Khasara No. 0.4710, on 05.03.2018. The liquidator alleged that unless the attachment orders of the District Collector, Muzaffarnagar and Tehsildar, Muzaffarnagar were set aside by the NCLT, no buyer would purchase the property of the RIPL due to uncertainty about the authority of the liquidator to sell the property. The liquidator also took the plea that PVVNL's claim would be classified in order of priority prescribed u/s 53 of the IBC, and PVVNL would be entitled to pro rata distribution of proceeds along with the other secured creditors from sale of liquidation assets. NCLT allowed the Application of Liquidator and this order was upheld by the NCLAT. The NCLAT also endorsed NCLT's reasoning that PVVNL fell within the definition of 'operational creditor', which could realize its dues in the liquidation process in accordance with the law. Against this Order of NCLAT, PVVNL filed the present Appeal.

Issue Involved

Whether the NCLAT erred by upholding the order of the NCLT directing the District

Magistrate and Tehsildar, Muzaffarnagar to immediately release property (which was previously attached at the request of the PVVNL) in favour of the liquidator of the Respondent- RIPL for enabling its sale, and after realisation of its value, for distributing the proceeds in accordance with the provisions of the IBC.

Held

After analysing the scheme of the IBC, particularly the waterfall mechanism as contained in Section 53 of the IBC, Bankruptcy Law Reforms Committee Report 2015, Report of the Insolvency Law Committee in response to the comments received from the Parliamentary Debates on the Amendment Act in the sixteenth Lok Sabha Session in 2018, decision of the Court in the case of ***Moser Baer Karamchari Union thr. President Mahesh Chand Sharma vs. Union of India & Ors. [2023 SCC Online SC 547]***, recovery mechanism under the Electricity Act, 2003 and the Uttar Pradesh Electricity Supply Code 2005, effect of Section 77 of the Companies Act (which provides on duty to register charges, etc with Registrar) etc., the Court held that the appeal deserved to fail.

The Court observed and held that dues payable to statutory corporations which do not fall within the description "amounts due to the central or state government" stand on a different footing. Such corporations may be operational creditors or financial creditors or secured creditors depending on the nature of the transactions entered into by them with the corporate debtor. On the other hand, dues payable or requiring to be credited to the Treasury, such as tax, tariffs, etc. which broadly fall within the ambit of Article 265 of the Constitution are 'government dues' and therefore, covered by Section 53(1)(f) of the IBC.

Though, PVVNL undoubtedly has government participation, it does not render it a government or a part of the 'State Government'. Thus, dues or amounts payable to PVVNL do not fall within the description of Section 53(1)(f) of the IBC. The court also distinguished on facts the judgment of the Court in the case of State Tax Officer Vs. Rainbow Papers Ltd. (as relied upon by PVVNL) from applicability to the facts of the present case. The Court also observed that in view of Section 238 of the IBC, it had primacy over the Electricity Act, 2003. Further, there were concurrent finding by both NCLT and NCLAT that PVVNL is a secured creditor/ secured operational creditor.

The Court also directed the liquidator to decide the claim exercised by PVVNL in the manner required by law and to complete the process within 10 weeks from the date of pronouncement of the decision, after providing such opportunity to the appellant, as is necessary under law.

SHAILESH K. BOTHRA & ORS. VS. STATE OF MAHARASHTRA & ORS. ORDER DT. 12/07/2023 PASSED IN WRIT PETITION NO. 4365 OF 2023 [BOMBAY HIGH COURT]

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") Vis-À-Vis Maharashtra Value Added Tax Act ("MVAT Act") – Charge of Secured Creditor Over The Assets of Debtor to have Primacy Over The Charge on Property Created by The Sales Tax Department Under MVAT

Attachment Order by Sales Tax Department Prior To Auction – Continues to Remain Valid And In Subsistence Even after The Property of Debtor is sold in Auction Under Sarfaesi Act – Auction Purchaser Is Said To

Have Constructive Notice Of Such Charge As Purchased on "As Is Where Is Basis"

Facts

Taurus Auto Dealers Pvt. Ltd. (for short "TADPL") borrowed ₹ 7,71,00,000/- from the Petitioner No. 3 i.e. Cholamandalam Investment & Finance Co. Ltd. (for short "CIFCL"), There were some borrowings by the directors of the company and its associate concern as well. An equitable mortgage was created by the directors on immovable property at Pune to secure the repayment of the loans.

As TADPL defaulted in repayment, CIFCL issued a notice u/s 13(2) of the SARFAESI Act on 14/03/2017, the authorized officer of CIFCL published a possession notice in the local newspaper, whereby formal possession of the subject property was taken over by the authorized officer.

Thereafter on 11/08/2017, the Sales Tax Department through its Deputy Commissioner issued an "Attachment Order" u/s 34 of the Maharashtra Value Added Tax Act ("MVAT Act") whereby it sought to attach the said Property to recover sales tax dues of Rs. 10,31,38,003/- of TADPL.

The Ld. District Magistrate on Application of CIFCL passed an order dated 22/12/2017 u/s 14 of SARFAESI Act under which physical possession of the said property was taken over by CIFCL.

Deputy Commissioner of Sale Tax issued a demand notice whereby it inter alia recorded that it has a lien over the said Property in view of Section 37 of the MVAT Act providing for first charge on the dealers property and initiated proceedings under the Maharashtra Land Revenue Code

The Bombay High Court vide Order dt 10/01/2020 in Writ Petition No. 4860 of 2019 filed by the CIFCL quashed and set aside this demand notice on the ground that CIFCL is secured creditor and its dues would rank above the dues of the State Government under the MVAT Act in view of the decision of the Division Bench in the case of ***ASREC (India) Ltd. vs. State of Maharashtra & Ors [Writ Petition No. 1039 of 2017 decided on 13 December, 2019]***

However, the Deputy Commissioner again issued a notice dated 17/02/2020 to CIFCL intimating a charge on another property of the borrowers, which was stated to be attached under the provisions of Section 32 of MVAT Act.

CIFCL auctioned the property which was sold to the Petitioner No.1 and 2 on 'as is where is basis'.

The CIFCL in their auction notice had disclosed the dues of the sales tax department. The Deputy Commissioner vide Notice dt 26/07/2021 called upon the Petitioner No.1 and 2 to pay the dues of TADPL as they had already attached the said property and on other grounds as mentioned therein.

In these circumstances the Petitioner approached the Bombay High Court challenging the said Notice dt. 26/07/2021 of the Deputy Commissioner holding the same to be in contempt of the Order dt. 10/01/2020 passed in WP/4860/2019.

Issue Involved

Whether Petitioner Nos. 1 & 2 who are auction purchasers in a securitization auction held by Petitioner No. 3 are liable to discharge the sales tax dues, for the recovery of which, the property as by them, was attached by the

Sales Tax Department prior to the auction; and/or whether Petitioner No. 1 and 2 have purchased an encumbered property?

Held

The Court dismissed the Petition in view of the following findings and observations:

- the Sales Tax Department had a charge on the said property as purchased by Petitioner Nos.1 and 2, in view of the attachment order dated 11/08/2017, which remained to be valid and subsisting at all material times.
- the consequence of the order dt 10/01/2020 passed on CIFCL's writ petition, was not of setting aside the attachment of the said property by the Sales Tax Department but merely recognizing CIFCL's entitlement to have the first charge on the said property, being a secured creditor,
- the charge of the State Government continued to operate and subsisted qua the purchase of the said property by Petitioner Nos.1 and 2, of which they had abundant notice, even applying the second part of Section 100 of the TP Act.
- It is not a case in which there was no enforceability of a charge on the said property of the Sales Tax Department, even when it changed hands, by CIFCL selling the same to petitioner Nos.1 and 2. Also in terms of Section 100 of the Act petitioner no.1 and 2 are not the persons without notice of the charge.
- Reliance was placed in the case of ***Medineutrina Pvt. Ltd. vs. District Industries Centre (D.I.C.) & Ors (Writ Petition No. 7971 of 2019 decided on 18.02.2021)*** wherein the Division Bench observed that when the purchase of the property was on "as is where is and what is there is" basis, it would mean that the purchaser is purchasing such property with all its obligations and liabilities whatsoever on the said property, which would include all dues, impositions, restrictions as may be imposed.
- that there is nothing in the sale certificate to indicate that petitioner Nos.1 and 2 have purchased the said property from petitioner No.3 free from encumbrances, which is a specific requirement of "Appendix V" as extracted above.
- The Court also rejected the contention of the Respondent that the unless the charge was registered with the CERSAI after 24/01/2020, it is only then the State could enforce its charge by relying on the decision of the Full Bench of this Court in the case of Jalgaon Janta Sahakari Bank Ltd. & Anr. Vs. Joint Commissioner of Sales Tax Nodal 9, Mumbai, & Anr. (Writ Petition No. 2935 of 2018 decided on 30 August, 2022)

GOLDEN LEGEND LEASING & FINANCE LTD. AND ANOTHER VS. MR. DILIP MANOHAR AMLADI & ORS. – ORDER DT. 05/07/2023 PASSED IN WP NO. 15477 OF 2022 [BOMBAY HIGH COURT]

The Maharashtra Rent Control Act, 1999 – Competent Authority/Revisional Authority Has No Jurisdiction to Decide if License Covered by Section 3(1)(B) – There Is No Conflict between Section 3(1)(B) And Section 24 of The Act and Therefore, No Question Arises Whether Section 24 Overrides Section 3(1)(B)

Facts

The dispute arises from a Leave and License Agreement entered into between the Petitioner No.1 and the Respondents for a flat in Galaxy Apartment CHSL, Bandra, Mumbai. The Respondents (landlord) issued a termination notice on 22/01/2021, seeking payment of outstanding license fees and utility charges within fifteen days. The Petitioners through their Advocates letter admitted their liability but still did not pay the arrears or vacate the premises.

Subsequently, the Respondent filed an application before the Competent Authority u/s 43 of the Maharashtra Rent Control Act, 1999 ("the Act") seeking eviction of the Petitioner and payment of arrears, liquidated damages and payment of TDS. The Respondents sought leave to defend before the Competent Authority which was rejected by Order dt 20/10/2021 and by the same Order allowed eviction application.

Aggrieved by the same, the Petitioners filed a Revision Application before the Additional Commissioner, Konkan Division, u/s 44 of the Act, inter alia, raising the ground of applicability of the Act in view of Section 3(1)(b) thereof as the Petitioner had a paid-up capital of more than 1 Crore. The Revisional Authority dismissed the Revision Application, confirming the order of the Competent Authority without considering the issue u/s 3(1)(b) of the Act. Aggrieved by the same, the Petitioners approached High Court under Article 227 of the Constitution of India.

Issue Involved

Whether the Competent Authority as well as Revisional Authority had jurisdiction to decide the case when the Petitioner (i.e. Licensee) being a public limited company having paid up capital of 1 crore or more was exempted from applicability of the Act u/s 3(1)(b) of the Act?

Held

The court held that The Maharashtra Rent Control Act, 1999, did not apply to the premises occupied by a private limited company with a paid-up share capital exceeding ₹ 1 crore as same was exempted u/s 3(1)(b) of the Act. Reliance was placed in the decisions in the case of ***EEPC India vs. Additional Commissioner, Konkan Division, Mumbai & Ors [2020 (5) Mh.L.J. 585]*** wherein it was held that there is no way the competent authority could entertain an application in respect of such premises. Moreover, exemption under Section 3(1)(b) of the Act shall also apply from application of Section 24 of the Act (which provides for 'Landlord entitled to recover possession of premises given on license on expiry') as there is no conflict between Section 3(1)(b) and 24 of the Act. Accordingly, the orders of the Competent Authority and the Revisional Authority were quashed with liberty to Respondent to pursue any other remedy available in law to evict the Petitioner.

CA Neha Gada
Hon. Jt. Secretary

CA Vitang Shah
Hon. Jt. Secretary

THE CHAMBER NEWS

Important events and happenings that took place online/ physical between **1st July, 2023 to 31st July, 2023** are being reported as under:

I. PAST PROGRAMMES

Sr. No.	*Date*	*Topics*	*Speakers*
		ACCOUNTING & AUDITING	
1.	20.07.2023	Legal and Practical aspects (covering various account software's) of Audit Trail	CA Narasimhan Elangovan
		INDIRECT TAXES	
1.	18.07.2023	Issues in handling Department Audits, replies to notices, etc.	*Chairman* CA Jatin Harjai **Group Leader** CA Vishal Poddar
2.	23.07.2022	Half Day Workshop on 'Sector Wise Ramifications of Amendments proposed by 47th GST Council Meet'	Nishant Shah, *Advocate* CA Parind Mehta
		PUNE STUDY GROUP	
1.	22.07.2023	Sec. 44AD, 44ADA, 44AE - A Critical Study	CA V. Ramnath
		STUDENT	
1.	17.07.2023	Online Session on New scheme of CA Education & Learning	CA Priti Paras Savla CA Daya Niwas Sharma
2.	19.07.2023	Income tax Return, AIS & TIS - Do's & Don'ts	CA Avinash Ravani

JANUARY 2023

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APRIL 2023

MAY 2023

JUNE 2023

JULY 2023

THE CHAMBER'S JOURNAL

Posted at the Mumbai Patrika Channel
Sorting Office, Mumbai 400 001.
Date of Posting: 15th-16th of Every Month

No. MCS/149/2022-24
R.N.I. No. MAHENG/2012/47041
Date of Publishing 12th of Every Month

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Printed and Published by Shri Kishor D. Vanjara on behalf of The Chamber of Tax Consultants, 3 Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020 and Printed at Finesse Graphics & Prints Pvt. Ltd., 309 Parvati Industrial Premises, Sun Mill Compound, Lower Parel (W), Mumbai - 400 013. Tel.: 4036 4600 and published at The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020. Editor : Vipul K. Choksi