THE INSTITUTE OF CHARTERED ACCOUNTNTS' OF INDIA

EASTERN INDIA REGIONAL COUNCIL

Jointly with

ACCOUNTANTS' LIBRARY CA STUDY CIRCLE OF EIRC OF ICAI

&

ASOCAS STUDY CIRCLE OF EIRC OF ICAI

Extends

a Very Warm Welcome

to

all Dignitaries, Guests,

Speakers and Deligates

at

BGM for Seminar on Direct Taxes 2020

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
NEW DELHI

MOTTO

Ya esa suptesu jagarti kamam kamam Puruso nirmimanah ।
Tadeva sukram tad brahma tadevamrtamucyate ।
Tasminlokah sritah sarve tadu natyeti Kascan । etad vai tat ।।

य एष सुप्तेषु जागर्ति कामं कामं पुरूषो निर्मिमाण : ।
तदेव शुक्रं तद् ब्रह्म तदेवामृतमुच्यते ।
तस्मिंल्लोकाः श्रिताः सर्वे तदु नात्येति कश्चन । एतद् वै तत् ।।

(That person who is awake in those that sleep, shaping desire after desire, that, indeed, is the pure. That is Brahman, that, indeed, is called the immortal. In it all the worlds rest and no one ever goes beyond it. This, verily, is that, kamam kamam : desire after desire, really objects of desire. Even dream objects like objects of waking consciousness are due to the Supreme Person. Even dream consciousness is a proof of the existence of the self.

No one ever goes beyond it : cf. Eckhart : 'On reaching God all progress ends.')

Source : Kathopanishad

ABOUT

THE INSTITUTE THE CHARTERED ACCOUNTANTS OF INDIA

AND

ITS EASTERN INDIA REGIONAL COUNCIL

ICAI is a statutory body established by an Act of Parliament, for regulating the profession of Chartered Accountancy in our country. The institute, functions under the aegis of the MCA, Government of India. The ICAI is the 2nd largest professional body of CAs in the world. Since 1949, the profession has grown by leaps and bounds with around 3,00,000 members and 8,00,000 students as of now. The EIRC of ICAI was constituted in the year 1952 with its jurisdiction on 10 States and 1 Union Territory. Today it has 13 branch-es, 23 study circles, 7 CPE chapters and 8 study groups. It caters to over 25,000 members and about 90,000 students as on date

SEMINAR ON

DIRECT TAX - VIVAD SE VISHWAS SCHEME 2020 & DEVELOPMENT AGREEMENTS : TAX & OTHER IMPLICATIONS

Organised by

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
EASTERN INDIA REGIONAL COUNCIL

Jointly with

ACCOUNTANTS LIBRARY CA STUDY CIRCLE OF EIRC
&
ASSOCAS STUDY CIRCLE OF EIRC

Date : 11th March 2020 • Time : 2.00 pm to 8.00 pm
Venue : MAHAJATI SADAN

REGISTRATION & NETWORKING : 1.30PM TO 2.00PM

Time	Topics	Speaker
INAUGURAL SESSION 2.00pm to 2.30pm		*Chief Guest :* SHRI BISWA NATH JHA Principal Chief Commissioner of Income Tax, Aayakar BhavanKolkata
TECHNICAL SESSION - I 2.30 pm to 5.30 pm	Direct Taxes Vivad se Vishwas Scheme 2020	*Session Moderator :* ADV. NARAYAN PRASAD JAIN *Speaker :* CA (DR.) GIRISH AHUJA
HI TEA : 5.30 PM TO 6.15 PM		
TECHNICAL SESSION - II 6.15pm to 8.00 pm	Development Agreements : Tax & Other implications	*Speaker:* CA ASHOK RAGHAVAN

3 Days Workshop
on
INCOME TAX WITH MOCK TRIBUNAL

Thursday 19th to Saturday 21st March, 2020
Time 5:30 PM to 8:30 PM
Venue : ICAI Bhawan, Russel Street

DAY I	Topic	Speaker
	VIVAD SE VISHWAS SCHEME AND SETTLEMENT COMMISSION	CA K K Chhaparia
DAY II	APPEAL FILLING & MOCK TRIBUNALHOW TO EFFECTIVELY REPRESENT BEFORE CIT(A) & ITAT	ITAT Members (Judge) CA Anand Tibrewal CA P K Himmatsinghka Adv. Subhash Agarwal
DAY III	REASSESSMENT & REVISION(CAPITAL ADDITION, PENNY STOCK, DEMONETIZATION ETC)	Adv. Kapil Goel

Contents

MESSAGES

CA Nitesh Kumar More, Chairman, EIRC 7

CA Animesh Mukhopadhyay, President – Accountants' Library 8

CA Sumantra Guha, Convenor-Accountants Library Chartered Accountants Study Circle EIRC 8

CA Sudhindra Nath Nag, Convenor - ASOCAS Chartered Accountants Study Circle - EIRC 8

PROFILES

Adv. Narayan Prasad Jain 10

Dr. Girish Ahuja 11

CA Ashok Raghavan 12

CA K K Chhaparia 13

Adv. Subash Agarwal 13

Mr. Kapil Goel 14

ARTICLES

IMPORTANT POINTS OF VIVAD SE VISHWAS SCHEME – 2020 WITH CHANGES APPROVED BY LOK SABHA
By Adv. Narayan Jain 15

VIVAD SE VISHWAS SCHEME, 2020
Compiled By CA K. K. Chhaparia, FCA 17

CHARITABLE TRUST
By CA Ramesh Kumar Patodia 46

PRACTICAL GUIDE TO PRIVATE TRUST
By CA Ramesh Kumar Patodia 53

DEVELOPMENT AGREEMENTS - AREA SHARING AND REVENUE SHARING-TAX ISSUES
By CA Ashok Raghavan 59

INCOME TAX SETTLEMENT COMMISSION
By CA K.K.Chhaparia 82

REASSESSMENT UNDER INCOME-TAX ACT,1961
By CA Ramesh Kumar Patodia 87

FACELESS E-ASSESSMENT
CA Nirav Sheth, FCA 92

RECENT APEX COURT RULINGS OF PRACTICAL DAY TO DAY USE
Compiled by Adv. Kapil Goel 98

OPERATION CLEAN MONEY ASSESSMENTS - POSTSCRIPT
By Adv. Kapil Goel & Adv. Sandeep Goel 119

Message

From Chairman, EIRC

Chartered accountancy is an invaluable, indispensable and supportive profession for modern business. Advances in our profession directly reflect the advancement of the nation's business and economy. Our profession has attained a coveted position as a result of constant pursuit for perfection, integrity, skills and knowledge. To maintain this position, it is essential that the expectations of the society are understood and met. With globalization and increasing business complexities, it is essential that Chartered Accountants equip themselves with the changes occurring and stand out to the expectations of the society.

It gives me immense pleasure to welcome the participants to this Seminar on Direct Tax - Vivad se Vishwas Scheme 2020 & Issues in Income Tax on 11th March 2020 being organised by the EIRC of ICAI Jointly with ASOCAS& Accountants' Library CA Study Circle of EIRC of ICAI.

The topics that would be deliberated in the conference are of practical significance and current relevance like Vivad se Vishwas Scheme 2020 & Issues in Income Tax. The programme would bring in immense value addition to the professional fraternity with the presence of eminent personalities from our profession, sharing their expert knowledge and wisdom amongst the delegates.

I am very confident that all the participants of the Seminar would be benefited by sharing the experience of the speakers so chosen.

With this message, I'd like to wish all the participants, thoughtful and rewarding sessions in the Seminar.

CA. NITESH KUMAR MORE
Chairman, EIRC

Date : 4th March, 2020
Place : Kolkata

Message

From President
Accountants' Library

The Joint initiative of EIRC of ICAI, ASSOCAS Study Circle of EIRC and Accountant' Library CA Study Circle of EIRC in putting together the seminar on "Direct Tax -Vivad Se Vishwas Scheme 2020 and Development Agreements: Tax and Other Applications" on 11th March 2020 at MahajatiSadan, Kolkata is a laudable effort not only in terms of the richness of its contents but also because of the magnanimity with which these two study circles under the aegis of EIRC of ICAI have come together in their role to act as agents of knowledge sharing. I wish the event a grand success.

Thanking you,

Yours in professional fellowship,

CA Animesh Mukhopadhyay
President – Accountants' Library
Kolkata

Message

From Convenor
Accountants Library Chartered Accountants Study Circle EIRC

Dear Members,

The combined effort of EIRC of ICAI, ASSOCAS Study Circle of EIRC and Accountant' Library Chartered Accountants Study Circle of EIRC in organising the seminar on "Direct Tax -Vivad Se Vishwas Scheme 2020 and Issues in Income Tax" on 11th March 2020 at MahajatiSadan, Kolkata is anappreciable initatative not only in terms of the quality of its contents but also because of the manner in which these two study circles under the aegis of EIRC of ICAI have come together in their role to act as torch bearers of sharing and dissemination of Knowledge. I am sure that the deliberations of Dr Girish Ahuja and CA Ashok Raghavan will go a long way in enriching our quest for enhancing our skills and expertise on the subjects chosen for discussion.

I wish the seminar a grand success.

Thanking you,

Yours in professional fellowship,

CA Sumantra Guha
Convenor,
Accountants Library Chartered Accountants Study Circle EIRC

Message

From Convenor
ASOCAS Chartered Accountants Study Circle - EIRC

Dear Professional Colleagues,

I am honoured to welcome you all to the One-Day Seminar on Direct Tax being organized by EIRC jointly with ASOCAS Chartered Accountants Study Circle-EIRC, and Accountants Library CA Study Circle-EIRC on 11.03.2020, at Mahajati Sadan, Kolkata.

The topic of the seminar is very popular. Moreover "Vivad se Vishwas 2020" scheme, recently announced by the Government of India, will be in the centre-stage of discussion. Nationally famed resource persons like Dr. Girish Ahuja and CA Ashok Raghavan will grace the seminar. We hope that the presence of such learned speakers in the seminar and their deliberations will enrich the participating CA fraternity.

I congratulate CA Nitesh More for being elected Chairman of EIRC and thank all the Council members of EIRC for giving our study circle an opportunity to be jointly associated with EIRC to organise this important seminar.

I am confident that wide participation our professional colleagues will make this seminar a grand success.

With Best Regards,

For and on behalf of ASOCAS Chartered Accountants Study Circle-EIRC

CA Sudhindra Nath Nag
Convenor

PROFILE

NARAYAN PRASAD JAIN
Advocate & Author

Mr. Narayan Prasad Jain was born on 13th August, 1957. After completing his LL.B. and LL.M. (Master in Law) from Calcutta University, he has been practicing as Advocate since 1982.

He is a visiting faculty at IIM, Kolkata, National University of Juridical Sciences (NUJS), ICAI, ICSI, ICWAI and various Institutes. He is the author of the famous books 'How to handle Income Tax Problems', 'Income Tax Pleading & Practice', 'Ready Reckoner of Business Expenditure', and 'Tax Treatment of Cash Credit & Unexplained Investments'. He is also Co-ordinating Editor of famous magazine Taxman.

He is regular contributor of articles in The Telegraph, Sanmarg, Financial Express, Ananda Bazar Patrika, Money Today, ITR, Taxman, Corporate Professionals Today, AIFTP Journal, various other dailies and magazines. He has appeared in more than 250 TV episodes on Income tax as well as other current socio political issues telecast by Calcutta Doordarshan, E TV, 24 Ghanta, Taaza TV and others.

The Ministry of Finance, Government of India has conferred upon Mr. Jain and his co-author Mr. Dilip Loyalka the Direct Taxes Literature Award for the year 1994-95 for his famous book '*Kaise Suljhayen Aaykar Samsyaen'*.

Mr. Jain was nominated by the Government of West Bengal as Member of West Bengal Minorities Commission for the term 2008 to 2011. He has also been appointed a Member of the Traffic Advisory Committee of the Kolkata Police by the City Police Commissioner and also as a member of Minority Development Committee by the Mayor of Kolkata Municipal Corporation in 2013-15. He is the founder of Direct Taxes Professionals' Association and served as its President in 1986-87.

ARBITRATION : He has acted as Arbitrator in many cases including some cases referred to him by Hon'ble Calcutta High Court. He has been a member of Arbitral Tribunal headed by Hon'ble Mr. Justice Chittatosh Mookerji, former Chief Justice of Calcutta & Bombay High Courts and with Hon'ble Mr. Justice Pradipta Ray, former Judge of Calcutta High Court. He has addressed Seminars and Workshops on Alternate Dispute Resolution with Hon'ble Mr. Justice Amitav Lala former Chief Justice of Allahabad High Court.

Presently he served as National Co-Chairman of Direct Taxes Representation Committee of All India Federation of Tax Practitioners (AIFTP) for 2019. He served AIFTP in various capacities, including as National Secretary General in 2012 and 2013; and as National Vice President of AIFTP for 2016.He has addressed various seminars in India and abroad.

He has been appointed as Member of Board of Studies in Faculty of Law of Mahatma Gandhi Kashi Vidyapith University, Varanasi and delivers lectures there from time to time.

He served famous NGO Concern for Calcutta (CC) as its President for 2016-18. Also served Calcutta Citizens' Initiative. He is now President of Churu Nagarik Parishad and Vice President of Rajasthan Bengal Maitri Parishad and was actively associated with a number of other NGOs including Rotary Club of Calcutta (Rotary Sadan).

Married to Kaushalya, he is blessed with a son (Deepak, LL.M.) and a daughter (Deepika, MBA).

*Contact:*Office: Narayan Prasad Jain, LL.M., Advocate, N.P. Jain & Co., 3, Ho Chi Minh Sarani, Kolkata 700071
E mail :npjainadv@gmail.com Mobile 098309 51252;079805 21720, Ph: (O) (033) 2282-1100

PROFILE

DR. GIRISH AHUJA

He did his graduation and post-graduation from Shri Ram College of Commerce, Delhi and was a position holder. He is a Fellow of the Institute of Chartered Accountants of India and was a rank holder both in the Intermediate and Final Examinations of the Institute. He was awarded a Ph.D. degree by Faculty of Management Studies (FMS), Delhi University. He had been nominated for six years by the Government to the Central Council of the Institutes of Company Secretaries of India. He is a member of the Direct Tax Committee ^nd Special Invitee to International Taxation Committee of ICAI and member of Editorial Advisory Board of,Institute of Company Secretary of India. He has addressed more than 2000 seminars organized by the various branches of Institute of Chartered Accountants of India. He is the Author of over twenty books on Direct Taxes, the Concise Commentary on Direct Taxes, A Compendium of Issues on Income Tax & Wealth Tax, the Direct Tax Ready Reckoner etc.

PROFILE

CA ASHOK RAGHAVAN
B.Com, FCA CHARTERED ACCOUNTANT

EDUCATIONAL QUALIFICATIONS

- ICSE from St.Joseph's Boys High School
- ISC(Commerce) from Bishop Cottons Boys School
- Bachelor of Commerce from Bangalore University
- Chartered Accountant.

PROFESSIONAL BACKGROUND

- Partner of M/s.N.C.S.Raghavan & Co., Chartered Accountants and Raghavan, Chaudhuri and Narayanan, Chartered Accountants, Bangalore
- Practising as a Chartered Accountant since 1993.

AREAS OF SPECIALISATION

- Income tax(Direct Taxation), Company Law, Foreign Exchange Management Act, Property Laws, Documentation of various agreements including Foreign Collaboration Agreements.

ACADEMIC ACHIEVEMENTS

- Has participated in various seminars, workshops organized by various bodies as an Organiser, Chairman, Speaker and paper writer.
- Written several Articles on Income Tax, Company Law and Auditing which have been published by various organizations and also displayed in professional web sites
- Authored the book on Tax Audit published by the SIRC of the Institute of Chartered Accountants of India.

POSITIONS HELD

- Was the Chairman of SIRC, Bangalore Branch of the Institute of Chartered Accountants of India (200102) and during the Chairmanship the Bangalore Branch was adjudged as the Best Branch of SIRC and was also given the excellent performance certificate by ICAI New Delhi.
- Was a Member of the Professional Development Committee of the Institute of Chartered Accountants of India for the year 2006-2007 , New Delhi.
- Was a member of the Accounting Standard for Local Bodies of the ICAI New Delhi for the year 2009-10
- Was a member of the Legal Committee of the Board of Control for Cricket in India (B.C.C.I) for the year 2009-10
- Was earlier the Vice-Chairman, Secretary and Treasurer of the Bangalore Branch of SIRC of Institute of Chartered Accountants of India
- Was the Secretary of the Southern India Chartered Accountant Students Association, Bangalore Branch (SICASA)
- Was a member of the Managing Committee of the Karnataka State Cricket Association during the term 2007-2010 and also a member of the Managing Committee of the said association for the period 2013-2019 .
- Was a Member of the Taxation Committee of the Federation of Karnataka Chamber of Commerce and Industry (FKCCI).
- Was a Member of the International Trade Committee, Energy Committee, Central and State Taxes Committees of the Federation of Karnataka Chambers of Commerce and Industry (FKCCI).
- Was a member of the Managing Committee of the Bangalore Turf Club as a Government Nominee for the year 2007-08.
- Was a Member of the Information Technology Committee of SIRC of ICAI.
- Was the Director of Youth Service of Rotary Club of Bangalore – R.T. Nagar.
- Participated in various seminars, workshops and conferences as Organiser, Speaker, Chairman and paper writer.
- Trustee of Sri Balabyraweshwara Educational & Charitable Trust carrying out yeoman services of educating under privileged children studying in Government Schools in the rural taluk of Pandavpura in Mandya District, Karnataka.

#48, "Ishita", 3rd Floor, 2nd Main Road, Vyalikaval, Bangalore 560 003, Tel. 2331030, 233112021
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PROFILE

CA K K CHHAPARIA

He is a graduate from St. Xaviers College, Kolkata is a FCA, ACS, DISA(ICAI), AASM, MIIA(USA). By profession, he is a practicing CA for about 20 yrs. He is specializing in handling income tax, corporate assessments, appeals and search cases. He is also regular consultant to corporates and advises on system implementation, corporate structuring, amalgamations, demergers, due diligence etc.

He believes in continuous academic updation and is past Editor and President of Views Exchange, Past Convener of Newsletter Committee of Direct Taxes Professionals' Association and has been on the Editorial Board of ICSI (Eastern Region).

is a regular trainer and faculty at Regional Training Institute of Income Tax Dept. and has given more than 50 presentations there, covering about 200 Income Tax Officials. He is also a regular faculty at Comptroller and Audit General of India (C.A.G) to train them to audit assessment records.

He is also a regular faculty at CA Institute, its branches and Study Circles, CS Institute, ICWAI workshops, IIPM (Management Institute), Chambers of Commerce etc.

PROFILE

ADV. SUBASH AGARWAL
B.Com (Hons), LL.B, Advocate

- Rank holder in LL.B Examination held by the Calcutta University in 1992.
- Enrolled as a Member of Bar Association in Calcutta High Court in 1999 and started practising there in Civil, Writ and Taxation Matters.
- At Present, practices mainly in the Income Tax Litigation field before the CIT(A), ITAT and High Court & has of late appeared before the Supreme Court on several tax matters. So far he has appeared in around 10,000 tax litigation matters in the last 20 years and around 250 matters have been reported in various reputed tax journals and web sites
- Was elected as the Committee Member of the Income Tax Bar Association, Calcutta twice and also as a treasurer twice.
- Was elected President of Direct Taxes Professionals Association, one of the largest organization of tax practitioners in Eastern India, for the term 2009-2010.
- Has written several Research Articles on Taxation, which have appeared in reputed Journals like The Chartered Accountant, Taxman, Income Tax Reports (ITR), ITAT Online. He had a regular feature "Replies to queries on income-tax" for continuous three years in the "Anmi Journal" published by the Association of National Exchanges Members of India.
- Has addressed a large number of seminars on income tax issues on invitation from the bodies like Institute of Chartered Accountants of India, All India Federation of Tax Practitioners, Direct Taxes Professionals' Association, Income Tax Bar Association, Commercial Taxes Bar Association, All Bengal Tax Bar Association etc.
- Is being regularly entrusted with the task of framing Moot Court Problem and is in the judging panel of the Justice Dr. B.P. Saraf Tax Moot Court competition organized by AIFTP and National University of Juridical Sciences from 2014 onwards, where all the prominent law universities and colleges of the country participate.

PROFILE

MR. KAPIL GOEL, B.Com(H) FCA LLB,
Advocate Delhi High Court • advocatekapilgoel@gmail.com, kapilnkgoelandco@gmail.com • 9910272806

Mr. Goel is a bachelor of commerce from Delhi University (2003) and is a Law Graduate from Merrut University (2006) and Fellow member of ICAI (Nov 2004). At present, he is practicing as an Advocate Delhi High Court. His expertise lies in Direct Tax litigation and prompt *in-depth* analysis of latest Case Laws.

He is member of Direct tax representation committee in All India Federation of Direct Tax Practioners for interaction with CBDT and Ministry of Finance.

He is awarded as best speaker emerging talent (Direct taxes) by NIRC-ICAI (2011; 2015)

He is designated faculty for International Taxation Certificate Course being conducted by Committee of International Taxation ICAI.

Addressed more than 1000 seminars in Bar Associations and Training in Corporates and ICAI branches/Study Circles/ Regional Councils/Direct tax Committee etc.

He is designated faculty for training at Regional Training Institute of National Academy of Direct Taxes (Lucknow/Chandigarh etc) and has addressed trainings of Sr. IRS officers (CIT's/Add CIT's/ Asst CIT's etc) in the northern region & has addressed more than 600 sr. officers in income tax department in northern region incl. Intl tax division.

He has represented more than 1000 cases at appellate authorities incl. ITAT and High Court level.

Experience : Prior to coming in his own practice, Mr Goel has been in service with M/s T.R.Chadha & Co., KPMG (Corporate Direct Taxation) and PwC (Direct Tax Litigation). During his service tenure, he has extensively worked on both domestic and international (Treaty) Direct Taxation issues, relating to various industries. Of special interest is his tenure at PwC, where he was actively involved in giving technical inputs on various litigative issues to various teams working for corporate in different industries.

Presently, Mr Goel is actively practicing at High Court; ITAT and CIT-A level representing host of big corporates on various direct tax issues. He is actively participating in number of activities by ITAT Bar Association.

Further, his articles on various tax issues have been published in PHD Chamber of Commerce, TIOL, Taxmann, NIRC - Newsletter, Mum ITAT Bar Website (ITATONLINE), CAPJ, TIOL, Indian Express etc.

He has addressed professional gatherings including : (*a) ICAI Branches and regional councils: Gurgaon Branch, Jalandhar, ludhiana, amritsar, Patiala, Karnal, Branch of NIRC,of ICAI) and South India ICAI Branches of SIRC, Kota Branch CIRC of ICAI, International Tax Conference on PE and Attribution of Profits*. (*b) CPE Study Circles of ICAI : Rohini, Nehru Place, Pusa Road, Patel Nagar, Inner Circle, Dhaka Chamber, Indraprastha, North-ex; North East, Shastri Nagar, Vikas Marg; Patpar Ganj, East Delhi, Shalimar Bagh, Inner Circle, North-ex, Shivaji Marg; etc*. (*c)CA Association Ahmedabad; Direct Tax Bar Association (CR Building). Delhi Sale Tax Bar Association, NIRC-CA Bar Room, NIRC, ITAT Bar Association on Search Assessment etc. (d) ICAI Certificate Course International Taxation: Visited as Faculty: Mumbai, Chennai, Delhi, Hyderabad; Kolkatta courses etc* .

Topics deliberated (inter-alia) : (1) Reassessment. (2) How to appear and represent before ITAT and CIT-A- Issues therein. (3) Concealment Penalty. (4) Service of Notice u/I.T.Act. (5) Direct Tax Code- draft- 2009. (6) TDS- Non resident Section 195. (7) Domestic TDS. (8) Treaty Taxation- PE and Attribution, Select Indian DTAA's etc. (9) Corporate Taxation - Recent Issues etc. (10) Search Assessment 153A etc. (11) Unexplained Income - Sec 68 to 69D. (12) Business Head and Other sources – Taxation

IMPORTANT POINTS OF VIVAD SE VISHWAS SCHEME – 2020 WITH CHANGES APPROVED BY LOK SABHA

ADV. NARAYAN JAIN

Vivad se Vishwas Scheme – 2020 has undergone lot of changes and it has been passed by Lok Sabha on 4th March, 2020. It is a welcome scheme and will help reduce pending litigations. The key features of the scheme, after amendments, are as under :

1. Widening of the Eligibility for the scheme

   Originally, the Bill has proposed to cover appeals pending before CIT(A), ITAT, High Court and Supreme Court. It is proposed to expand the scope of the Scheme by covering the following matters :

   a) Orders where time limit for filing appeal has not expired as on 31.01.2020

   b) Case pending before DRP as on 31.01.2020 as well as cases where DRP had issued directions on or before 31.01.2020 but no order has been passed

   c) Revision petitions pending before CIT u/s 264 on 31.01.2020

   d) Search cases where the disputed demand is less than Rs. 5 Crore – The limit of Rs. 5 crore will be computed year wise.

2. Amount of Payment to be made under the Scheme
   Appeals filed by the assessee

	Appeals filed by the assessee	Where payment made up to 31.03.2020	Where payment made after 31.03.2020
1.	Search cases involving dispute relating to tax, interest, penalty, etc.	125% of the disputed tax. Penalty and interest would be waived	135% of disputed tax, penalty and interest would be waived
2.	Other than search cases where dispute involves tax, interest, penalty, etc.	100% of the disputed tax, penalty and interest would be waived	110% of disputed tax, penalty and interest would be waived
3.	Where dispute relates to only interest, penalty or levy	25% of disputed interest, penalty or fee – balance 75% would be waived	30% of disputed interest, penalty or fee – balance 70% would be waived

Appeals filed by Department or the Department has lost an issue

	Appeals filed by Department or the Department has lost an issue	Where payment made up to 31.03.2020	Where payment made after 31.03.2020
1.	Search cases involving dispute relating to tax, interest, penalty, etc.	62.5% of the disputed tax. Penalty and interest would be waived	67.5% of disputed tax, penalty and interest would be waived
2.	Other than search cases where dispute involves tax, interest, penalty, etc.	50% of the disputed tax, penalty and interest would be waived	55% of disputed tax, penalty and interest would be waived
3.	Where dispute relates to only interest, penalty or levy	12.5% of disputed interest, penalty or fee – balance 87.5% would be waived	15% of disputed interest, penalty or fee – balance 85% would be waived

3. Who cannot opt for the Scheme

   The search cases where disputed tax is more than Rs. 5 Cr, prosecution cases, cases involving undisclosed foreign income/ assets and the cases completed on the basis of information received from other countries would not be covered under the scheme. Further, cases covered under certain laws such as Benami law, PMLA, Narcotic Drugs and Psychotropic Substances Act, Special Courts Act, the Unlawful Activities (Prevention) Act, 1967, the Prevention of Corruption Act, the Conservation of Foreign Exchange and

Prevention of Smuggling Activities Act, 1974 would continue to remain out of the scope of the scheme.

4. Refund of excess tax paid by taxpayer

   The amended Scheme now proposes to provide for refund of excess tax paid by taxpayer before filing declaration over the amount payable under the Scheme

5. Declaration will not set any precedence

   The revised Scheme now provides that filing of declaration will not set any precedence and it cannot be claimed in any other proceedings that the taxpayer or the Department has conceded its tax position by settling the dispute.

6. Revised Scheme doesn't allow filing declaration issue-wise

   Though the revised Scheme doesn't allow filing declaration issue-wise [i.e. it is not possible for declarant to file declaration for some issues and litigate the balance issues], it provides that in a case where the taxpayer has got a favourable decision on an issue at higher forum, he would be required to pay only 50% of disputed tax on that issue even in the cases in which he has filed appeal.

7. Proof of withdrawal of appeal to be submitted with the intimation of payment

   On withdrawal of appeal, the amended Scheme proposes to provide that the taxpayer would be required to submit the proof of withdrawal of appeal/ writ with the intimation of payment i.e. before the issuance of final certificate for settling dispute and not with the declaration as originally proposed in the Bill.

8. Withdrawal of appeals by Department

   Scheme now proposes to provide for withdrawal of appeals by Department, whereby "the department would also withdraw the appeal/writ before the issuance of final certificate for settling dispute."

9. Carry forward / set-off of losses

   The revised Scheme also proposes a mechanism for carry forward / set-off of losses. It provides that in case where the AO has reduced the returned loss by making addition, the taxpayer shall have an option to either pay the notional tax on amount by which the loss has been reduced and carry forward the claimed loss without reduction or by accepting the reduced carry forward of loss without making any payment under the Scheme. Same mechanism would apply for reduction in MAT credit.

10. Transfer pricing adjustment

    On the transfer pricing aspect, the revised scheme proposes to provide that the settling of dispute regarding transfer pricing adjustment would not have any effect on the secondary adjustment, and the taxpayer would be required to repatriate fund to India in respect of settled transfer pricing adjustment.

11. CBDT Circular No.7/2020 dated 4.3.2020 containing FAQs on Vivad Se Vishwas has been issued. The Bill has already been passed by Lok Sabha and likely to be passed in Rajya Sabha soon. The Rules, Forms and further clarifications may be issued by the Central Board of Direct Taxes for smooth implementation of scheme.

Conclusion:

The deadline for payment of tax without any extra payment of 10 per cent is 31st March 2020. It seems to be inadequate time frame as the taxpayers will be able to file declaration in the prescribed form and after consulting their Advocate or Chartered Accountant. Then the prescribed authority will examine the matter and will issue a certificate advising the amount of payment to be made. Time for making such payment is also another 15 days. Thus with a practical view point the deadline for payment of tax (without extra 10 per cent) should be amended as 30th April, 2020 instead of 31st March, 2020. Further in case of delay in payment at best interest at the rate of 1 per cent only should be charged and declarant taxpayer should not be required to pay extra 10 per cent. I hope all concerned will take benefit of this scheme to considerably reduce the litigations.

VIVAD SE VISHWAS SCHEME, 2020

Compiled By
K. K. CHHAPARIA, FCA

1. INTRODUCTION

1.1. The "Vivad Se Vishwas Scheme" was announced by our Honourable Union Finance Minister Mrs. Nirmala Sitharaman during her budget speech on February 1, 2020. As announced in the Budget Speech, in the past too, the Government has taken several measures to reduce tax litigations. In the Budget 2019, SabkaVishwas Scheme was brought in to reduce litigation in indirect taxes. It resulted in settling over 1,89,000 cases. Currently, there are 4,83,000 direct tax cases pending in various appellate forums i.e. Commissioner (Appeals), ITAT, High Court and Supreme Court. The Vivad Se Vishwas Scheme has been proposed to bring a scheme similar to the Indirect Tax Sabka Vishwas Scheme for reducing litigations even in direct taxes.

The various amnesty schemes introduced in India by various governments under Direct Taxes:

Sl.	Year	Scheme name
1	1965	Block Voluntarily Disclosure Scheme
2	1975	Voluntarily Disclosure Scheme
3	1985	Amnesty Scheme
4	1997	Voluntary Disclosure Of Income Scheme (VDIS-97)
5	1998	Kar Vivad Samadhan Scheme, 1998 (KVSS)
6	2016	Income Declaration Scheme (IDS)
7	2016	Direct Tax Dispute Resolution Scheme (DTDRS)
8	2016	Pradhan Mantri Garib Kalyan Yojana (PMGKY)

1.2. The statement of objects and reasons attached to the direct tax Vivad Se Vishwas Bill, 2020 states that the amount of disputed tax arrears are Rs. 9.32 lakh crores as compared to tax collections for FY 2018-19 of Rs. 11.37 crores. Carrying such a huge due has its implications. As we all know there is time value associated with money. A rupee today isn't worth the same tomorrow.

1.3. It also states "Tax disputes consume copious amount of time, energy and resources both on the part of the Government as well as taxpayers. Moreover, they also deprive the Government of the timely collection of revenue. Therefore, there is an urgent need to provide for resolution of pending tax disputes."

1.4. Also important is to understand and accept the probability of you winning a dispute before putting efforts behind continuing it. The success ratio of the department at ITAT, high courts and supreme courts is very low possibly between 10% to 20%.

1.5. For any dispute to be fought there arises need for resources. The income tax infrastructure, the appellate tribunals, departmental representatives' emoluments, lawyers' fees. All this can be saved proportionately if a dispute is settled otherwise.

1.6. The Direct Tax Vivad Se Vishwas Bill, 2020 has been introduced in the Parliament as a taxpayer friendly-measure with the objective of minimizing litigation as well as to realize the demand locked up in litigation. Considering the importance being attached by the Government to the Vivad Se Vishwas Scheme, instructions have been given to the field formations to make efforts for the success of the Scheme.

1.7. The CBDT Instructions also mention that all the field officers i.e.. the Assessing Officers, Range Heads, Pr. Commissioners of Income Tax, Chief Commissioners of Income Tax and Pr. Chief Commissioners of Income Tax may give details of their performance in respect of 'Vivad Se Vishwas Scheme' in the self-appraisal in the APAR for F.Y.2019-20. Details of the number of disputed cases, amount involved in disputed cases as

well as the number of cases resolved and the amount collected under the scheme may be reported in the self-appraisal. The performance of officers in respect of 'Vivad Se Vishwas Scheme' will be specifically commented upon by the Reporting and the Reviewing officers and shall be an important factor in determining their future postings.

2. ELIGIBILTY CONDITIONS

2.1. Appeals pending with Supreme Court, High Court, ITAT and CIT(A) as on 31.01.2020, whether filed by the taxpayers or the department.

2.2. All disputes covered, subject to some exclusion, in relation to the

- Disputed Tax
- Disputed Penalty
- Disputed Interest
- Disputed Fee
- Disputed TDS/TCS

2.3. Orders for which time limit for filing appeals has not expired on 31.01.2020.

2.4. Cases pending before Dispute Resolution Panel (DRP) on 31.01.2020 or Cases where DRP issued direction on or before 31.01.2020 but no order has been passed.

2.5. Cases where assessee filed revision under Section 264 on or before 31.01.2020.

2.6. Search case if the disputed demand is less than Rs 5 Crore for a particular financial year.

2.7. Disputes where the payment has already been made shall also be eligible.

2.8. Cases in arbitration in India or Abroad.

3. EXCLUSIONS UNDER THE SCHEME

3.1. Search cases if disputed tax is more than Rs 5 Crore.

3.2. Prosecution cases under the Income tax Act or IPC filed by the Department.

3.3. Cases relating to undisclosed foreign income and assets.

3.4. Cases completed on the basis of information from foreign countries as per section 90 or 90A.

3.5. Cases covered under offense under IPC, the Unlawful Activities (Prevention) Act, 1967, NDPS Act, 1985 PC Act, 1988 PMLA Act, 2002 COFEPOSA Act, 1974, Prohibition of Benami Property Transactions Act, 1988 and Special Court Trial in Securities Act,1992.

4. AMOUNT PAYABLE IN TERMS OF THE SCHEME

Payment on or before	Appeal relates to disputed tax	made Appeal relates only to disputed penalty or interest or fee
31st March 2020	100% of the disputed tax (125% in search cases)	25% of the disputed penalty or interest or fee
End date (30th June 2020)	110% of the disputed tax (135% in search cases) such that it does not increase total demand	30% of the disputed penalty or interest or fee
If an issue in taxpayer's pending appeal already decided in his favour by appellate forum or if Department has filed appeal on an issue, amount payable is 50% of aforesaid amounts.		

5. WHAT IS DISPUTEDTAX?

"Disputed Tax", in relation to an assessment year or financial year, as the case may be, means the income tax, including surcharge and cess (hereinafter this clause referred to as the amount of tax) payable by the appellant under the provisions of the Income tax Act,1961 as computed hereunder:

Nature of Case	Disputed Tax
Where any appeal, writ petition or special leave petition is pending before the appellate forum as on 31.01.2020	Amount of tax (including surcharge and cess but excluding interest) payable, if such appeal, writ petition or special leave was to be decided against taxpayer.
Where an order in an appeal or in writ petition has been passed by the appellate forum on or before 31.01.2020 and time for filing appeal or special leave petition against such order has not expired as on that date	Amount of tax (including surcharge and cess but excluding interest) payable by the taxpayer after giving effect to order so passed.

Where the order has been passed by the Assessing Officer on or before 31.01.2020 and the time for filing appeal against such order has not expired as on that date.	Amount of tax (including surcharge and cess but excluding interest) payable by the taxpayer in accordance with such order
Where objection filed by the appellant is pending before the Dispute Resolution Panel under section 144C of the Income-tax Act as on the 31.01.2020	Amount of tax (including surcharge and cess but excluding interest) payable by the taxpayer if DRP was to confirm variation proposed in the draft order.
Where Dispute Resolution Panel has issued any direction under sub section 5 of section 144C of the Income tax Act and the Assessing Officer has not passed the order under sub section 13 of that section on or before 31.01.2020.	Amount of tax (including surcharge and cess but excluding interest) payable by taxpayer as per the assessment order passed by the Assessing Officer sub-section (13) thereof;
Where an application for revision under section264 filed by the taxpayer is pending as on 31.01.2020	Amount of tax (including surcharge and cess but excluding interest) payable by the taxpayer if such application for revision was not to be accepted.
Where Commissioner (Appeals) has issued notice of enhancement under section 251 of the Income tax Act on or before31.01.2020	The disputed tax shall be increased by the amount of tax pertaining to issues for which notice of enhancement has been issued.
Where the dispute in relation to an assessment year relates to reduction of tax credit under section 115 JAA or section 115 D of the Income tax Act or any loss or depreciation computed there under.	The appellant shall have an option either to include the amount of tax related to such tax creditor loss or depreciation in the amount of disputed tax or to carry forward the reduced tax credit or loss or depreciation, in such manner as may be prescribed.

6. WHAT IS DISPUTED INTEREST?

   Disputed interest means the interest determined in any case under the provisions of the Income tax Act, 1961,where:

   - Such interest is not charged or chargeable on disputed tax.
   - An appeal has been filed by the appellant in respect of such interest.
   - It covers those cases wherein the assessee is not disputing quantum addition but calculation of interest u/s 234B etc.

7. WHAT IS DISPUTED PENALTY?

   Disputed Penalty means the penalty determined in any case under the provisions of the Income tax Act, 1961where:

   - Such penalty is not levied or leviable in respect of disputed income or disputed tax, as the case may be.
   - An appeal has been filed by the appellant in respect of such penalty.
   - It covers penalties like 271B, 271A etc.

8. WHAT IS DISPUTED FEE?

   Disputed fee means the fee determined under the provisions of the Income tax Act, 1961 in respect of which appeal has been filed by the appellant.

9. PROCEDURE

   - Taxpayer to file declaration in specified form before the designated authority.
   - Taxpayer to furnish an undertaking his right direct or indirect to seek or pursue any remedy or claim in relation to the tax arrears under any law.
   - Designated authority within 15 days from the date of receipt of declaration to determine the amount payable by the Taxpayer and grant a certificate to the declarant containing particulars of tax arrears and amount payable in prescribed form.
   - Upon filing of the declaration, the appeal is deemed to have been withdrawn from the date of issue of certificate U/s 5(1).

- The taxpayer would be required to submit the proof of withdrawal of appeal/writ with the intimation of payment i.e. before the issuance of final certificate for settling dispute and not with the declaration.
- Taxpayer to pay the amount determined by the designated authority within 15 days from the date of receipt of the certificate and in form the designated authority of such payment made in prescribed form.
- Order passed under Section 5(1) by the designated authority to be conclusive as to matters mentioned there in and such matters cannot be reopened in any other proceedings.
- No institution of any proceedings in respect of an offence, penalty or interest. [Section6] (For the benefit of declarant).
- Appellate forums/arbitrator, conciliator or mediator not to decide the issue in respect of cases where an order under clause 5(1) is passed by the designated authority.[Section4(7)]

10. CERTAIN OTHER FEATURES OF THE SCHEME

10.1. Refund of Excess Amount : If the amount paid by the taxpayer before filing declaration exceeds the amount payable under the Scheme, he would be granted the refund for such excess amount.

10.2. No Refund: Any amount paid in pursuance of the scheme shall not be refundable under any circumstances.

10.3. Removal of Difficulty: The Central Government may by order not inconsistent with the provisions of the scheme remove the difficulty.

10.4. If there are more than one issues involved in the appeal, the taxpayer would be required to file declaration for all issues, he cannot file declaration for some issues and litigate the balance issues.

10.5. In a case where the taxpayer has got a favourable decision on an issue at higher forum, he would be required to pay only 50% of disputed tax on that issue even in the cases in which he has filed appeal.

10.6. The taxpayer would be required to submit the proof of withdrawal of appeal/writ with the intimation of payment i.e. before the issuance of final certificate for setting dispute and not with the declaration as originally proposed in the Bill The department would also withdraw the appeal/writ before the issuance of final certificate for setting dispute.

11. FREQUENTLY ASKED QUESTIONS

11.1. The CBDT vide its Circular No. 7/2020 dated 4th March, 2020 has came up with Clarifications on provisions of the Direct Tax Vivad Se Vishwas Bill, 2020. The said clarification has been given in Questions/Answers format.

- Question No. 1 to 24 deals with questions on Scope/Eligibility
- Question No. 25 to 40 deals with questions on Calculation
- Question No. 41 to 50 deals with questions on Procedure
- Question No. 51 to 55 deals with consequence of filing under the Scheme

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Circular No. 7/2020

F. No. IT(A)/1/2020-TPL

Government of India

Ministry of Finance

Department of Revenue

Central Board of Direct Taxes

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Dated: 4th March, 2020

Sub.: Clarifications on provisions of the Direct Tax Vivad se Vishwas Bill, 2020 – reg.

During the Union Budget, 2020 presentation, the 'Vivad se Vishwas' Scheme was announced to provide for dispute resolution in respect of pending income tax litigation. Pursuant to Budget announcement, the Direct Tax Vivad se Vishwas Bill, 2020 (***Vivad se Vishwas***) was introduced in the Lok Sabha on 5th Feb, 2020. The objective of ***Vivad se Vishwas*** is to *inter alia* reduce pending income tax litigation, generate timely revenue for the Government and benefit taxpayers by providing them peace of mind, certainty and savings on account of time and resources that would otherwise be spent on the long-drawn and vexatious litigation process. Subsequently, based on the representations received from the stakeholders regarding its various provisions, official amendments to ***Vivad se Vishwas*** have been proposed. These amendments seek to widen the scope of ***Vivad se Vishwas*** and reduce the compliance burden on taxpayers.

2. After introduction of ***Vivad se Vishwas*** in Lok Sabha, several queries have been received from the stakeholders seeking clarifications in respect of various provisions contained therein. Government has considered these queries and decided to clarify the same in form of answers to frequently asked questions (FAQs). These clarifications are, however, subject to approval and passing of ***Vivad se Vishwas*** by the Parliament and receiving assent of the Hon'ble President of India.

"QUESTIONS ON SCOPE/ ELIGIBILITY (Q. No. 1 – 24)"

Question No. 1. ***Which appeals are covered under the Vivad se Vishwas?***

Answer: Appeals pending before the appellate forum [Commissioner (Appeals), Income Tax Appellate Tribunal (ITAT), High Court or Supreme Court], and writ petitions pending before High Court (HC) or Supreme Court (SC) or special leave petitions (SLPs) pending before SC as on the 31st day of January, 2020 (specified date) are covered. Cases where the order has been passed but the time limit for filing appeal under the Income-tax Act, 1961 (the Act) against the order has not expired as on the specified date are also covered. Similarly, cases where objections filed by the assessee against draft order are pending with Dispute Resolution Panel (DRP) or where DRP has given the directions but the

Assessing Officer (AO) has not yet passed the final order on or before the specified date are also covered. Cases where revision application under section 264 of the Act is pending before the Principal Commissioner or Commissioner are covered as well. Further, where a declarant has initiated any proceeding or given any notice for arbitration, conciliation or mediation as referred to in clause 4 of the Bill is also covered.

Question No. 2. ***If there is no appeal pending but the case is pending in arbitration, will the taxpayer be eligible to apply under Vivad se Vishwas? If yes what will be the disputed tax?***

Answer:

An assessee whose case is pending in arbitration is eligible to apply for settlement under ***Vivad se Vishwas*** even if no appeal is pending. In such case assessee should fill the relevant details applicable in his case in the declaration form. The disputed tax in this case would be the tax (including surcharge and cess) on the disputed income with reference to which the arbitration has been filed.

Question No. 3. ***Whether Vivad se Vishwas can be availed for proceedings pending before Authority of Advance Ruling (AAR)? If a writ is pending against order passed by AAR in a HC will that case be covered and how disputed tax to be calculated?***

Answer:

Vivad se Vishwas is not available for disputes pending before AAR. However, if the order passed by AAR has determined the total income of an assessment year and writ against such order is pending in HC, the appellant would be eligible to apply for the ***Vivad se Vishwas***. The disputed tax in that case shall be calculated as per the order of the AAR and accordingly, wherever required, consequential order shall be passed by the AO. However, if the order of AAR has not determined the total income, it would not be possible to calculate disputed tax and hence such cases would not be covered. To illustrate, if AAR has given a ruling that there exists Permanent Establishment (PE) in India but the AO has not yet determined the amount to be attributed to such PE, such cases cannot be covered since total income has not yet been determined.

Question No. 4. ***An appeal has been filed against the interest levied on assessed tax; however, there is no dispute against the amount of assessed tax. Can the benefit of the Vivad se Vishwas be availed?***

Answer:

Declarations covering disputed interest (where there is no dispute on tax corresponding to such interest) are eligible under ***Vivad se Vishwas***. It may be clarified that if there is a dispute on tax amount, and a declaration is filed for the disputed tax, the full amount of interest levied or leviable related to the disputed tax shall be waived.

Question No. 5. ***What if the disputed demand including interest has been paid by the appellant while being in appeal?***

Answer:

Appeals in which appellant has already paid the disputed demand either partly or fully are also covered. If the amount of tax paid is more than amount payable under ***Vivad se Vishwas***, the appellant will be entitled to refund without interest under section 244A of the Act.

Question No. 6. ***Can the benefit of the Vivad se Vishwas be availed, if a search and seizure action by the Income-tax Department has been initiated against a taxpayer?***

Answer:

Case where the tax arrears relate to an assessment made under section 143(3) or section 144 or section 153A or section 153C of the Act on the basis of search initiated under section 132 or section 132A of the Act are excluded if the amount of disputed tax exceeds five crore rupees in that assessment year.

Thus, if there are 7 assessments of an assessee relating to search & seizure, out of which in 4 assessments, disputed tax is five crore rupees or less in each year and in remaining 3 assessments, disputed tax is more than five crore rupees in each year, declaration can be filed for 4 assessments where disputed tax is five crore rupees or less in each year.

Question No. 7. ***If assessment has been set aside for giving proper opportunity to an assessee on the additions carried out by the AO. Can he avail the Vivad se Vishwas with respect to such additions?***

Answer:

If an appellate authority has set aside an order (except where assessment is cancelled with a direction that assessment is to be framed de novo) to the file of the AO for giving proper opportunity or to carry out fresh examination of the issue with specific direction, the assessee would be eligible to avail ***Vivad se Vishwas***. However, the appellant shall also be required to settle other issues, if any, which have not been set aside in that assessment and in respect of which either appeal is pending or time to file appeal has not expired. In such a case disputed tax shall be the tax (including surcharge and cess) which would have been payable had the addition in respect of which the order was set aside by the appellate authority was to be repeated by the AO.

In such cases while filling the declaration form, appellant can indicate that with respect to the set-aside issues the appeal is pending with the Commissioner(Appeals).

Question No. 8. ***Imagine a case where an appellant desires to settle concealment penalty appeal pending before CIT(A), while continuing to litigate quantum appeal that has travelled to higher appellate forum. Considering these are two independent and different appeals, whether appellant can settle one to exclusion of others? If yes, whether settlement of penalty appeal will have any impact on quantum appeal?***

Answer:

If both quantum appeal covering disputed tax and appeal against penalty levied on such disputed tax for an assessment year are pending, the declarant is required to file a declaration form giving details of both disputed tax appeal and penalty appeal. However, he would be required to pay relevant percentage of disputed tax only. Further, it would not be possible for the appellant to apply for settlement of penalty appeal only when the appeal on disputed tax related to such penalty is still pending.

Question No. 9. ***Is there any necessity that to qualify under the Vivad se Vishwas, the appellant should have tax demand in arrears as on the date of filing declaration?***

Answer:

Vivad se Vishwas can be availed by the appellant irrespective of whether the tax arrears have been paid either partly or fully or are outstanding.

Question No. 10. ***Whether 234E and 234F appeals are covered?***

Answer:

If appeal has been filed against imposition of fees under sections 234E or 234F of the Act, the appellant would be eligible to file declaration for disputed fee and amount payable under ***Vivad se Vishwas*** shall be 25% or 30% of the disputed fee, as the case may be.

If the fee imposed under section 234E or 234F pertains to a year in which there is disputed tax, the settlement of disputed tax will not settle the disputed fee. If assessee wants to settle disputed fee, he will need to settle it separately by paying 25% or 30% of the disputed fee, as the case may be.

Question No. 11. ***In case where disputed tax contains qualifying tax arrears as also non-qualifying tax arrears (such as, tax arrears relating to assessment made in respect of undisclosed foreign income):***

(i) Whether assessee is eligible to the Vivad se Vishwas itself?
(ii) If eligible, whether quantification of disputed tax can

exclude/ignore non-qualifying tax arrears?

Answer: If the tax arrears include tax on issues that are excluded from the ***Vivad se Vishwas***, such cases are not eligible to file declaration under ***Vivad se Vishwas***. There is no provision under ***Vivad se Vishwas*** to settle part of a pending dispute in relation to an appeal or writ or SLP for an assessment year. For one pending appeal, all the issues are required to be settled and if any one of the issues makes the declaration invalid, no declaration can be filed.

Question No. 12. ***If a writ has been filed against a notice issued under section 148 of the Act and no assessment order has been passed consequent to that section 148 notice, will such case be eligible to file declaration under Vivad se Vishwas?***

Answer: The assessee would not be eligible for ***Vivad se Vishwas*** as there is no determination of income against the said notice.

Question No. 13. ***With respect to interest under section 234A, 234B or 234C, there is no appeal but the assessee has filed waiver application before the competent authority which is pending as on 31 Jan 2020? Will such cases be covered under Vivad se Vishwas?***

Answer: No, such cases are not covered. Waiver applications are not appeal within the meaning of ***Vivad se Vishwas***.

Question No. 14. ***Whether assessee can avail of the Vivad se Vishwas for some of the issues and not accept other issues?***

Answer: Refer to answer to question no 11. Picking and choosing issues for settlement of an appeal is not allowed. With respect to one order, the appellant must chose to settle all issues and then only he would be eligible to file declaration.

Question No. 15. ***Will delay in deposit of TDS/TCS be also covered under Vivad se Vishwas?***

Answer: The disputed tax includes tax related to tax deducted at source (TDS) and tax collection at source (TCS) which are disputed and pending in appeal. However, if there is no dispute related to TDS or TCS and there is delay in depositing such TDS/TCS, then the dispute pending in appeal related to interest levied due to such delay will be covered under ***Vivad se Vishwas.***

Question No. **16.** ***Are cases pending before DRP covered? What if the assessee has not filed objections with DRP and the AO has not yet passed the final order?***

Answer: Yes, a person who has filed his objections before the DRP under section 144C of the Act and the DRP has not issued any direction on or before the specified date as well as a person in whose case the DRP has issued directions but the AO has not passed the final assessment order on or before the specified date, is eligible under ***Vivad se Vishwas***.

It is further clarified that there could be a situation where the AO has passed a draft assessment order before the specified date. Assessee decides not to file objection with the DRP and is waiting for final order to be passed by the AO against which he can file appeal with Commissioner(Appeals). In this situation even if the final assessment order is not passed on or before the specified date, the assessee would be considered as the appellant and would be eligible to settle his dispute under ***Vivad se Vishwas***. Disputed tax in such case would be computed based on the draft order. In the declaration form, the appellant in this situation should indicate that time to file objection with DRP has not expired.

Question No. **17.** ***If CIT(Appeals) has given an enhancement notice, can the appellant avail the Vivad se Vishwas after including proposed enhanced income in the total assessed income?***

Answer: The amendment proposed in the ***Vivad se Vishwas*** allows the declaration even in cases where CIT (Appeals) has issued enhancement notice on or before 31st January, 2020. However, the disputed tax in such cases shall be increased by the amount of tax pertaining to issues for which notice of enhancement has been issued.

Question No. **18.** ***Are disputes relating to wealth tax, security transaction tax, commodity transaction tax and equalisation levy covered?***

Answer: No. Only disputes relating to income-tax are covered.

Question No **19.** ***The assessment order under section 143(3) of the Act was passed in the case of an assessee for the assessment year 2015-16. The said assessment order is pending with ITAT. Subsequently another order under section 147/143(3) was passed for the same assessment year and that is pending with CIT (Appeals)? Could both or one of the orders be settled under Vivad se Vishwas?***

Answer: The appellant in this case has an option to settle either of the two

appeals or both appeals for the same assessment year. If he decides to settle both appeals then he has to file only one declaration form. The disputed tax in this case would be the aggregate amount of disputed tax in both appeals.

Question No. 20. ***In a case there is no disputed tax. However, there is appeal for disputed penalty which has been disposed off by CIT (Appeals) on 5th January 2020. Time to file appeal in ITAT against the order of Commissioner(Appeals) is still available but the appeal has not yet been filed. Will such case be eligible to avail the benefit?***

Answer: Yes, the appellant in this case would also be eligible to avail the benefit of ***Vivad se Vishwas***. In this case, the terms of availing ***Vivad se Vishwas*** in case of disputed penalty/interest/fee are similar to terms in case of disputed tax. Thus, if the time to file appeal has not expired as on specified date, the appellant is eligible to avail benefit of ***Vivad se Vishwas***. In this case the appellant should indicate in the declaration form that time limit to file appeal in ITAT has not expired.

Question No. 21. ***In a case ITAT has quashed the assessment order based on lack of jurisdiction by the AO. The department has filed an appeal in HC which is pending. Is the assessee eligible to settle this dispute under Vivad se Vishwas and if yes how disputed tax be calculated as there is no assessment order?***

Answer: The assessee in this case is eligible to settle the department appeal in HC. The amount payable shall be calculated at half rate of 100%, 110%, 125% or 135%, as the case may be, on the disputed tax that would be restored if the department was to win the appeal in HC.

Question no 22. ***In the case of an assessee prosecution has been instituted and is pending in court. Is assessee eligible for the Vivad se Vishwas?***

Answer: No. However, where only notice for initiation of prosecution has been issued with reference to tax arrears, the taxpayer has a choice to compound the offence and opt for ***Vivad se Vishwas.***

Question no 23. ***If the due date of filing appeal is after 31.1.2020 the appeal has not been filed, will such case be eligible for Vivad se Vishwas?***

Answer: Yes

Question no 24. ***If appeal is filed before High Court and is pending for admission as on 31.1.2020, whether the case is eligible for Vivad se Vishwas?***

Answer: Yes

"QUESTIONS RELATED TO CALCULATION (Q. No. 25-40)"

Question No. 25. ***In a case appeal or arbitration is pending on the specified date, but a rectification is also pending with the AO which if accepted will reduce the total assessed income. Will the calculation of disputed tax be calculated on rectified total assessed income?***

Answer:

The rectification order passed by the AO may have an impact on determination of disputed tax, if there is reduction or increase in the income and tax liability of the assessee as a result of rectification. The disputed tax in such cases would be calculated after giving effect to the rectification order passed, if any.

Question No. 26. ***Refer to question number 5. How will disputed tax be calculated in a case where disputed demand including interest has been paid by the assessee while being in appeal?***

Answer:

Please refer to answer to question no. 5. To illustrate, consider a non-search case where an assessee is in appeal before Commissioner(Appeals). The tax on returned income (including surcharge and cess) comes to Rs. 30,000 and interest under section 234B of Rs.1,000. Assessee has paid this amount of Rs. 31,000 at the time of filing his tax return. During assessment an addition is made and additional demand of Rs. 16,000 has been raised, which comprises of disputed tax (including surcharge and cess) of Rs. 10,000 and interest on such disputed tax of Rs.6000. Penalty has been initiated separately. Assessee has paid the demand of Rs. 14,000 during pendency of appeal; however interest under section 220 of the Act is yet to be calculated. Assessee files a declaration, which is accepted and certificate is issued by the designated authority (DA). The disputed tax of Rs 10,000 (at 100%) is to be paid on or before 31st March 2020. Since he has already paid Rs. 14,000, he would be entitled to refund of Rs. 4,000 (without section 244A interest). Further, the interest leviable under section 220 and penalty leviable shall also be waived.

Question No. 27. ***Refer to question no 7. How will disputed tax be computed in a case where assessment has been set aside for giving proper opportunity to an assessee on the additions carried out by the AO?***

Answer:

Please refer to answer to question no. 7. To illustrate, return of income was filed by the assessee. The tax on returned income was Rs 10,000 and interest was Rs 1,000. The amount of Rs 11,000 was paid before filing the return. The AO made two additions of Rs 20,000/- and Rs 30,000/-. The tax (including surcharge and cess) on this comes to Rs 6,240/- and Rs 9,360/- and interest comes toRs.2,500 and Rs.3,500 respectively. Commissioner(Appeals) has confirmed the two additions. ITAT confirmed the first addition (Rs 20,000/-) and set aside the second addition (Rs 30,000/-) to the file of AO for verification with a specific direction. Assessee appeals against the order of ITAT with respect to first addition (or has not filed appeal as time limit to file appeal against the order has not expired). The assessee can avail the ***Vivad se Vishwas*** if declaration covers both the additions. In this case the disputed tax would be the sum of disputed tax on both the additions i.e. Rs. 6240/- plus Rs. 9,360/-.

In such cases while filling the declaration form, appellant can indicate that with respect to the set-aside issues the appeal is pending with the Commissioner(Appeals).

Question No. 28. ***What amount of tax is required to be paid, if an assessee wants to avail the benefit of the Vivad se Vishwas?***

Answer:

Under the ***Vivad se Vishwas***, declarant is required to make following payment for settling disputes:

A. In appeals / writ / SLP / DRP objections / revision application under section 264 / arbitration filed by the assessee -

(a) In case payment is made till 31st March, 2020

(i) 100% of the disputed tax (125% in search cases) where dispute relates to disputed tax (excess amount over 100% limited to the amount of interest and penalty levied or leviable), or

(ii) 25% of the disputed penalty, interest or fee where dispute relates to disputed penalty, interest or fee only.

(b) In case payment is made after 31st March, 2020 –

(i) 110% of the disputed tax (135% in search cases) where dispute relates to disputed tax (excess amount over 100% limited to the amount of interest and penalty), or

(ii) 30% of the disputed penalty, interest or fee in case of dispute related to disputed penalty, interest or fee only.

However, if in an appeal before Commissioner(Appeals) or in

objections pending before DRP, there is an issue on which the appellant has got favourable decision from ITAT (not reversed by HC or SC) or from the High Court (not reversed by SC) in earlier years then the amount payable shall be half or 50% of above amount.
Similarly, if in an appeal before ITAT, there is an issue on which the appellant has got favourable decision from the High Court (not reversed by SC) in earlier years then the amount payable shall be half or 50% of above amount.

B. In appeals /writ / SLP filed by the Department –

(a) In case payment is made till 31st March, 2020–
   (i) 50% of the disputed tax (62.5% in search cases) in case of dispute related to disputed tax or
   (ii) 12.5% of the disputed penalty, interest or fee in case of dispute related to disputed penalty, interest or fee only.

(b) In case payment is made after 31st March, 2020 –
   (i) 55% of the disputed tax (67.5% in search cases) in cases of dispute related to disputed tax, or
   (ii) 15% of the disputed penalty, interest or fee in case of dispute related to disputed penalty, interest or fee only.

Question No. 29. ***Whether credit for earlier taxes paid against disputed tax will be available against the payment to be made under Vivad se Vishwas?***

Answer:

The amount payable by the declarant under *Vivad se Vishwas* shall be determined by the DA under clause 5. Credit for taxes paid against the disputed tax before filing declaration shall be available to the declarant. Please refer to example at question no. 26 above. If in that example against disputed tax of Rs. 10,000 an amount of Rs. 8,000/- has already been paid, the appellant would be required to pay only the remaining Rs. 2,000/- by 31st March 2020.

Question No. 30. ***Where assessee settles TDS appeal or withdraws arbitration (against order u/s 201) as deductor of TDS, will credit of such tax be allowed to deductee?***

Answer:

In such cases, the deductee shall be allowed to claim credit of taxes in respect of which the deductor has availed of dispute resolution under *Vivad se Vishwas*. However, the credit will be allowed as on the date of settlement of dispute by the deductor and hence the interest as applicable to deductee shall apply.

Question No. 31. ***Where assessee settles TDS liability as deductor of TDS under Vivad se Vishwas (i.e against order u/s 201), when will he get consequential relief of expenditure allowance under proviso to section 40(a)(i)/(ia)?***

Answer:

In such cases, the deductor shall be entitled to get consequential relief of allowable expenditure under proviso to section 40(a)(i)/(ia) in the year in which the tax was required to be deducted.

To illustrate, let us assume that there are two appeals pending; one against the order under section 201 of the Act for non-deduction of TDS and another one against the order under section 143(3) of the Act for disallowance under section 40(a)(i)/(ia) of the Act. The disallowance under section 40 is with respect to same issue on which order under section 201 has been issued. If the dispute is settled with respect to order under section 201, assessee will not be required to pay any tax on the issue relating to disallowance under section 40(a)(i)/(ia) of the Act, in accordance with the provision of section 40(a)(i)/(ia) of the Act.

In case, in the order under section 143(3) there are other issues as well, and the appellant wants to settle the dispute with respect to order under section 143(3) as well, then the disallowance under section 40(a)(i)/(ia) of the Act relating to the issue on which he has already settled liability under section 201 would be ignored for calculating disputed tax.

If the assessee has challenged the order under section 201 on merits and has won in the Supreme Court or the order of any appellate authority below Supreme Court on this issue in favour of the assessee has not been challenged by the Department on merit (not because appeal was not filed on account of monetary limit for filing of appeal as per applicable CBDT circular), then in a case where disallowance under section 40(a)(i)/(ia) of the Act is in consequence of such order under section 201 and is part of disputed income as per order under section 143(3) in his case, such disallowance would be ignored for calculating disputed tax, in accordance with the proviso to section 40(a)(i)/(ia) of the Act.

It is clarified that if the assessee has made payment against the addition representing section 40(a)(i)/(ia) disallowance, the assessee shall not be entitled to interest under section 244A of the Act on amount refundable, if any, under ***Vivad se Vishwas.***

It is further clarified that if the assessee wish to settle disallowance under section 40(a)(i)/(ia) in a search case on the basis of settlement of the dispute under section 201, he shall be required to pay higher amount as applicable for search cases for settling dispute in respect of that TDS default under section 201.

Question No. 32. ***When assessee settles his own appeal or arbitration under Vivad se***

Vishwas, will consequential relief be available to the deductor in default from liability determined under TDS order u/s 201?

Answer:

When an assessee (being a person receiving an income) settles his own appeal or arbitration under *Vivad se Vishwas* and such appeal or arbitration is with reference to assessment of an income which was not subjected to TDS by the payer of such income (deductor in default) and an order under section 201 of the Act has been passed against such deductor in default, then such deductor in default would not be required to pay the corresponding TDS amount. However, he would be required to pay the interest under sub-section (1A) of section 201 of the Act. If such levy of interest under sub-section (1A) of section 201 qualifies for *Vivad se Vishwas*, the deductor in default can settle this dispute at 25% or 30% of the disputed interest, as the case may be, by filing up the relevant schedule of disputed interest.

Question No. 33. ***Where DRP order passed on or after 1st July, 2012 and before 1st June, 2016 have given relief to assessee and Department has filed appeal, how assessed tax to be calculated?***

Answer:

If department appeal is required to be settled, then against that appeal the appellant is required to pay only 50% of the amount that is otherwise payable if it was his appeal.

Question No. 34. ***Appeals against assessment order and against penalty order are filed separately on same issue. Hence there are separate appeals for both. In such a case how disputed tax to be calculated?***

Answer:

Please see question no. 8. Further, it is clarified that if the appellant has both appeal against assessment order and appeal against penalty relating to same assessment pending for the same assessment year, and he wishes to settle the appeal against assessment order (with penalty appeal automatically covered), he is required to give details of both appeals in one declaration form for that year. However, in the annexure he is required to fill only the schedule relating to disputed tax.

Question No. 35. ***If there is substantive addition as well as protective addition in the case of same assessee for different assessment year, how will that be covered? Similarly if there is substantive addition in case of one assessee and protective addition on same issue in the case of another assessee, how will that be covered under Vivad se Vishwas?***

Answer:

If the substantive addition is eligible to be covered under *Vivad se Vishwas*, then on settlement of dispute related to substantive addition AO shall pass rectification order deleting the protective addition relating to the same issue in the case of the assessee or in the case of another

assessee.

Question No. 36. ***In a case ITAT has passed order giving relief on two issues and confirming three issues. Time to file appeal has not expired as on specified date. The taxpayer wishes to file declaration for the three issues which have gone against him. What about the other two issues as the taxpayer is not sure if the department will file appeal or not?***

Answer: The *Vivad se Vishwas* allow declaration to be filed even when time to file appeal has not expired considering them to be a deemed appeal. *Vivad se Vishwas* also envisages option to assessee to file declaration for only his appeal or declaration for department appeal or declaration for both. Thus, in a given situation the appellant has a choice, he can only settle his deemed appeal on three issues, or he can settle department deemed appeal on two issues or he can settle both. If he decides to settle only his deemed appeal, then department would be free to file appeal on the two issues (where the assessee has got relief) as per the extant procedure laid down and directions issued by the CBDT.

Question No 37. ***There is no provision for 50% concession in appeal pending in HC on an issue where the assessee has got relief on that issue from the SC?***

Answer: If the appellant has got decision in his favour from SC on an issue, there is no dispute now with regard to that issue and he need not settle that issue. If that issue is part of the multiple issues, the disputed tax may be calculated on other issues considering nil tax on this issue.

Question no 38. ***Addition was made u/s 143(3) on two issues whereas appeal filed only for one addition. Whether interest and penalty be waived for both additions.***

Answer: Under *Vivad se Vishwas*, interest and penalty will be waived only in respect of the issue which is disputed in appeal and for which declaration is filed. Hence, for the undisputed issue, the tax, interest and penalty shall be payable.

Question no 39. ***DRP has issued directions confirming all the proposed additions in the draft order and the AO has passed the order accordingly. The issues confirmed by DRP include an issue on which the taxpayer has got favourable order from ITAT (not reversed by HC or SC) in an earlier year. The time limit to file appeal in ITAT is still available. The taxpayer is eligible for Vivad se Vishwas treating the situation as taxpayer's deemed appeal in ITAT. In this case how will disputed tax be calculated? Will it be 100% on the issue allowed by ITAT in earlier years or 50%?***

Answer:

In this case, or. the issue where the taxpayer has got relief from ITAT in an earlier year (not reversed by HC or SC) the disputed tax shall be computed at half of normal rate of 100%, 110%, 125% or 135%, as the case may be.

Question No. 40. ***Where there are two appeals filed for an assessment year– one by the appellant and one by the tax department, whether the appellant can opt for only one appeal? If yes, how would the disputed tax be computed?***

Answer:

The appellant has an option to opt to settle appeal filed by it or appeal filed by the department or both. Declaration form is to be filed assessment year wise i.e. only one declaration for one assessment year. For different assessment years separate declarations have to be filed. So the appellant needs to specify in the declaration form whether he wants to settle his appeal, or department's appeal in his case or both for a particular assessment year. The computation of tax payable would be carried out accordingly.

"QUESTIONS RELATED TO PROCEDURE (Q. No. 41-50)"

Question No. 41. ***How much time shall be available for paying the taxes after filing a declaration under the Vivad se Vishwas?***

Answer:

As per clause 5 of *Vivad se Vishwas*, the DA shall determine the amount payable by the declarant within fifteen days from the date of receipt of the declaration and grant a certificate to the declarant containing particulars of the tax-arrear and the amount payable after such determination. The declarant shall pay the amount so determined within fifteen days of the date of receipt of the certificate and intimate the details of such payment to the DA in the prescribed form. Thereafter, the DA shall pass an order stating that the declarant has paid the amount. It may be clarified that 15 days is outer limit. The DAs shall be instructed to grant a certificate at an early date enabling the appellant to pay the amount on or before 31st March, 2020 so that he can take benefit of reduced payment to settle the dispute.

Question No. 42. ***If taxes are paid after availing the benefits of the Vivad se Vishwas and later the taxpayer decides to take refund of these taxes paid, would it be possible?***

Answer:

No. Any amount paid in pursuance of a declaration made under the *Vivad se Vishwas* shall not be refundable under any circumstances.

Question No. 43. ***Where appeals are withdrawn from the appellate forum, and the***

declarant is declared to be ineligible under the Vivad se Vishwas by DA at the stage of determination of amount payable under section 5(1) or, amount determined by DA is at variance of amount declared by declarant and declarant is not agreeable to DA's determination of amount payable, then whether the appeals are automatically reinstated or a separate application needs to be filed for reinstating the appeal before the appellate authorities

Answer:

Under the amended procedure no appeal is required to be withdrawn before the grant of certificate by DA. After the grant of certificate by DA under clause 5, the appellant is required to withdraw appeal or writ or special leave petition pending before the appellant forum and submit proof of withdrawal with intimation of payment to the DA as per the same clause. Where assessee has made request for withdrawal and such request is under process, proof of request made shall be enclosed.

Similarly in case of arbitration, conciliation or mediation, proof of withdrawal of arbitration/conciliation/mediation is to be enclosed along with intimation of payment to the DA.

Question No. 44. ***Clause 5(2) requires declarant to pay amount determined by DA within 15 days of receipt of certificate from DA. Clarification is required on whether declarant is to also intimate DA about fact of having made payment pursuant to declaration within the period of 15 days?***

Answer:

As per clause 5(2), the declarant shall pay the amount determined under clause 5(1) within fifteen days of the date of receipt of the certificate and intimate the details of such payment to the DA in the prescribed form and thereupon the DA shall pass an order stating that the declarant has paid the amount.

Question No. 45. ***Will DA also pass order granting expressly, immunity from levy of interest and penalty by the AO as well as immunity from prosecution?***

Answer:

As per clause 6, subject to the provisions of clause 5, the DA shall not institute any proceeding in respect of an offence; or impose or levy any penalty; or charge any interest under the Income-tax Act in respect of tax arrears. This shall be reiterated in the order under section 5(2) passed by DA.

Question No. 46. ***Whether DA can amend his order to rectify any patent errors?***

Answer:

Yes, the DA shall be able to amend his order under clause 5 to rectify

any apparent errors.

Question No. 47. ***Where tax determined by DA is not acceptable can appeal be filed against the order of designated authority before ITAT, High Court or Supreme Court?***

Answer: No. As per clause 4(7), no appellate forum or arbitrator, conciliator or mediator shall proceed to decide any issue relating to the tax arrears mentioned in the declaration in respect of which order is passed by the DA or the payment of sum determined by the DA.

Question No 48. ***There is no provision for withdrawal of appeal/writ/SLP by the department on settlement of dispute***

Answer: On intimation of payment to the DA by the appellant pertaining to department appeal/writ/SLP, the department shall withdraw such appeal/writ/SLP.

Question no 49. ***Once declaration is filed under Vivad se Vishwas, and for financial difficulties, payment is not made accordingly, will the declaration be null and void?***

Answer: Yes it would be void.

Question no 50. ***Where the demand in case of an assessee has been reduced partly or fully by giving appeal effect to the order of appellate forum, how would the amount payable under Vivad se Vishwas be adjusted?***

Answer: In such cases, after getting the proof of payment of the amount payable under ***Vivad se Vishwas,*** the AO shall pass order under the relevant provisions of ***Vivad se Vishwas*** to create demand in case of assessee against which the amount payable shall be adjusted. }

"QUESTIONS RELATED TO CONSEQUENCES (Q. No. 51-55)"

Question No. 51. ***Will there be immunity from prosecution?***

Answer: Yes, clause 6 provides for immunity from prosecution to a declarant in relation to a tax arrears for which declaration is filed under ***Vivad se Vishwas*** and in whose case an order is passed by the DA that the amount payable under ***Vivad se Vishwas*** has been paid by the declarant.

Question No. 52. ***Will the result of this Vivad se Vishwas be applied to same issues***

pending before AO?

Answer: No, only the issues covered in the declaration are settled in the dispute without any prejudice to same issues pending in other cases. It has been clarified that making a declaration under this Act shall not amount to conceding the tax position and it shall not be lawful for the income-tax authority or the declarant being a part in appeal or writ or in SLP to contend that the declarant or the income-tax authority, as the case may be, has acquiesced in the decision on the disputed issue by settling the dispute.

Question No. 53. ***If loss is not allowed to be adjusted while calculating disputed tax, will that loss be allowed to be carried forward?***

Answer: As per the amendment proposed in ***Vivad se Vishwas***, in a case where the dispute in relation to an assessment year relates to reduction of Minimum Alternate Tax (MAT) credit or reduction of loss or depreciation, the appellant shall have an option either to (i) include the amount of tax related to such MAT credit or loss or depreciation in the amount of disputed tax and carry forward the MAT credit or loss or depreciation or (ii) to carry forward the reduced tax credit or loss or depreciation. CBDT will prescribe the manner of calculation in such cases.

Question No. 54. ***If the taxpayer avails Vivad se Vishwas for Transfer Pricing adjustment, will provisions of section 92CE of the Act apply separately?***

Answer: Yes, secondary adjustment under section 92CE will be applicable. However, it may be noted that the provision of secondary adjustment as contained in section 92CE of the Act is not applicable for primary adjustment made in respect of an assessment year commencing on or before the 1st day of April 2016. That means, if there is any primary adjustment for assessment year 2016-17 or earlier assessment year, it is not subjected to secondary adjustment under section 92CE of the Act.

Question No. 55. ***The appellant has settled the dispute under Vivad se Vishwas in an assessment year. Whether it is open for Revenue to take a stand that the additions have been accepted by the appellant and hence he cannot dispute it in future assessment years?***

Answer Please refer answer to question no 52. It has been clarified in Explanation to clause 5 that making a declaration under *Vivad se Vishwas* shall not amount to conceding the tax position and it shall not

be lawful for the income-tax authority or the declarant being a part in appeal or writ or in SLP to contend that the declarant or the income-tax authority, as the case may be, has acquiesced in the decision on the disputed issue by settling the dispute.

04.03.2020
(Ankur Goyal)

Under Secretary to the Govt. of India

Copy to:

1. PS to FM/ OSD to FM/ PS to MoS(F)/ OSD to MoS(F)
2. PPS to Secretary (Revenue)
3. Chairman, CBDT & All Members, CBDT
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04.03.2020.
(Ankur Goyal)

Under Secretary to the Govt. of India

AS PASSED BY LOK SABHA ON 4.3.2020

Bill No. 29-C of 2020

THE DIRECT TAX VIVAD SE VISHWAS BILL, 2020

A

BILL

to provide for resolution of disputed tax and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Seventy-first Year of the Republic of India as follows:—

1. This Act may be called the Direct Tax Vivad se Vishwas Act, 2020.

2. (*1*) In this Act, unless the context otherwise requires,—

(*a*) "appellant" means—

(*i*) a person in whose case an appeal or a writ petition or special leave petition has been filed either by him or by the income-tax authority or by both, before an appellate forum and such appeal or petition is pending as on the specified date;

(ii) a person in whose case an order has been passed by the Assessing Officer, or an order has been passed by the Commissioner (Appeals) or the Income Tax Appellate Tribunal in an appeal, or by the High Court in a writ petition, on or before the specified date, and the time for filing any appeal or special leave petition against such order by that person has not expired as on that date;

(iii) a person who has filed his objections before the Dispute Resolution Panel under section 144C of the Income-tax Act, 1961 and the Dispute Resolution Panel has not issued any direction on or before the specified date;

(iv) a person in whose case the Dispute Resolution Panel has issued direction under sub-section (*5*) of section 144C of the Income-tax Act and the Assessing Officer has not passed any order under sub-section (*13*) of that section on or before the specified date;

(v) a person who has filed an application for revision under section 264 of the Income-tax Act and such application is pending as on the specified date;";

(b) "appellate forum" means the Supreme Court or the High Court or the Income Tax Appellate Tribunal or the Commissioner (Appeals);

(c) "declarant" means a person who files declaration under section 4;

(d) "declaration" means the declaration filed under section 4;

(e) "designated authority" means an officer not below the rank of a Commissioner of Income-tax notified by the Principal Chief Commissioner for the purposes of this Act;

(f) "disputed fee" means the fee determined under the provisions of the Income-tax Act, 1961 in respect of which appeal has been filed by the appellant;

(g) "disputed income", in relation to an assessment year, means the whole or so much of the total income as is relatable to the disputed tax;

(h) "disputed interest" means the interest determined in any case under the provisions of the Income-tax Act, 1961, where—

(i) such interest is not charged or chargeable on disputed tax;

(ii) an appeal has been filed by the appellant in respect of such interest;

(i) "disputed penalty" means the penalty determined in any case under the provisions of the Income-tax Act, 1961, where—

(i) such penalty is not levied or leviable in respect of disputed income or disputed tax, as the case may be;

(ii) an appeal has been filed by the appellant in respect of such penalty; (*j*) "disputed tax", in relation to an assessment year or financial year, as the case may be, means the income-tax, including surcharge and cess (hereafter in this clause referred to as the amount of tax) payable by the appellant under the provisions of the Income-tax Act, 1961, as computed hereunder:—

(A) in a case where any appeal, writ petition or special leave petition is pending before the appellate forum as on the specified date, the amount of tax that is payable by the appellant if such appeal or writ petition or special leave petition was to be decided against him;

(B) in a case where an order in an appeal or in writ petition has been passed by the appellate forum on or before the specified date, and the time for filing appeal or special leave petition against such order has not expired as on that date, the amount of tax payable by the appellant after giving effect to the order so passed;

(C) in a case where the order has been passed by the Assessing Officer on or before the specified date, and the time for filing appeal against such order has not expired as on that date, the amount of tax payable by the appellant in accordance with such order;

(D) in a case where objection filed by the appellant is pending before the Dispute Resolution Panel under section 144C of the Income-tax Act as on the specified date, the amount of tax payable by the appellant if the Dispute Resolution Panel was to confirm the variation proposed in the draft order;

(E) in a case where Dispute Resolution Panel has issued any direction under sub-section (*5*) of section 144C of the Income-tax Act and the Assessing Officer has not passed the order under sub-section (*13*) of that section on or before the specified date, the amount of tax payable by the appellant as per the assessment order to be passed by the Assessing Officer under sub-section (*13*) thereof;

(F) in a case where an application for revision under section 264 of the Income-tax Act is pending as on the specified date, the amount of tax payable by the appellant if such application for revision was not to be accepted:

Provided that in a case where Commissioner (Appeals) has issued notice of enhancement under section 251 of the Income-tax Act on or before the specified date, the disputed tax shall be increased by the amount of tax pertaining to issues for which notice of enhancement has been issued:

Provided further that in a case where the dispute in relation to an assessment year relates to reduction of tax credit under section 115JAA or section 115D of the Income-tax Act or any loss or depreciation computed thereunder, the appellant shall have an option either to include the amount of tax related to such tax credit or loss or depreciation in the amount of disputed tax, or to carry forward the reduced tax credit or loss or depreciation, in such manner as may be prescribed.

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

(l) "last date" means such date as may be notified by the Central Government in the Official Gazette;

(m) "prescribed" means prescribed by rules made under this Act;

(n) "specified date" means the 31st day of January, 2020;

(o) "tax arrear" means,—

(i) the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax, and penalty leviable or levied on such disputed tax; or

(ii) disputed interest; or

(iii) disputed penalty; or

(iv) disputed fee, as determined under the provisions of the Income-tax Act;

(2) The words and expressions used herein and not defined but defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.

3. Subject to the provisions of this Act, where a declarant files under the provisions of this Act on or before the last date, a declaration to the designated authority in accordance with the provisions of section 4 in respect of tax arrear, then, notwithstanding anything contained in the Income-tax Act or any other law for the time being in force, the amount payable by the declarant under this Act shall be as under, namely:—

Sl. No.	Nature of tax arrear.	Amount payable under this Act on or before the 31st day of	Amount payable under this Act or after the 1st day of April, 2020 but on or before the last date. March, 2020.
(a)	where the tax arrear is the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax.	amount of the disputed tax.	the aggregate of the amount of disputed tax and ten per cent. of disputed tax: provided that where the ten per cent. of disputed tax exceeds the aggregate amount of interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable under this Act .
(b)	where the tax arrear includes the tax, interest or penalty determined in any assessment on the basis of search under section 132 or section 132A of the Income-tax Act. cent. of disputed	The aggregate of the amount of disputed tax and twenty-five per cent. of the disputed tax: Provied that where the twenty-five per cent on such disputed tax and tax exceeds the aggregate amount interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax, the excess shall be ignored for the purpose of computation of amount payable under this Act.	The aggregate of the amount of disputed tax and thirty-five per cent. of disputed tax: Provided that where the thirty-five per cent. of disputed tax exceeds the aggregate amount of interest chargeable or charged penalty leviable or levied on such disputed tax, the excess of shall be ignored for the purpose of computation of amount payable
(c)	where the tax arrear relates to disputed of interest or disputed penalty or disputed fee.	twenty-five per cent. thirty per cent. of disputed disputed interest interest or disputed penalty or or disputed penalty disputed fee : or disputed fee.	

Provided that in a case where an appeal or writ petition or special leave petition is filed 50 by the income-tax authority on any issue before the appellate forum, the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed:

Provided further that in a case where an appeal is filed before the Commissioner (Appeals) or objections is filed before the Dispute Resolution Panel by the appellant on any issue on which he has already got a decision in his favour from the Income Tax Appellate Tribunal (where the decision on such issue is not reversed by the High Court or the Supreme Court) or the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed:

Provided also that in a case where an appeal is filed by the appellant on any issue before the Income Tax Appellate Tribunal on which he has already got a decision in his 10 favour from the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable shall be one-half of the amount in the Table above calculated on such issue, in such manner as may be prescribed.

4. (*1*) The declaration referred to in section 3 shall be filed by the declarant before the designated authority in such form and verified in such manner as may be prescribed.

(*2*) Upon the filing the declaration, any appeal pending before the Income Tax Appellate Tribunal or Commissioner (Appeals), in respect of the disputed income or disputed interest or disputed penalty or disputed fee and tax arrear shall be deemed to have been withdrawn from the date on which certificate under sub-section (*1*) of section 5 is issued by the designated authority.

(*3*) Where the declarant has filed any appeal before the appellate forum or any writ petition before the High Court or the Supreme Court against any order in respect of tax arrear, he shall withdraw such appeal or writ petition with the leave of the Court wherever required after issuance of certificate under sub-section (*1*) of section 5 and furnish proof of such withdrawal alongwith the intimation of payment to the designated authority under 25 sub-section (*2*) of section 5.

(4) Where the declarant has initiated any proceeding for arbitration, conciliation or mediation, or has given any notice thereof under any law for the time being in force or under any agreement entered into by India with any other country or territory outside India whether for protection of investment or otherwise, he shall withdraw the claim, if any, in such 30 proceedings or notice after issuance of certificate under sub-section (*1*) of section 5 and furnish proof of such withdrawal alongwith the intimation of payment to the designated authority under sub-section (*2*) of section 5.

(5) Without prejudice to the provisions of sub-sections (*2*), (*3*) and (*4*), the declarant shall furnish an undertaking waiving his right, whether direct or indirect, to seek or pursue 35 any remedy or any claim in relation to the tax arrear which may otherwise be available to him under any law for the time being in force, in equity, under statute or under any agreement entered into by India with any country or territory outside India whether for protection of investment or otherwise and the undertaking shall be made in such form and manner as may be prescribed.

(*6*) The declaration under sub-section (*1*) shall be presumed never to have been made if,— Filing of declaration and particulars to be furnished.

(a) any material particular furnished in the declaration is found to be false at any stage;

(b) the declarant violates any of the conditions referred to in this Act;

(*c*) the declarant acts in any manner which is not in accordance with the undertaking given by him under sub-section (*5*), and in such cases, all the proceedings and claims which were withdrawn under section 4 and all the consequences under the Income-tax Act against the declarant shall be deemed to have been revived.

(*7*) No appellate forum or arbitrator, conciliator or mediator shall proceed to decide any issue relating to the tax arrear mentioned in the declaration in respect of which an order has been

made under sub-section (*1*) of section 5 by the designated authority or the payment of sum determined under that section.

5. (*1*) The designated authority shall, within a period of fifteen days from the date of 5 receipt of the declaration, by order, determine the amount payable by the declarant in accordance with the provisions of this Act and grant a certificate to the declarant containing particulars of the tax arrear and the amount payable after such determination, in such form as may be prescribed.

(2) The declarant shall pay the amount determined under sub-section (*1*) within fifteen 10 days of the date of receipt of the certificate and intimate the details of such payment to the designated authority in the prescribed form and thereupon the designated authority shall pass an order stating that the declarant has paid the amount.

(3) Every order passed under sub-section (*1*), determining the amount payable under this Act, shall be conclusive as to the matters stated therein and no matter covered by such 15 order shall be reopened in any other proceeding under the Income-tax Act or under any other law for the time being in force or under any agreement, whether for protection of investment or otherwise, entered into by India with any other country or territory outside India.

Explanation.—For the removal of doubts, it is hereby clarified that making a declaration under this Act shall not amount to conceding the tax position and it shall not be lawful for the 20 income-tax authority or the declarant being a party in appeal or writ petition or special leave petition to contend that the declarant or the income-tax authority, as the case may be, has acquiesced in the decision on the disputed issue by settling the dispute.

6. Subject to the provisions of section 5, the designated authority shall not institute any proceeding in respect of an offence; or impose or levy any penalty; or charge any 25 interest under the Income-tax Act in respect of tax arrear.

7. Any amount paid in pursuance of a declaration made under section 4 shall not be refundable under any circumstances.

Explanation.—For the removal of doubts, it is hereby clarified that where the declarant had, before filing the declaration under sub-section (*1*) of section 4, paid any amount under 30 the Income-tax Act in respect of his tax arrear which exceeds the amount payable under section 3, he shall be entitled to a refund of such excess amount, but shall not be entitled to interest on such excess amount under section 244A of the Income-tax Act.

8. Save as otherwise expressly provided in sub-section (*3*) of section 5 or section 6, nothing contained in this Act shall be construed as conferring any benefit, concession or 35 immunity on the declarant in any proceedings other than those in relation to which the declaration has been made.

9. The provisions of this Act shall not apply—

(a) in respect of tax arrear,—

(i) relating to an assessment year in respect of which an assessment has 40 been made under sub-section (*3*) of section 143 or section 144 or section 153A or section 153C of the Income-tax Act on the basis of search initiated under section 132 or section 132A of the Income-tax Act, if the amount of disputed tax exceeds five crore rupees;

(ii) relating to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration;

(iii) relating to any undisclosed income from a source located outside India or undisclosed asset located outside India;

(iv) relating to an assessment or reassessment made on the basis of information received under an agreement referred to in section 90 or section 90A of the Income-tax Act, if it relates to any tax arrear;

(b) to any person in respect of whom an order of detention has been made under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on or before the filing of declaration:

Provided that—

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

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

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

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

(c) to any person in respect of whom prosecution for any offence punishable under the provisions of the Unlawful Activities (Prevention) Act, 1967, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Prevention of Corruption Act, 1988, the Prevention of Money Laundering Act, 2002, the Prohibition of Benami Property Transactions Act, 1988 has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any of those Acts;

(d) to any person in respect of whom prosecution has been initiated by an Income-tax authority for any offence punishable under the provisions of the Indian Penal Code or for the purpose of enforcement of any civil liability under any law for the time being in force, on or before the filing of the declaration or such person has been convicted of any such offence consequent to the prosecution initiated by an Income- tax authority;

(e) to any person notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 on or before the filing of declaration.

10. (*1*) The Central Board of Direct Taxes may, from time to time, issue such directions or orders to the income-tax authorities, as it may deem fit:

Provided that no direction or order shall be issued so as to require any designated authority to dispose of a particular case in a particular manner.

(*2*) Without prejudice to the generality of the foregoing power, the said Board may, if it considers necessary or expedient so to do, for the purpose of this Act, including collection of revenue, issue from time to time, general or special orders in respect of any class of cases, setting forth directions or instructions as to the guidelines, principles or procedures to be followed by the authorities in any work relating to this Act, including collection of revenue and issue such order, if the Board is of the opinion that it is necessary in the public interest so to do.

11. (*1*) If any difficulty arises in giving effect to the provisions of this Act, the Central 5 Government may, by order, not inconsistent with the provisions of this Act, remove the difficulty:

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

(*2*) Every order made under sub-section (*1*) shall, as soon as may be after it is made, be laid before each House of Parliament.

12. (*1*) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

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

(a) the form in which a declaration may be made, and the manner of its verification under section 4;

(b) the form and manner in which declarant shall furnish undertaking under sub-section (*5*) of section 4;

(c) the form in which certificate shall be granted under sub-section (*1*) of section 5;

(d) the form in which payment shall be intimated under sub-section (*2*) of section 5;

(e) determination of disputed tax including the manner of set-off in respect of brought forward to carry forward of tax credit under section 115JAA or section 115JD of the Income-tax Act or set-off in respect of brought forward or carry forward of loss or allowance of depreciation under the provisions of the Income-tax Act;

(f) the manner of calculating the amount payable under this Act;

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

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total 30 period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

CHARITABLE TRUST

CA RAMESH KUMAR PATODIA

This article deals with some of the practical issues that Charitable trust are confronted with in day to day administration of trust. For last few years, the Government has been tightening the rules relating to the Charitable trust. In the Finance Bill 2020 also , major changes regarding the manner in which the registration of a Charitable trust or institution is to be carried out has been proposed. It is therefore of utmost importance that the administration of the trust is carried out in accordance with the objects of the trust taking into account compliance with the rules and regulations as applicable.

1. Investment in shares -Whether can be done by a charitable Trust?

   As per the provisions of Section 11(5) of the Income-tax Act,1961 investments by a trust has to be made as per the prescribed mode of investments as contained therein. A question arises whether a trust can purchase equity shares of any company or can invest in Stock market?

   In this regard, the shares of public sector companies are eligible mode of investment as per Section 11(5)(vii) of the Income-tax Act,1961 and also those shares which prescribed as a mode of investment u/s 11(5)(xii) of the Income-tax Act,1961.

   With reference to the investment in other shares, the trust has to dispose of the same as per the provisions of Section 13(1)(d) of Income-tax Act,1961. The trust though is not permitted to acquire these other shares but can receive any shares by way of donation from any person and in such a situation, the law allows the trust to receive the shares by way of donation but the same has to be disposed off within one year and the proceeds has to be invested as per the mode of investment allowed as per Section 11(5) of the Income-tax Act,1961.

   In this regard, the following issues are relevant -

   i) Bonus shares which are received are not to be counted for the purpose of calculation of limit as specified in Section 13(2)(h)- CIT Vs Narinder Mohan Foundation (2009) 311 ITR 425(Del).

   ii) Innocent deviation need not loose exemption- 253 ITR 593(Del). Also see Export Promotion council for handicrafts Vs DGIT(Exemptions) (2011) 337 ITR 26(Del)

   In this regard, another pertinent question which arises is whether in case of a trust which makes investment which are not as per the provisions of Section 11(5), what happens to the taxation of such a trust whether the entire income becomes taxable or only the income. It is only the income from such investment which are not made as per the provisions of Section 11(5) is liable for tax as per this clause and not the entire income of the Trust.

2. Sale of Capital assets by a Charitable trust- Applicability of Section 50C

   Section 50C of the Income-tax Act,1961 deals with Special provision for full value of consideration in certain cases and as per this section, where the consideration received or accruing as a result of the transfer by assessee of a capital asset, being land & building or both is less than the value adopted or assessed or assessable by any authority or a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall for the purpose of Section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

   A question arises whether in a case of a charitable trust which has sold any property during the year - whether the provisions of Section 50C are applicable. In this regard, it may be noted that Section 11(1A) of the Act specifically deals with the capital asset held by a charitable trust and thus the calculation has to be done as per the provisions of Section 11(1A) and Section 50C cannot be invoked. The following cases in this regard can be relied upon: -

   i) DCIT Vs Saife Jubilee High School (Ahmedabad ITAT ITA No 2301/Ahd/2014)

ii) ACIT-1 Kanpur Vs Upper India Chamber of Commerce ITA 601/LKW/2011

iii) CIT Vs Thiruvendgadam Investments Pvt ltd (2010) 320 ITR 345(Mad)

It is also to be noted that Section 50C doesn't start with a non-obstante clause and therefore these provisions are not applicable in case there are specific provisions dealing with the computation as in case of charitable trust.

3. Claim of depreciation on asset already claimed as application of income

Income of a Charitable trust has to be computed on Commercial basis and Claim of Additional depreciation by a Charitable Trust has to be allowed notwithstanding that the entire amount of the capital asset may have been claimed as an application of Income.

It has time and again been held that the income of a Charitable trust has to be computed on commercial principles [CIT Vs Institute of Banking (2003) 264 ITR 110(Bom)]and therefore even if the entire cost of the asset has been allowed to be treated as an application of income, depreciation on such asset in subsequent years has to be allowed on commercial principles. See also DIT(Exemptions) Vs Framjee Cawasjee Institute (1993) 109 CTR 463(Bombay) and CIT Vs Munisuvrat Jain (1994) Tax LR 1084(Bom). Moreover, if an asset is not capable of being used and has to be discarded and the entire WDV is written off in the books of account, then the same has to be allowed as an additional depreciation notwithstanding that the nomenclature in the accounts may not have been used as Additional depreciation because nomenclature cannot decided the claim under the Act. CIT(Exemptions) Vs Bhatia General Hospital (2018) 405 ITR 24(Bom). Also CIT Vs Sheth Manilal Ranchhoddas Vishram Bhavan Trust(1992) 192 ITR 598(Guj) and CIT Vs Ganga Charity Trust (1986) 162 ITR 612(Guj). Similar view has been taken in the case of CIT Vs Market Committee, Pipli (2011) 330 ITR 16(P&H), CIT Vs Raipur Pallottine Society(1989) 180 ITR 579(MP),CIT Vs Sheth Manilal Ranchooddas Vishram Bhavan Trust(1992) 198 ITR 598(Guj), CIT Vs Society of the Sisters' of St Anne(1984) 146 ITR 28(kar). In the case of 146 ITR, the Court dealt with the argument of the Revenue that Depreciation allowance being a notional expenditure cannot be allowed to be debited to the expenditure account of the trust. The depreciation is nothing but decrease in the value of the property through wear, deterioration or obsolescence and allowance is made for this purpose in book keeping, accountancy etc. The balance sheet will not present a true and fair view unless depreciation was provided for.

Decision against- Kerala High Court Lissie Medical Institutions (2012) 348 ITR 344(Ker) -this decisions brings views of CBDT also as well as the CBDT Circular No 5-P is reported in End notes.

Allahabad High Court in the case of CIT(Exemptions) Vs Seth Anandram Jaipuria education society Cantonment(2017) 394 ITR 712(All) has not accepted the Kerala High Court view.

Amendment made by Finance (No 2) Act 2014 in Section 11(6).

The controversy as above has been set at rest by introduction of the provisions of Section 11(6) which states that *when any income is required to be applied or accumulated or set apart for application, then for such purposes the income shall be determined without any deduction or allowance by way of deprecation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this section in the same or any other previous year.*

Thus, in view of the specific provisions in Section 11(6), now the claim of depreciation is not possible with effect from 1/4/2015.

Amendment considered in the case of CIT-III,Pune Vs Rajasthan & Gujrati Charitable Foundation Poona(2018) 402 ITR 441(SC) and it was noted that the amendment is prospective in nature

Whether carry forward of excess expenditure can be claimed as application of income in subsequent years by a Charitable Trust?

In the case of [CIT Vs Institute of Banking (2003) 264 ITR 110(Bom)] it was held that Income derived from trust property has also got to be computed on commercial principles and if commercial principles are applied then adjustment of expenses incurred by the trust in the subsequent year will have to be regarded as application of income of the trust for charitable and religious purposes in subsequent year in which adjustment has been made having regard to the benevolent provisions contained in Section 11 of the

Act. See also CIT Vs Shri Plot Swetamber Murti Pujak Jain Mandal(1995) 211 ITR 293(Guj) and Circular No 100 dated January 24,1973, F No 195/1/72-I.T.(A.I) [(1973) 88 ITR (St) 66]

Also CIT Vs Maharana of Mewar Charitable Foundation (1987) 164 ITR 439(Raj) CIT Vs Kristi Upaj Mandi Samiti(2017) 390 ITR 59(Raj).[SLP granted against this decision reported in (2017) 245 Taxman 270(SC)] The decision of Rajasthan High Court in the case of Shri Akhey Ram Ishwari Prasad Trust Vs CIT (2004) 266 ITR 281 (Raj) was considered here as having not laying down any law that in all cases where the expenditure are incurred by the assessee in excess of income earned during the previous year relevant to the assessment year, such income though applied for charitable purposes, shall not be entitled for exemption under Section 11(1)(a) of the Act.

Whether a Charitable trust can switch from one method of accounting to another ?

In the case of CIT Vs Ganga Charity Trust Fund(1986) 162 ITR 612(Guj) it was held that there is nothing in the Act which precludes the assessee, who bona fide desires to switch over to another system of accounting, from doing so. A bona fide assessee cannot be precluded from switching over to another system of accounting which he finds convenient and which would reflect his real income. Reliance was placed on the following decisions:-

1. CIT Vs Rajasthan Investment Co (P) Ltd (1978) 113 ITR 294(Cal)
2. Reform Flour Mills Pvt ltd Vs CIT(1978) 114 ITR 227(Cal)
3. Snow White Food Products Co Ltd Vs CIT(1983) 141 ITR 861(Cal)

Whether payment of income-tax and wealth-tax has to be deducted from income for the purpose of arriving at income which is available for application?

In the case of CIT Vs Ganga Charity trust fund(1986) 162 ITR 612(Guj),it was held that for the purpose of actual application or accumulation or setting apart of income from trust property for the purposes of the trust, the trustees must have on hand income which could be so utilised and what are outgoings towards payment of income-tax must be deducted for working out such surplus income. Similar view was taken in the case of CIT Vs Trustees of HEH , the Nizam's Supplemental Religious Endowment Trust(1981) 127 ITR 378(AP) by holding that the payment of income-tax and wealth-tax made during the relevant year relating to the previous assessment years were incidental to the carrying out of the charitable purposes of the trust. Such payments were outgoings in that particular year and were, therefore, incidental to the carrying out of the objects of the trust and had, therefore to be excluded from the income of the trust. See Also CIT Vs Janaki Amal Ayya Nadar Trust (1985) 153 ITR 159(Mad) in which it was held that payment of tax is necessary to preserve the property of the trust when a demand is lawfully made. Even though the trust may not accept the demand and challenges the same on appeal, that is not relevant for considering the question whether payment has to be made to preserve the trust property .The expenditure incurred by way of payment of tax out of current year's income has to be considered as application for charitable purposes. This is because payment is made to preserve the corpus, the existence of which is absolutely necessary for the trust. The Court also relied on the CBDT Circular No 5 dated 19th June,1968(to check whether Circular No 5-P (LXX-6) of 1968 dated July, 19 1968) wherein the application of income is to be considered and Income means income after considering all outgoings.

Income for the purpose of Section 11 need not be computed in accordance with the provisions of Section 14 applicable for computation of total income

In the case of CIT Vs Calavala Cunnan Chetty Charities (1982) 135 ITR 485(Mad), a question came up before the Hon'ble Court that whether for the purpose of computing the accumulation in excess of 25 percent, as laid down in Section 11(1)(a) of the Income-Tax Act, 1961 income has to be computed under various heads as enumerated under the Income-tax Act? The Court considered that the provisions of Section 11 are contained in the Chapter III dealing "Income which do not form part of total income". Thus, Section 11 forms Part of receipts or income which would be excluded from computation of total income. The Court also considered that in the case of Lord Chetwode Vs IRC (1977) 1 All ER 638 it was observed that " it is notorious that there is not and never has been any definition of income in the UK Tax Code. The same position holds good in India also because what is chargeable to income-tax is left to be determined

according to the statutory provisions of the Act in the light of the elastic concept of income. That is why Section 2(24) defines "income" as including particular category of receipts. The idea is more to bring in all the categories of income which are brought to tax by applying a legal fiction so that by their non-inclusion in the definition, such categories did not escape taxation. In the absence of any definition of income, the same has to be proceeded on the basis of income as understood in general parlance. Income would ordinarily exclude a receipt by way of capital. Mere gross receipt cannot also be taxed as income. It may be broadly stated that what is taxed is not also any gross receipt. The receipt must be revenue in nature and is to be taxed after excluding the necessary outgoings. The court also noted that where Parliament considered that the computation should be done in accordance with the provisions of the Act, it introduced the concept by using appropriate language "as computed in accordance with the other provisions of this Act". The computation under different categories of income arises only for the purposes of charge. Those provisions cannot be introduced to find out what the income derived from the property held under trust to be excluded from the total income is, for the purpose of exemption under Chapter III. Finally it was held that income from properties held under trust would have to be arrived at in the normal commercial manner without reference to the provisions which are attracted by Section 14. This decision was followed in the case of CIT Vs Estate of V L Ethiraj (1982) 136 ITR 12(Mad).

Whether Provisions for doubtful debts can be considered to be an application of income?

The Bombay High court in the case of Bombay Stock Exchange Vs DDIT(Exemption) and others (No 1) (2014) 365 ITR 160(Bom) quashed the reopening of the assessment by holding that full details of the provision for doubtful debts was given at the time of assessment and as such it could not have been said that there was an omission or failure to disclose fully and truly all material facts relating to the assessment. Similar view was taken in the case of Bombay Stock Exchange Ltd Vs DDIT(No 2) (2014) 365 ITR 181(Bom).

Whether Corpus donation can be spent for the objects of the trust?

Often it is seen that the Assessing officers dispute the application of income on the pretext that the application has been made out of the corpus fund. In this regard, it is to be noted that there is no bar on spending any amount received for the purpose of Corpus of the trust and it can be spent for the specific purpose for which it is received or there is no specific purpose then towards the objects of the trust.

Anonymous Donation

The provisions regarding anonymous donation are contained in Section 115BBC and generally speaking a religious trust is allowed to take anonymous donation. However, there is a difference between anonymous and unaccounted donation.

Unaccounted donation means the routing of unaccounted income into the trust by way of donation unlike anonymous donation which does not means so wherein the donor of a particular fund does not wants to reveal his identity only and simply because of this reason it cannot be said that there is routing of unaccounted income via medium of donation to trust. In this regard, the judgment of Vidyavardhini Vs Asstt CIT, Central Circle-2, Thane(2012) 20 taxmann.com 81(Mum) is relevant wherein the unaccounted donation has been charged to income tax under the general provision and not under section 115BBC which is in respect of anonymous donation.

Delay in filing Form No 10

Where eighty five percent income of the trust are not applied, or is not deemed to have been applied, to charitable or religious purposes in India during the previous year then the trust has an option to accumulate the said income for the purpose of application in the next five years. The said option has to be exercised by filing a statement in form 10 in the prescribed manner to the assessing officer stating the purpose for which the income is being accumulated or set apart and the period for which the income is to be accumulated or set apart, which shall in no case exceed five years. This was the problem prior to the coming into the force of Finance Act, 2015.

The Finance Act, 2015 amended section 11 and section 13 of the Act with effect from 01.04.2016(A.Y.2016-17).Consequently, Income-tax Rules, 1962 (hereafter 'Rules') were also amended vide the Income-tax (1st Amendment) Rules, 2016.

As per the amended provisions of the Act read with rule 17 of the Rules, while 15% of the income can be accumulated indefinitely by the trust or institution, 85% of income can only be accumulated for a period not exceeding 5 years subject to the conditions, *inter alia,* that such person submits the prescribed Form No. 10 electronically to the Assessing Officer within the due date specified under section 139(1) of the Act. Therefore from the assessment year 2016-17 and onwards Form 10 has to be filed within the time allowed u/s 139(1). Here it may be noted that prior to the finance act, 2015 requirement of filing the form 10 within the time allowed u/s 139(1) was prescribed in the Rules only however after the amendment carried out by Finance Act, 2015 the requirement of filing the form 10 within the time allowed u/s 139(1) has also been incorporated in section 11(2) of the Act. There are number of case laws on this issue that Belated form 10 can also be filed is there are bonafide reasons or reasons which are beyond the controls of the assessee. The Hon'ble Bombay High Court in case of CIT Vs Sakal Relief Fund reported under 2017 (4) TMI 772 held that *Tribunal justified in holding that Form 10 prescribed in terms of Rule 17 of Income Tax Rules for the purpose of Section 11 of the Act would be valid even if filed during the Assessment Proceedings, consequent to a reopening notice under Section 148 of the Act, even if not filed with the return of income".* The said principle. The Hon'ble Gujrat High Court in case of CIT Vs Mayur Foundation reported under 274 ITR 562 (2005) also held that belated form 10 can be filed.

Recently the Hon'ble Chennai ITAT in case of DDIC vs The Madras Seva Sadan in ITA No 974/Mds/2015 dated 27.04.2016 held that *"We are of the opinion, considering the activities of the trust and genuineness of the objects and supporting affidavit in explaining the delay, the assessee should file before Assessing Officer revised form No.10B and form No. 10 further considering the principles of natural justice and provisions of Rule 46A, we set aside the entire disputed issue to the file of the Assessing Officer for limited purpose to verify the genuineness of evidence and pass the order afresh after providing adequate opportunity of being heard to the assessee".*

Further the CBDT vide circular no 273 (F.No 180/57/80-IT(A-I)}, dated 03.06.1980 authorised the Commissioner for condoning the delay in filing of Form10 and directed him to admit belated application u/s 11(2) read with rule 17 and to dispose of the same after satisfying itself.

Also, recently vide Circular no.3/2020 dated 03-01-2020 it has also been decided by the CBDT that where there is delay of upto 365 days in filing Form 9 A and Form No. 10 for Assessment Year 2018-19 or for any subsequent Assessment Years, the Commissioners of Income-tax are hereby authorized to admit such belated applications of condonation of delay u/s 119(2) of the IT Act and decide on merits.

Delay in filing of Audit Report in Form No 10B

Further is the similar manner there are number of judgments in which Hon'ble Court held that exemption u/s 11 cannot be denied merely for delay in filing the Audit Report in Form 10B which is procedural in nature. The Hon'ble Calcutta High Court had occasion to deal with the similar issues in case of Commissioner of Income Tax vs Rai Bahadur Bissesswarlal Motilal Malwasie. Trust reported under 195 ITR 825 (Calcutta). In this case assessee had not filed the audit report in Form 10B along with its return of income but filed the same before the completion of assessment. The Hon'ble Calcutta High Court in the above case held that where the assessee has complied with the provisions of the Act in the course of the assessment proceedings by curing the defect in the return by filing an audit report, the ITO cannot ignore such audit report or the return in completing the assessment and decided the issue in favour of the assessee. The said decision also followed by the Hon'ble Calcutta High Court in case of Commissioner of Income Tax vs Hardeodas Agarwalla Trust reported under 198 ITR 511 (Calcutta) and held that " *In our view, having regard to the object of section 12A, it cannot be said that the Legislature intended that, even where the trust has got its accounts audited and the certificate obtained in Form No. 10B before the completion, merely because such report could not be filed in the course of the assessment proceedings, it would deprive a trust of getting the exemption if it is otherwise entitled to it in law."*

Moreover Hon'ble Andhra Pradesh High Court in case of CIT vs Andhra Pradesh State Road Transport Corporation reported under 285 ITR 147 confirmed the view of the ITAT that the provisions contained in

section 12A(b) are only directory in nature and not mandatory"

Also, CBDT has issued circular from time to time regarding condonation in delay in filing Form 10B. Recently, Circular No. 2/2020 dated 03-01-2020 wherein it has been decided by the CBDT that where there is delay of upto 365 days in filing Form No. 10B for Assessment Year 2018-19 or for any subsequent Assessment Years, the Commissioners of Income-tax are hereby authorized to admit such belated applications of condonation of delay u/s 119(2) of the Act and decide on merits.

Six years for carry over -change in the use – application

Section 11(3) of the Income Tax Act, 1961 deals with non fulfilment of conditions specified in section 11(2) wherein clause © of Section11(3) read as follows:

© cis not utilised for the purpose for which it is so accumulated or set apart during the period referred to in clause (a) of that sub section or in year immediately following the expiry thereof,

In reference to the above, it has been stated therein that such income shall be deemed to be the income of such person of the previous year immediately following the expiry of the period aforesaid.

Thus, section 11(3)(c) of the Income Tax Act, 1961 grants an assessee a bonus year for utilisation of funds accumulated under section 11(2). It means that an assessee can utilise the funds accumulated under section 11(2) in the 6th year as well and if the same is not utilised in the 6th year, then the income will be taxable under section 11(3) in the following year.

It is often seen that after filing form. No 10 for a specified purpose, due to some reason that purpose is not capable of being fulfilled and needs to be changed. In this regard, the AO is permitted to entertain an Application for change of the use as per Section 11(3A) and thereafter it can be spent for the purposes as specified in the change which is done.

Can a foreigner be a trustee of a trust?

In this regard, it may be noted that the Income-tax Act,1961 doesn't say anything regarding this and resort has to be made to other Acts. The Indian Trust Act,1882 can be roped in even though it has been stated in the Act itself that this Act is not applicable to charitable or religious trust. In this regard as per the provisions of Section 73 of the Indian Trust Act where a person appointed as a trustee is absent for a continuous period of six months, leaves India for a continuous period of six months, or leaves India for the purpose of residing abroad, a new trustee may be appointed in his place by a person nominated in the trust documentfor that purpose, if an and in absence of such person, by settlor of the trust, if alive and competent to contract or the surviving/continuing trustee, if any or the retiring trustee himself with the consent of the court. See Global Academy of Emergency Vs CIT[E] decided on 14th September,2018 Delhi ITAT.

Whether Section 8 Company liable for MAT?

There are specific provisions in Section 115JB dealing with exemption related to income of an entity registered u/s 11 of the Income-tax Act,1961. Resort can also be had to the decision of Delhi Gymkhana Club Ltd Vs DCIT in ITA No 3585/Del/2006 dated 30th September, 2009

Can a trust do charitable activities outside India?

In this regard, it is to be noted that as per the provisionsof Secrtion11 the application of the Income has to be made for objects in India. It is clear that if the application is made as such, then the exemption u/s 11 cannot be availed. However, in the case of CIT Vs State Bank of India (1988) 169 ITR 298(Bom) it was held that simply a clause in the trust deed which permitted application outside India without there being actual spending outside India would not violate Section 11(1) © of the Income-tax Act. Also, in the case of CIT Vs Trustees of Nizam's religious endowment trust (1977) 108 ITR 229(SC) it was held that in case of a trust having activities outside India, the exemption will be denied to the extent of income applied outside India.

Capital gains in case of Charitable Trust

The manner in which capital gains are to be dealt with in Section 11(1A) as reproduced hereinabove. In this regard, CBDT's Instruction No 883 [XXI/1/74] dated 24.09.1975 is to be noted which read as follows:

" Section 11(1A) of the Act provides that where a capital asset being property held under trust wholly for charitable or religious is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then the capital gain arising from the transfer shall be deemed

to have been applied to charitable or religious purpose to the extent specified therein.

2. *The Board had occasion to examine whether investment of the net consideration in fixed deposit with a bank would be regarded as utilisation of the amount of the net consideration for acquiring 'another capital asset' within the meaning of section 11(1A) of the Income-tax Act, 1961. The Board has been advised that investment of the net consideration in fixed deposit with a Bank for a period of 6 months or above would be regarded as utilisation of the net consideration for acquisition of 'another capital asset' within the meaning of section 11(1A)".*

   Thus, if a charitable trust simply puts the net consideration on transfer of capital asset in fixed deposit exceeding six months, no capital gains tax is payable.

Whether a charitable trust can accept donation in Cash?

There is no bar on a charitable trust accepting donation in cash directly. However in this regard, provisions of Section 269ST has to kept in mind wherein restriction has been provided in respect of receiving an amount of rupees two lakh or more from a person in a day or for a single transaction or in respect of one event or occasion form 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. Also as far as donor is concerned, Section 80G (5D) provides that no deduction shall be allowed under this Section in respect of donation of any sum exceeding Rs 2000/- unless such sum is paid by any mode other than cash.

Whether a Charitable Trust can make expenditure in cash?

An explanation 3 was inserted in Section 11 by Finance Act 2018 to provide that *for the purpose of determining the amount of application under clause (a) or clause (b), the provisions of sub-clause (ia) of clause (a) of Section 40 and sub-section (3) and (3A) of Section 40A, shall mutatis mutandis apply as they apply in computing the income chargeable under the head "profits and gains of business or profession".*

The expression "mutatis mutandis" has its usual meaning, that is , that only such verbal changes are to be made in the rules mentioned (in the rules where to be applied) as would make the principles embodied in these rules applicable to applications under (rules from where it is to be applied).

In this regard, the memorandum explaining provisions are as follows:-

At present, there are no restrictions on payments made in cash by charitable or religious trusts or institutions. There are also no checks on whether such trusts or institutions follow the provisions of deduction of tax at source under Chapter XVII-B of the Act. This has led to lack of an audit trail for verification of application of income.

- In order to encourage a less cash economy and to reduce the generation and circulation of black money, it is proposed to insert a new Explanation to the section 11 to provide that for the purposes of determining the application of income under the provisions of sub-section (1) of the said section, the provisions of sub-clause (ia) of clause (a) of section 40, and of sub-sections (3) and (3A) of section 40A, shall, *mutatis mutandis*, apply as they apply in computing the income chargeable under the head "Profits and gains of business or profession".

PRACTICAL GUIDE TO PRIVATE TRUST

CA RAMESH KUMAR PATODIA

The present article deals with various aspects relating to Private Trust including its definition and meaning as well as the issues relating to the creation, registration, amendment, extinguishment and taxation of a private discretionary and specific trust. The Private trust form is most widely used form for succession planning throughout the world in a most tax efficient manner.

Definition and meaning of Trust

a) As per Section 3 of the Indian Trust Act, 1882 a trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the "author of the trust"; the person who accepts the confidence is called the "trustee"; the person for whose benefit the confidence is accepted is called the "beneficiary"; the subject matter of the trust is called "trust-property" or "trust-money"; the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the "instrument of trust".

b) The property may belong to the beneficiary, but for obligation and use of it, the property vests in trustee. The trustee's ownership is qualified by the annexed obligation and is not absolute ownership as known to law. The trustee is placed under an obligation to use the ownership rights for the benefit of those to whom the ownership rights really belong.

Types of Trust

Two types of trust are prevailing i.e., Specific or Fixed Trust and Discretionary trust. In order to create a valid discretionary trust there has to be more than one beneficiary though the specific trust can have a single beneficiary.

a) Fixed Trust-A fixed trust is a trust in which the beneficiaries have a current fixed entitlement to such income as remained after proper exercise of trustee's powers. They have an interest in possession under the trust.

b) Discretionary Trust- A discretionary trust is a trust in which the beneficiaries have no such current fixed entitlement but only hope that the trustees, in carrying out their duty to consider how much income might be paid to which beneficiary, will in their discretion pay income to a particular beneficiary or beneficiaries. No interest in possession subsists.

Registration of a Trust-

The law of registration of documents is contained in Registration Act, 1908. Under Section 17 of the Registration Act, a non-testamentary instrument declaring any right, title or interest in an immovable property valuing Rs 100 or more is required to be registered.

As per Section 5 of the Indian Trust Act, 1882 no trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Non testamentary disposition of property is where property is given otherwise than by the instrument of will and can take effect during the life time of the person making the instrument.

Thus, unless there is an immovable property involved as a settlement in a private trust, the registration is not compulsory. Moreover, even if there is an immovable property which is subject matter of settlement, the registration is not compulsory is the trust is created by a will. The trust law recognises the creation of the trust by wills, no formal deed is necessary for the purpose of recognition of a trust created by a Will.

Who may create a Trust

a) a trust may be created as per Section 7 by
   (i) every person competent to contract
   (ii) With the permission of a principal civil court of original jurisdiction, by or on behalf of a minor.

Discretionary Trust

a) The Income-tax Act, 1961 doesn't define Discretionary Trust. However, Section 164(1) refers to discretionary trust as follows:-

Any income in respect of which the persons who are liable as representative assessee or any part thereof is not specifically receivable on behalf or for benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or part thereof is receivable are indeterminate or unknown.

The Apex court in the case of CWT v. Estate of Late Vikramsinhji of Gondal, (2015) 5 SCC 666: 2014 SCC OnLine SC 340 at page 673 observed as follows in relation to discretionary trust:-

A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour. [Snell's Principles of Equity, 28th Edn., 138]

b) Generally speaking a discretionary trust is a trust in which the individual shares in income or corpus of the beneficiaries are indeterminate or unknown.

A trust has to be certain as to its beneficiary

a) A trust has to be certain as to its beneficiary. Where it is for the benefit of an individual, it is expected that an alternative beneficiary should be provided in case of pre-decease of such individual before maturity of the trust. Where a trust is created for the two minors provided for the contingency of pre-decease of either of them, but not for the contingency of both, the AO held the trust to be invalid on grounds of uncertainty as regards the beneficiaries. The High Court in Mehra Trust (2006) 284 ITR 149(All) found that in such a case, Section 77 of the Trust Act would provide for extinguishment of the trust, so that it will revert back to the settlor. There is therefore no uncertainty as presumed by the AO. The trust was held to be valid.

Trust how extinguished

Section 77 of the Indian Trust Act, 1882 provides that a trust is extinguished-

(A) When its purpose is completely fulfilled; or

(B) When its purpose becomes unlawful; or

(C) When the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise ;or

(D) When the trust being revocable, is expressly revoked.

Revocation of trust-

Section 78 of the Indian Trust Act, 1882 provides that

A trust created by will may be revoked at the pleasure of the testator.

A trust otherwise created can be revoked only-

(A) Where all the beneficiaries are competent to contract – by their consent

(B) Where the trust has been declared by a non-testamentary instrument or by words of mouth- in exercise of a power of revocation expressly reserved to the author of the trust; or

(C) Where the trust is for the payment of debts of the author of the trust and has not been communicated to the creditors –at the pleasure of the author of the trust.

Nature of interest of a beneficiary under a discretionary trust

a) Often a question arises as to what is the nature of interest of a beneficiary of a private trust. In the case of Gartside Vs Inland Revenue Commissioners (1968) 70 ITR 663, 719-20(HL) it was held that

No doubt in a certain sense the beneficiary under a discretionary trust has an interest, the nature of it may sufficiently for the purpose be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by Court of equity. Certainly that is so and when it is said that he has a right to have the trustees exercise their discretion fairly and reasonably or properly that indicates that some objective consideration must be applied.

Amendment of the trust deed

a) Once a trust is setup by way of a trust deed, there may be a need to amend the trust deed.

The Apex court in the case of CIT Vs Kamla Town Trust Vs CIT (1996) 217 ITR 699(SC) held that It is not open to the AO to disregard the rectification of a trust deed, when it is done by order of a City Civil court though such order would operate only prospectively. It is important to note the following passage from the above judgement. So far as jurisdiction of the civil court to grant rectification of the trust deed is concerned the relevant provision is found in Section 26 of the Specific Relief Act, 1963 which had succeeded the prior Specific Relief Act of 1877. Under the earlier Act an analogous provision was found in Section 31 of the Act. As per these provisions a suit could be filed before the competent civil court for rectification of an instrument when through fraud or a mutual mistake of the parties a contract or other instrument in writing does not express their real intention. It is obvious that a trust deed is not a contract in the strict sense of the term but it would certainly be covered by the expression "other instrument in writing". It could therefore, not be urged with any emphasis that the competent civil court which was approached by the Settlor Company for rectification of the instrument of trust, was not having requisite jurisdiction to entertain such proceedings

Status of a Private Trust

There is a lot of ambiguity in this regard. In respect of the specific and Discretionary trust, there can be several permutations and combinations whereby individual and non-individuals can be beneficiary of the trust and a question arises whether trust derives its status from that of its Beneficiaries or that of its Trustees?

A trustee appointed under a trust, declared by a duly executed instrument in writing (oral trust included), testamentary or otherwise, is a representative assessee as per section 160 of the Act provided he receives or is entitled to receive any income on behalf of or for the benefit of any person. Such a trustee is deemed to be an assessee for the purpose of the Act. The computation of income and also the taxation thereof must be in like manner and to the same extent as it would be in respect of the person beneficially entitled to the income. This position in law is by virtue of express provisions of sec 161(1).

Thus, Trustee is only a representative of the beneficiaries. He represents the beneficiaries who are the real owners and the income is also be liable to taxed in the like manner and to the same extent as it would have been in respect of beneficiaries.

The Apex Court in the case of CWT v/s Nizam's Family (Reminder Wealth) Trust (Trustees of HEH)(1977) 3 SCC 362(SC) held that the words 'in like manner and to the same extent ' have to be construed that there would have to be as many assessments on the trustees as there are beneficiaries with determinate and known shares. In a number of cases it has been held that if the beneficiary is an individual then the status of the trustee would also be that of an individual. This would be so even if there is more than one beneficiary provided all of them are individuals. The assessment will be taxed at individual rates of taxes applicable to total income of each beneficiary.

Again , the Delhi High Court in the case of CIT Vs Food Corporation of India, Contributory Provident Fund Trust(2009) 318 ITR 318(Del) has held that in order to determine whether an assessee is responsible for deduction of tax at source, the status of the assessee is required to be determined and in case of a trust where individuals are beneficiaries, the trust has to be treated as individual and hence no deduction of tax at source is required to be done u/s 194A.

The High Court upheld the ITAT order which had relied on the following decisions:-

CIT Vs SAE Head office Monthly paid Employees Welfare trust(2004) 271 ITR 159(Del)

CIT Vs Shri Krishna Bhandari Trust(1993) 201 ITR 989(Cal)

CIT Vs Deepak Family Trust(No 1) (1995) 211 ITR 575(Guj)

M L Family trust Vs State of Gujrat (1995) 213 ITR 152(Guj)

ITO Vs Arihant Trust (1995) 214 ITR 306(Mad)

CIT Vs T S K Enterprises (2005) 274 ITR 41(Mad)

Status of Specific Trust

I) In accordance with the interpretation hereinabove as well as the Apex Court case of

N.V.Shanmugham& Co. v/s CIT [1971] 81 ITR 310 (SC). it is clear that:

A) There would have to be as many assessments on Trustees with determinate or known shares.

B) Assessment of the trustee would have to be made in the same status as that of the beneficiary whose income is sought to be taxed

C) The amount of tax payable by trustee would be the same as that payable by each beneficiary in respect of his beneficial interest, if he were to be assessed directly.

If there are two beneficiaries say one being an individual and the other being a Hindu Undivided Family, the trustee would be liable to tax with respect to the share of the individual beneficiary in the status of "individual" and with respect to the share of "HUF".

FILING OF RETURN/PAN

There is no provision for mentioning multiple statuses in one Return of Income or a single PAN application.

The return of income as well as the software is not designed in accordance with this law. CBDT issued a Circular No. 6/2012 [F.No.133/44/2012-SO (TPL)] facilitating manual filing of Return of Income of Private Trusts since the exiting e-filing software did not accept Return of income of a Private Discretionary Trust in the status of an individual. However, there are no such circulars in subsequent years and as such this is a perennial problem faced by the assessees and the returns are being filed and accepted in wrong status.

II. Status of Discretionary Trust

To begin with, when the shares of the beneficiaries are indeterminate, the income cannot be assessed in the hands of the beneficiaries. Tax shall be charged on relevant income at maximum marginal rate in the hands of Trustees. If the case falls into exceptions provided in proviso 164(1) then tax shall be charged on relevant income as if it were the total income of an AOP. It is only that the tax shall be charged as if it were an AOP, not necessarily that the status shall be determined on that basis.

A. If there are two or more beneficiaries who are individuals?

In a case where all the beneficiaries are individuals status of such a private discretionary trust would be that of an Individual:

- CIT v/s Deepak Family Trusts 211 ITR 575 (Guj)
- CIT v/s Shri Krishna Bandar Trust 201 ITR 989 (Cal.)

B. If there are two or more beneficiaries some of whom are individual, and the others are non-individuals.

In the case of CITv.Indira Balkrishna [1960] (39 ITR 546) the Hon'ble SC while considering what constitutes an association of persons, held that the word "association" means "to join in any purpose" or "to join in an action". Therefore, "association of persons" as used in section 2(31) (v) of the Income-tax Act, 1961, means an association in which two or more persons join in a common purpose or common action. In the present case, neither the trustees nor the beneficiaries can be considered as having come together with the common purpose of earning income. The beneficiaries have not set up the trust. The trustees derived their authorities under the terms of the deed of trust. Neither the trust nor the beneficiaries have come together for a common purpose. They are merely in receipt of income. The mere fact that the beneficiaries or the trustees being representative assessees are more than one, cannot lead to the conclusion that they constitute "an association of persons".

Thus, here also the status cannot be AOP. The question of status of these types of Private Discretionary Trusts seems to be wide open.

C. If there are only non-individual beneficiaries

Where there are only one type of beneficiaries, say only Corporates the status of the discretionary private Trust may be considered as "Company".

Taxation of Private Discretionary trust

Chapter XV of the Income-tax Act 1961 deals with the liability of the Representative Assessees –general provisions.

Section 160

a) Section 160(1)(iv)- representative assessee means in respect of income which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise receives or is entitled to receive on

behalf of or for the benefit of any person such trustee or trustees.

b) Section 160(1)(v)- in respect of income which a trustee appointed under an oral trust receives or is entitled to receive on behalf of or for the benefit of any person, such trustee or trustees.

c) Explanation 1 contains a deeming fiction whereby in certain cases- a trust even though not declared by a duly executed instrument is writing is deemed to be a trust declared by a instrument in writing.

d) Explanation 2 –definition of oral trust- which has not been declared by a duly executed instrument in writing and which has not been deemed to be a trust duly declared by an instrument in writing as per Explanation 1

Section 161

a) Section 161(1)-every assessee to be assessed in the same manner in which it is assessable upon the beneficiary.

b) Section 161(1A)-business income-taxable as MMR. The rationale behind this is explained in the CBDT Circular No 387 dated 6th July,1984 that Trustees of a trust are ordinarily not expected to carry on any business, because implicit in the nature of business is the possibility of incurring loss and no prudent trustee would like to risk the trust's property in business venture. However, increasingly it has been seen that taxpayers are conducting business through the medium of trusts and the arrangements are mainly entered for the purpose of tax avoidance, the main object being to avoid payment of the tax firm tax which would become payable if the business is carried on in partnership.

However, MMR is not applicable where profit and gains are receivable by trust declared by a person by will exclusively for the benefit of any relative dependent upon him for support and maintenance, and such trust is the only trust so declared by him.(Relative –Section 2(41).

c) Section 161(2)-where an income already assessed in the hands of the representative assessee –cannot again be taxed under any other provisions of the Act.

Section 164-Charge of tax where share of beneficiaries unknown

-164(1)-any income which is not specifically receivable on behalf of or for the benefit of any person or where the individual shares of the person on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown the tax shall be charged at MMR.

Exceptions

a) None of the beneficiaries have any other income chargeable under the Act exceeding the maximum amount not chargeable to tax in the case of an AOP or is a beneficiary under any other trust, or

b) Where the trust is declared by a will and the trust is the only trust so declared or

c) The relevant income is receivable by trustees on behalf of a provident fund, superannuation fund, gratuity fund, pension fund or any other fund created bonafide by a person carrying on a business or profession exclusively for the benefit of the persons employed in such business or profession.

In such cases the tax shall be charged as if the same were total income of an AOP.

Again in case of income from business or profession, the tax shall be chargeable at AOP rate only if the trust is declared by will exclusively for the benefit of any relative dependent on him for support and maintenance and such trust is the only trust so declared by him.

Explanation 1 of Section 164- deals with

a) Deeming fiction as to when any income shall be deemed as being not specifically receivable on behalf or for the benefit of any one person

b) Deeming fiction as to when the individual shares of the person on whose behalf or for whose benefit such income or part thereof is receivable shall be deemed to indeterminate or unknown Section 164A-Oral trust-MMR Rate.

The provisions were introduced by the Finance Act, 1981 w.e.f. 1/4/1981 and the provisions as introduced has been explained in CBDT Circular No. 308 dated 29/6/1981.The effect of the provisions are

a) An oral trust, the terms of which are not subsequently recorded in writing and intimated to the AO in the specified manner, will be chargeable to tax at the MMR rate in all cases; and

b) An oral trust, the terms whereof are subsequently recorded in writing and intimated to the AO in the

specified manner, will be chargeable to income-tax at the MMR rate in cases where the shares of the beneficiaries are indeterminate or unknown. Where however the shares are determined the tax would be recovered in the same manner as the beneficiaries.

Section 166- direct assessment or recovery not barred

As per this section, the AO can directly assess the beneficiary also in respect of the income which is receivable by him in case the AO finds it to be beneficial in the interest of revenue. It has been held in the context of discretionary trust that the income of a particular year when accrued in the hands of a discretionary trust can be taxed in the hands of trust only since until it is distributed, one cannot say it belongs to which beneficiary. However, if the income is distributed in the same year in which it is earned, then the AO can apply the provisions of Section 166 to assess either the trust or the beneficiary.

Trust created for benefit of minor

Where a trust is created for the deferred benefit of a minor child by accumulated the income of the trust until such time the minor attains majority, the provision relating to clubbing u/s 64(1A) are not applicable.

CIT Vs M R Doshi (1995) 211 ITR 1(SC). See also Kapoor Chand (Dead) 376 ITR 450(SC)

However, this doesn't mean that even the trust cannot be taxed-See Ganesh Chhababhai Valabhai Patel Vs CIT (2002) 258 ITR 193(Guj).

Trust for unborn child

A trust for an unborn child is a valid trust-
CWT Vs Rakesh Mohan (2007) 289 ITR 308(All)

Specific trust becoming discretionary and vice versa

In case of a discretionary trust, if the shares are specified later on the trust becomes a specific trust from the date of the specification- CIT Vs Devshi Trust(2005) 279 ITR 519(Bom). Similarly there may be a specific trust and may be made discretionary later on. Until it is discretionary the same has to be treated as specific trust. CIT Vs Mani Enterprises (2004) 267 ITR 157(Guj).

Meaning of Maximum Marginal Rate(MMR)

Maximum rate of tax is prescribed by law in certain cases as in case of a discretionary trust, where the shares of the beneficiaries are not specified. Should such assessees be deprived of a minimum exemption limit, so as to apply maximum rate for the entire wealth? The issue was decided by the Supreme Court in favour the tax payer in the case of DIT Vs Gopal Srinivasan Trust(2002) 253 ITR 759(SC). It was found that the maximum rate would have no application in respect of wealth for which no tax was payable. The objective of maximum rate was that the revenue should not lose, where the wealth was taxable but not to bring to tax, what would not have been taxable.

Section 161(1A) prescribed liability at MMR for a trust which carries on a business. Where there is a business loss, but all the same, it has other taxable income, the issue whether MMR rate would apply to the income even in such a case, is debatable. See GangaMedical Trust Vs CIT (2003) 261 ITR 286(Mad).

Trust income not to be included for rate purposed- CIT Vs P N Bajaj (2003) 262 ITR 593(Mad) – since the trustees are assessed in the same status as that of beneficiary –there cannot be any reason for inclusion of the income from trust for rate purposes u/s 86.

Where the beneficiaries itself are trust- if they are so specified- MMR May not be applicable- CIT Vs Srinivali Trust (2004) 267 ITR 165(Guj).

Conclusion

The above provisions are general provisions as applicable to specific and discretionary trust.

DEVELOPMENT AGREEMENTS - AREA SHARING AND REVENUE SHARING-TAX ISSUES

CA ASHOK RAGHAVAN

The transfer of immovable property by owners of land through the developers and/or his nominees using the mechanism of a Development Agreement (popularly known as a Joint Development Agreement) has been rampant especially in prime urban areas where the Owners but do not have the time or expertise to develop the land and market the property on their own and therefore enter into as arrangement of mutual benefit with a reputed builder known as a Developer for developing and marketing the development to various buyers of individual units. The Development Agreements are either entered into under the Area Sharing Method or the Revenue Sharing Method.

A. Broad Features of Area Sharing Development Agreements:

i. Owner of lands:

A Single Owner being an individual or an entity or a group of Co-Owners own certain lands.

ii. Conversion:

Such lands may be agricultural in nature and they get 'converted' by suitable orders of the competent statutory authorities for use for non-agricultural purposes i.e., for the development of sites, flats, apartments, townships etc.

iii. Offer of developer:

A Property Developer approaches the Owners and offers the following: -

a. To construct for the Owners certain specified extent of built up area of flats / apartments together with the right to use certain common areas, facilities and amenities.

b. In return for the same, the Owner agrees to sell a specified share / percentage of undivided interest in the land to the prospective buyers nominated by the Developer.

iv. Acceptance and execution of development agreement:

The aforesaid terms are accepted by the Owners and in pursuance thereof the Development Agreements are entered into between the Owners and the Developers. Under these agreements the Developer by himself does not purchase any immovable property from the Owner and it is the prospective buyer who buys a specified share of undivided interest in the land from the Owner or Developer as the case may be. Therefore, these agreements between the Owner and the Developer are purely contractual and commercial in nature and hence logically the provisions of Section 53A of the Transfer of Property Act, 1882 should not apply since the Developer by himself is not a transferee / purchaser of any immovable property. Further the development agreement is more in the nature for a "contract for sale" and not a "contract of sale".

v. Popularly known as Joint Development:

Even though it is only the Developer who develops the property and constructs the super structure, is responsible for all the risks and obligations attached to the development, the above arrangement is popularly known as "Joint Development".

vi. Developer to nominate buyers:

The Developer is authorized to exclusively nominate the prospective buyers for his share of super built area known as "Developers Share", and enter into agreements with them fixing the sale price/s and consideration payable by them.

vii. G.P.A to Developer:

The Developer is empowered through a General Power of Attorney (GPA) by the Owner to act on Owner's behalf and agree to sell certain specified shares of undivided interests in the land to the prospective buyers at the aforesaid prices fixed for this purpose. A General Power of Attorney given by the Owner to a Developer constitutes only an authority given to a Developer to act for and on behalf of and in the name of the Owner. No right or interest in the immovable property or right to have possession of the property is conferred on the Developer in any manner whatsoever. The GPA also empowers the

Developer to do all acts, deeds and things in pursuance of the Development Agreement including applying for plan sanction, various licences and clearances required for the development of the Project.

viii. No power given to Developer to execute Sale Deeds and possession to prospective buyers before sale:

The Developer is not given any power to execute sale deeds/ lease deeds/mortgage deeds etc in favour of the prospective buyers and /or others but only given the power to enter into agreements and collect advances from the prospective customers. Such power to execute sale deeds etc is conferred on the Developer on completing the construction of the specified built up area of flats / apartments for the Owner as per the agreed specifications and dimensions, and on handing over the same to the Owner with 'occupancy' rights on or after being granted by the competent statutory authorities. At this stage the sale deeds are executed by the Owner himself in favour of the prospective buyers or in the alternative, only at this stage the Owner gives a separate General Power of Attorney to the Developer to execute and register the sale deeds on Owner's behalf to and in favour of the prospective buyers. At no stage before the actual sales are effected, the prospective buyers are put in possession of the flats / apartments sold to them.

ix. Allocation/ Area Sharing Agreement

The Owner and the Developer will enter into area sharing/allocation agreement immediately after the receipt of plan sanction. In the said agreement, the Parties will clearly identify the units which will be allotted to the Developer as a part of Developer's share and to be allotted the Owner as a part of the Developer share. Such allocation can also be done Block-wise, Floor-wise or Unit-wise.

x. Developer's right to entry is only 'License' – not possession:

It will be specifically provided that the development and construction and such right of entry is only a License coming within the purview of the provisions of Section 52 of the Indian Easements Act 1882. It will be clearly provided and recorded that the legal domain, control and physical possession of the property shall be vested with and remain with the Owner till the same or parts thereof are sold to the prospective buyers.

The Developer is only permitted to enter the property for the limited purpose of development. The Developer not being the purchaser or a transferee, the provisions of Section 53-A of the Transfer of Property Act 1882 should have no application and the aforesaid right of entry to the Developer constitutes only a 'License' coming within the meaning of the term under the aforesaid Section 52 of the Indian Easements Act 1882.

xi. Separate agreements for flats / apartments:

The Developer enters into separate agreements for construction with the prospective buyers fixing the consideration payable by them for the super built area in respect of the Developers share which devolves upon the Developer as per the development agreement. These agreements are entered into by the Developer on his own and not as a G.P.A holder for the Owner. Further the Developer also enters an agreement of sale of undivided share of right, title and interest in land in favour of the prospective buyers of apartments where he acts in the capacity of the GPA holder for and on behalf of the Owner and also himself joining the said agreement as a confirming party.

xii. Registration of Agreements – Benefits Available:

The Development Agreements entered into by the Owners with the Developers can be registered with the appropriate registration authorities of the State Government under the Registration Act 1908, and they will get the benefit of entry into Book-I maintained in the Registrar's Office. Such entry will ensure that there is 'public notice' to these documents and their contents. Whenever any encumbrance certificates are obtained on the concerned immovable properties, there will be entries recording the execution of the Development Agreement. The General Power of Attorney (GPA) given to a Developer by the Owner can also be registered in the same manner and the same will be entered in Book IV maintained at the Sub Registrar's office. When the fact of this G.P.A is recorded in the Development Agreements, there will be 'Public Notice' to the G.P.A also. As the G.P.A's are given to the Developer for 'consideration', these G.P.A's will become irrevocable as it will be treated as creating an agency coupled with interest to come within the purview of the provisions of Section 202 of the Indian Contract Act 1872. There

will be a suitable clause in the G.P.A to indicate that the same is irrevocable. The total cost of stamp duty and registration fee payable on development agreements and the general power of attorney granted in pursuance to the same vary in different states. Generally, the stamp duty payable on the GPA is nominal if the appropriate full stamp duty is paid on the Development Agreement and vice versa.

B. Main Points Relating to Taxation Highlighted:

i. The Developer is not a Transferee / Purchaser coming within the meaning of Section 53A of the Transfer of Property Act 1882.

ii. The Developer does not buy any land or property from the Owners.

iii. The right to develop the property granted to a Developer as provided in the Development agreement does not constitute a contract to a transfer of any immovable property as between the Owner and the Developer, to attract the provisions of Section 53-A of the Transfer of Property Act 1882 between them.

iv. The Development agreement is a "contract for sale" and not" a contract of sale" and hence there is no interest created on the property per se in favour of the Developer.

v. The Developer only nominates the prospective buyers for his share.

vi. The Developer enters the property only for the purposes of development of the property under a licence issued which is of the nature prescribed u/s 52 of the Indian Easements Act 1882 and not as a purchaser / transferee.

vii. The G.P.A given to a Developer is only to enter into agreements with the prospective buyers for and on behalf of the Owner and not for executing the sale deeds. There will be a restrictive clause in the G.P.A to this effect.

viii. Only the prospective buyers are the purchasers / transferees in respect of the flats / apartments purchased by them together with the corresponding shares of undivided interests, rights and titles in the land.

ix. The prospective buyers of flats / apartments are never put into possession of their apartments before the sale deeds are executed and registered in their favour and hence there is no scope for invoking the provisions of Section 2(47)(v) read with Section 45 of the Income tax Act 1961 and the provisions of Section 53-A of the Transfer of Property Act 1882.

x. It is only the Developer who develops the lands by constructing flats/ apartments together with common ways, infrastructure, amenities and facilities both for the Owners of lands as well as for the prospective buyers of flats/ apartments and his profit margins is assessable as business income.

xi. In the hands of the Owners, the chargeability to tax the gains made by them will be treated as follows: -

a. Normally only as and when the flats / apartments constructed by the Developer towards the Owners share are handed over to the Owner post completion, the Owner hands over the legal possession of the Developers share to the Developer and/or his/its nominees and at this point of time the Owner becomes liable to pay Capital gains on the transfer of the land pertaining to the Developers share . The deemed value of consideration for the transfer of the Developers share of land to the Developer and/or its/his nominees to the Owner, will be equal to the cost of the flats / apartments built by the Developer for the Owners. On the occupancy of these flats / apartments being given to the Owners after the completion of the construction of the same as per the specifications and dimensions mutually agreed to between the Owners and the Developer, the consideration to be given to the Owners becomes fully /discharged.

b. When the Owners get more flats / apartments than what they can personally use and occupy, they affect sales of such additional flats / apartments. When such sales are made the following position will emerge.

c. If the sales are made within two years (earlier three years) from the date when occupancy was given to the Owners, the further gains made by them on sale of the super built up area will be treated as short term capital gains and if the sale of the super built up area is effected after a period of three years after taking possession, the gains will be treated as long term capital gains. However, it is to be noted that the consideration for the sale of undivided share of land relating to the Owners share of apartments will be taxed as long-term capital gains only as the same were

always held by the Owners and not transferred at any time to the Developer or his nominees.

There is a credible argument to also treat the transfer of the super built area i.e., the units belonging to the Owners share as long term capital gains even if the same were to be sold(transferred) immediately after receiving possession from the Developer to the ultimate Buyer(transferee), on the ground that the right to receive a specific identified super built up area fructified and crystallised as on the date of entering into the Allocation Agreement/Area Sharing Agreement between the Owner and the Developer. In this regard there are a catena of decisions which have held that the period of holding for the purpose of determining the capital gains arising from sale/transfer of a capital asset should be reckoned from the date on which he had a right in the capital asset, which could either be the date of Agreement or Allotment of a unit. The decisions to be referred to in this regard are as follows:

Allotment of flat to Assessee results in Conferment of Rights to the Assessee in the property and period of holding is to be reckoned from the date of allotment of Flat.

- Madhu Kaul v. CIT & Anr. (2014) 57 (I) ITCL 306 (Punj &Har-HC) : (2014) 363 ITR 54 (Punj &Har)
- Vinod Kumar Jain v/s CIT (2012) 344 ITR 501 (P& H)
- ITO Vs Jayshree H Jain (2016) 150 TR (A) 758 (Mum-Trib).
- ACIT v. Keyur Hemant Shah (2019) : (2019) 72 ITR (Trib) 108 (Mum-Trib) (2019) 199 TTJ (Mum-Trib) 388
- Gurucharansingh Anand v. Dy.CIT (1993) 45 ITD 299 (JP-Trib) Jaipur Bench
- Asstt.CIT v. Nagesh C Kawale (2001) 73 ITD 38 (Pune-Trib)
- Awadhnarayan Lakshminarayana Singh vs. DCIT, ITA No. 5555/Mum/2017, ITAT "A" Bench Mumbai, rendered on 12/12/2018.
- DCIT vs Jennifer Chakraborty (2018) ITA no 400/Kol/2016 and ITA no 514/Kol/2016 rendered on 31st July 2018.
- ACIT Central Circle 16(2) Mumbai vs Ashwin Bhalekar ITA no 6822/Mum/2016 (ITAT Mumbai "A" Bench) rendered on 21-5-2019
- CIT vs Ram Gopal (2015) 55 taxmann.com 536 (Del)
- ITO V/S Monish Kaan Tahilramani ITA No 4715 / Mum / 2015 ITAT Mumbai Bench Rendered ON 2/04/2019
- CIT V/S Tata Teleservices Ltd (1980) 122 ITR 594 (Bombay)
- CIT V/S Sterling Investment Corporation Ltd 123 ITR 441.
- Sanjeev Lal & another vs. CIT (2014) 365 ITR 389 (SC)

It has also been held that the allotment of an apartment is by itself a right acquired by the allottee in the apartment and in case of transfer of such right by the allottee after the period of 3 years the same will be considered as transfer of long term capital asset with capital gains applicable accordingly.

- Miss Indira Vasanji Shah v. DCIT (2017) ITA No.8805/Mum/2011
- Bhagwan J Tahilliani (HUF) vs. ITO, [2018] 67 ITR (S.N.) 38 (Mumbai ITAT)

Allotment right will commence from the date from which the agreement in pursuance of the allotment letter is entered into and not from the date of the allotment or confirmation letter.

- Gulshan Malik v CIT (2014) 223 Taxman 243 (Del).

xii) Claiming of deduction under Section 54F by the Land Owner

Where the Owners retain one flat each out of the total number of apartments allotted to them towards their share, each of them will be entitled to claim exemption under Section 54F of the Income tax Act on the cost of construction of such retained apartment, subject however to other conditions under Section 54F being fulfilled by them.

In another interesting decision in the case of Vittal Krishna Conjeevaram V ITO (2013) 144 ITD 325 (Hyd "A" Trib), the tribunal has held that where an Owner received seven flats in exchange for the portion of land being a residential property in pursuance to a

development agreement, he was entitled to a deduction u/s 54F in respect of all seven flats received following the decisions of the Karnataka and Andhra Pradesh High Courts referred above. The analogy adopted in the above decision has also been affirmed by the Madras High Court in CIT Coimbatore Vs Smt V R Karpagam (2014) 50 taxmann.com 55 rendered on 18th August 2014 also reported in (2015) 373 ITR 127 (Mad) and by the ITAT "A" Bench Chennai in the case of ITO Business Ward V (1) Chennai Tribunal vs PA Sarala (2015) 58 taxmann.com 290 rendered on 15-5-2015.

The other case laws that have upheld the analogy rendered by the above decisions are detailed below:

- CIT v. Smt K.G Rukminiamma 331 ITR 211 (Kar-HC)
- CIT Vs. Gumanmal Jain (2017) 394 ITR 666 (Mad)
- ITO v. Sureddy Venkata Ramanamamma (2017) 165 ITD 574 (Vishaka)
- Dr, Sudhir Naik and others vs ITO, 4(2) Hyd ITA No. 1463 and 1467/Hyd/2016 ITAT "A"Bench rendered on 31/01/2018.
- Harbinder Singh Chimni v. Dy. CIT [2018] 68 ITR (Trib) (S.N.) 73 (Delhi)
- Meghraj Singh Shekhawat v. Dy. CIT I. T. A. Nos. 443 and 444/JP/2017 dated March 7, 2018.
- Damodar Reddy Vs. ITO ITA No. 3052/Bang/2018 rendered on 9 January,2019 (ITAT, BANGALORE BENCH)
- B J Badrinath v. ITO (2019) 168 TR (A) 820 (Ban Trib) Ward 4(3)(1)- ITA No. 2938/Bangalore/2018 rendered on 16/11/2018 (ITAT "SMC, C" Bench : Bangalore)
- A.R. Prasad v. ITO Ward 6(2)(4) and A.P. Lakshmi Gowri v. ITO ward 6(2014) ITA no. 956 & 957 (Bangalore) 2016 rendered on 28/08/2019 ITAT Bangalore Bench at Bangalore.

These decisions may however not be relevant any more with the amendment to the provisions of Section 54 and 54F by the Finance Act 2014 where it is now clearly mandated by law that the assessee will be entitled to exemption to the extent of investment in "one house" only

C. TRANSFER TAKES PLACE ON THE DATE OF SIGNING THE DEVELOPMENT AGREEMENT

However, it is pertinent and relevant to state that in spite of all the basic concepts mentioned above indicating that there cannot be a "transfer" on the date of entering into the joint development agreement, a spate of decisions rendered by various courts and tribunals which are detailed below, have held that there is a "transfer" to the extent of the Developers Share in the land as on the date of entering into the Joint Development agreement itself. The decisions have been rendered on the analogy that the Developer has been given unrestricted and unbridled right to enter into Agreements for Sale and even Sale Deeds in respect of his/its share of units, the right to mortgage his/its share of units for construction finance thereby indicating that the domain and control of the immovable property to the extent of the Developers Share is already transferred to and vested with the Developer as on the date of entering into the Development Agreement.

The decisions to be referred to in this regard are as under:

The Karnataka High Court has vide its judgement rendered on 20th June 2011 in the case of CIT Vs Dr T K Dayalu in ITA No 3209 of 2005 C/W ITA No 3165 of 2005, 60 DTR (Kar) 403, 202 Taxman 531(Kar), following the decision of the Bombay High Court in the case of of Charturbuj Dwarakadas Kapadia Vs CIT (2003) 260 ITR 491 (Bom), held that the "transfer" as far as the Owner is concerned takes place on the date of entering into the development agreement on the ground that possession given to a Developer would also fall into the ambit of the definition of "transfer" u/s 53A of the transfer of Property Act 1882 r/w Section 2(47)(v) of the Income Tax Act. This judgement with due respect seems to be flawed as it has not considered the basic fact that the possession given to a Developer is permissive possession and cannot be construed as a possession given in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act.

The Karnataka High Court has in the case of CIT and Others Vs H B Jairaj (2012)43(I) ITCL 85 in ITA No 20 of 2005 C/W ITA No 21 of 2005 rendered on 16th September 2011,held that the date of entering into the Development agreement should be reckoned as the date of "transfer' of land to assess the Capital Gains arising to the Owner, thereby confirming the

principle laid down in Dr TK Dayalu's decision as above and has further followed the said principle in the case of CIT Vs Ved Prakash Rakhra (2012) 210 Taxman 605 Karnataka: (2013) 256 CTR (Karn) 285. The analogy of the Karnataka High Court in the case of Dr.T.K. Dayalu and H.P.Jayaraj (Supra) has been followed by the said court in the case of Smt. Prameela Krishnan vs. Income Tax Officer, Ward -1(2) Mysore vide judgement dated 18/11/2013 reported in [2014] 42 taxmann.com 185 Karnataka and (2014) 221 Taxmann 418(Kar).

The Bangalore ITAT "A" Bench has in the case of ITO v/s M.S Nagaraj ITA No. 676/Bang/2011 vide its judgement rendered on 01.12.2014 reported in 52 taxmann.com 511 confirmed the analogy of the decisions in the case of Dr. T.K Dayalu and Ved Prakash Rakhra (Supra), by holding that the "transfer" takes place on the date of entering into Joint Development and the consideration for the purpose of transfer is the cost of construction to be incurred by the developer on the Owner share of super built up area. It is important to note that this judgement all though rendered after the provisions of Section 50D came into force relates to an assessment year which is prior to the year in which Section 50D was introduced.

The Tribunal in rendering its decision has also cited the decisions of the Madras High Court in the case of T.V Sundaram Iyengar and Sons 37 ITR 26 and that of the Apex Court in the case of Alapathi Venkataramiah v/s CIT (1965) 57 ITR 185(SC). In the said case the Hon'ble court has observed that to attract the liability to tax under Section 45, it is sufficient if in the accounting year, profits have arisen out of the transfer of capital assets and the assessee had a right to receive the profit. The court also held that the actual receipt of profit is not a relevant consideration.

The Hyderabad Tribunal in the case of ACIT Vs A Ram Reddy(2012) 23 Taxmann.com 59 and reported in 52 SOT 521 (Hyd B Trib) has held that the date of entering into the development agreement is the date regarded as "transfer" u/s 2(47)(v) of the Income Tax Act 1961, as the Developer has got general control over the property to use it for the intended purpose based on the earlier judgement of the Hyderabad Tribunal in the case of Dr Maya Shenoy (2009)124 TTJ 692(Hyd) and that of the Bombay High Court in the case of of Charturbuj Dwarakadas Kapadia Vs CIT (2003) 260 ITR 491 (Bom). The decision in the case of Ram Reddy (supra) has been further followed by the Hyderabad Tribunal in the case of Krishnakumar D Shah (HUF) vs DCIT(2012) 23 taxmann.com 111 and in the case of Ravinder Singh Arora vs ACIT 10(1) Hyderabad rendered on 20th of July 2012(ITA Appeal Nos 58&355(Hyd) of 2011 and in the case of Mrs Durdana Khatoon Vs ACIT(2013) 24 ITR 55(Hyd B Bench) rendered on 5-3-2013.

The decision of the Andhra Pradesh High Court in the case of Potla Nageswar Rao Vs DCIT IITA 245 of 2014 rendered on 9-4-2014 reported in (2014) 365 ITR 249 (AP), (2014) 269 CTR (Hyd) 325, also supports the view adopted in the above cases.

Other decisions which have upheld the aforesaid analogy are given below:

1. Mahesh Nemichandra Ganeshwade vs. ITO (2012) 17 ITR 116 (Pune 'A' Trib)
2. Krishnakumar D Shah (HUF) Vs DCIT(2012) 23 taxmann.com 111
3. Jasbir Singh Sarkaria (2007) 294ITR 196(AAR)
4. Azad Zubarchand Bhandari Vs Asst CIT(2013) 58 SOT 347 (Mum 'A" Trib)
5. Taher Alimohammed Poonawala v. Addl. CIT [2009] 124 TTJ (Pune) 387- ITAT Pune Bench
6. Ms Rubab M Kazerani Vs Jt CIT(2005) 2(II) ITCL 456(Mum-Trib)(TM)
7. ITO Vs Vikash Behal (2010) 34(II) ITCL 73 (Kol "C" Trib)
8. G Sreenivasan V Dy CIT (2013) 140 ITD 235 (Coch-Trib)
9. R Kalanidhi Vs ITO (2009) 314 ITR (AT) 266 (Chennai-ITAT)
10. DCIT Vs Jai Trikanand Rao (2014)149 ITD 112 (Mum J Trib)
11. Ram Prasad Vs Dy CIT (2015) TaxPub(DT) 5142 (Hyd 'A' Trib)
12. B V Narayana Reddy v. Asst CIT (2015) TaxPub (DT) 4553 (Hyd 'B' - Trib)
13. ITO Vs Ayisha
14. Fathima (2016) 160 ITD 377 (ITAT Chennai Bench D): (2016) 182 TTJ(ITAT Chennai Bench D) 437
15. Adinarayana Reddy Kummeta vs ACIT Circle-11(1), Hyderabad [2018] 91 taxmann.com 360 [Hyderabad-Trib.].

16. CIT v. Jeelani Basha (2002) 256 ITR 282/122 Taxman 509 (Mad)
17. Tamilnadu Brick Industries V ITO ITA no 744/ Chny/ 2017 rendered on 11-5-2018
18. Kasturi D v CIT 323 ITR 40 (Mad)
19. Udai Hospitals Pvt Ltd vs ITO. Ward 17(3), Hyd, (ITAT "B" Bench) ITA No. 1755/Hyd/2017 rendered on 28/09/2018.
20. K Vijaya Lakshmi Vs ACIT ITA no. 1561/Hyd/2016 and 372/Hyd/2017 rendered on 28/02/2018.
21. K. Vijaya Lakshmi Vs ACIT (2019) 165 TR (A) 253 (Hyd-Trib): (2018) 195 TTJ (Hyd 'B' - Trib) 114
22. Vijaya Productions (P) Ltd vs Addl. CIT (2012) 134 ITD 19 (Chennai-Trib)(TM)
23. Dy. CIT vs. Jamnaben J Gokani 2015 TaxPub(DT) 1224 (Mum 'E' - Trib)
24. ITO vs. Arvind Govardhan & Others (2018) TaxPub DT 235 (Bang 'A' - Trib): 61 ITR (Trib) 159 (Bang 'A' - Trib)
25. Damodar Reddy Vs. ITO ITA No. 3052/Bang/2018 rendered on 9 January,2019 (ITAT, BANGALORE BENCH)

It is respectfully submitted that the adverse decisions as detailed above have emanated purely as a result of faulty documentation and lack of proper representation before the judicial authorities. The critical aspect that there has to be a definite value for the consideration as on the date of transfer and other critical aspects has not been put forth properly and effectively during the judicial proceedings.

The credible arguments which could have been put forth before the relevant judicial authorities and which could now be canvassed before the apex court are as follows-

a) The following observation of the Supreme Court in the case of Govind Saran Ganga Saran v/s Commissioner of Sales Tax and Others (1985) 155 ITR 145 (SC) is worth considering

   The Components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity.

It is well settled that when the language of the statute is clear and admits of no ambiguity, recourse to the Statement of Objects and Reasons for the purpose of construing a statutory provision is not permissible.

b) The following observation of the Supreme Court in the case of Her Highness Maharani Shantidevi P Gaikwad vs. Savjibhai Haribhai Patel AIR 2001 (SC) 1462 (2001) 5 SCC 101 involved a Development agreement between an Owner and a Developer for development of a large tract of land into a housing scheme complying with the Urban Land Ceiling Act. A Power of Attorney expressly made irrevocable was also made by the Owner in favour of the Developer. Holding that the agreement was validly terminated under the terms of the agreement, the court observed that " Section 202 had no applicability"; thus making powers under the Power of Attorney subservient to the terms of the agreement. The Court also observed:

   " It is not a case of agency coupled with interest. No interest can be said to have been created on account of plaintiff being permitted to prepare the scheme and take ancillary steps".

   An agreement with the Developer under which he will develop the land does not create interest in the property to be developed. Such contract itself can be terminated under circumstances. Hence a Power of Attorney given to a Developer for giving effect to an earlier agreement of development is not coupled with interest and is not irrevocable. The rights of the Developer flow from the development agreement. If stated as irrevocable, and is revoked, the agent can claim compensation.

c) To highlight this analogy the following observations of the Supreme Court in the case of Ishikawajima – Harima Heavy Industries Ltd. Vs

Director of Income Tax, Mumbai (2007) (SC) 288 ITR 408 is reproduced below:

In construing a contract, the terms and conditions thereof are to be read as whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions.

d) Section 53A of the Transfer of Property Act 1882 provides that where any person contracts to transfer for consideration any immovable property by writing, signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

In the case of a development agreement whether the developer can be considered as a "transferee" or only the end buyer of apartments can be considered as a "transferee" is the critical point for evaluation.

e) The language of Section 54 of the Transfer of Property Act which provides that "sale" is as a "transfer" of ownership in exchange for a price paid or promised or part paid and part promised.

Contract for sale- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

It is highly relevant to note that a Development Agreement is a "contract for sale" and not a "contract of sale".

The Apex Court has in the case of Suraj Lamp & Industries (P.) Ltd v State of Haryana - 14 taxmann.com 103 (SC) [2011] that immovable property can be legally and lawfully transferred/ conveyed only by a registered deed of conveyance and General Power of Attorney Sales ('GPA Sales') or Sale Agreement/General Power of Attorney/ Will transfers ('SA/GPA/WILL' transfers) do not convey title and do not amount to transfer, nor can they be recognized as valid mode of transfer of immovable property.

f) Interestingly, the High Court of Karnataka had in the case of CWT and another Vs Giridhar G Yadalam reported in (2010) 325 ITR 223 (Karn) held that in case of the assessee who had given his property on Joint Development, the land in question continue to be held an urban land, even though construction has commenced. It further held that the same would be the position till the construction was complete and owner's share of super built up area was handed over to him. The assessee has successfully argued before the CIT (Appeals) and the Tribunal that the land offered for Joint Development would not fall under the definition of asset under Sec 2(e)(a) of Wealth Tax Act 1957,once the construction commences on the property one of the arguments put forth by the assessee was that it had retained the ownership of the land till the flats were fully constructed and possession of assessee's share handed over to it. The said argument has in a way been upheld by the High Court by confirming the analogy that Wealth Tax has to be paid by the assessee on the land in question by treating the same as urban land till the construction was

complete. The assessee's appeal against decision of Karnataka High Court has been rejected by the Supreme Court (2016)284 CTR 433: (2016) 237 Taxmann 392: [2016] 384 ITR 52:, thereby bringing finality to the proceedings and upholding the decision of the High Court that the Owner would have to pay wealth tax on the entire land even after construction has commenced on the property pursuant to entering the joint development agreement.

This decision could be used to counter the decisions of various High Courts which have held that there is a transfer by the owner to the developer to the extent of developer's share in the land as on the date of entering into the Joint Development.

D. TAXATION ON TRANSFER OF DEVELOPER'S SHARE IN CASE OF UNREGISTERED DEVELOPMENT AGREEMENT

It is to be noted that the document containing contracts to transfer for consideration any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement i.e w.e.f 24-9-2001, then, they shall have no effect for the purposes of the said Section 53-A. As a result of the said amendment it is now mandatory to register the agreement for sale and pay the Stamp duty as stipulated under the relevant article of the Schedule to the Stamp Act as if the same is not done, there will be no "transfer "of the nature referred to in Section 53-A of the Transfer of Property Act so as to invoke the provisions of Section 2 (47)(v) of the Income Tax Act. This analogy has been upheld by the Kerala High Court in the case of N.A. Baby vs Dy. CIT (2015) 234 Taxman 371.

The Punjab and Haryana High Court has in the case of G S Atwal vs CIT Ludhiana rendered on 22-7-2015 and reported in (2015) 59 taxmann.com 359 held that there cannot be a transfer on the date of entering into the Joint Development agreement if such agreement is not registered pursuant the amendment to Section 17 of the Indian Registration Act 1908 as stated above. The Supreme Court had however granted special leave to the revenue against the aforesaid decision as reported in (2015) 383 ITR (St) 1.

The above analogy of the Punjab and Haryana High Court has been followed by the same court in the case of Punjab Coop House Building Society V CIT and Another (2016) 386 ITR 116 (P&H), wherein the court has held that the possession given to the developer is only a licence and does not amount to a transfer under section 53A of the transfer Of Property Act 1882 and consequently does not fall within the ambit of the provisions of Section 2(47) (v) of the Income Tax Act. It must be mentioned that this was a case where disputes arose between the Owners and the Developers pursuant to entering of the joint development agreement and part of the land was not given possession to the Developer.

The Mumbai Tribunal has in the case of Fardeen Khan Vs ACIT 11(1) Mumbai- ITA No 1588/1589 of 2013 (ITAT F Bench Mumbai) rendered on 25-2-2015 has held that the provisions of Section 53A of the Transfer of Property Act read with Section 2 (47)(v) of the Income Tax Act will not apply on agreements which are not registered after the amendment to Section 17 of the Registration Act although another bench of the same tribunal had in the case of Suresh Chandra Agarwal Vs. Income-tax Officer, Ward 20(3)(3)* rendered on14/09/2011 (IT Appeal Nos. 2376 & 2377(Mum.) of 2010(2011)15 taxmann.com 115(Mumbai-Trib)) ,held that the amendment made by the Registration and Other Related Laws (Amendment) Act 2001 which mandates the registration of the document contemplating the transfer of immovable property for it would be construed as a part performance u/s 53A of the Transfer of Property Act, shall not affect the definition of "transfer" u/s 2(47)(v) of the Income Tax Act

In other words, according to the above judgement even if the agreement to sell with possession is not registered after 24/09/2001, it would still be considered as a 'transfer' u/s 2(47)(v) of the Income Tax Act 1961.This could be used by an assessee where the development agreement has not been registered.

The view that an unregistered Joint Development Agreement does not give rise to a taxable event as on the date of entering into the Development Agreement has been finally settled by the order of the Apex Court in the case of -CIT v. Balbir Singh Maini (2017) 398 ITR 531 (SC).

E. OWNERS CAN CONVERT THE LANDS INTO STOCK-IN-TRADE:

It is to be noted that all the adverse decisions have been rendered on the analogy that there is a "transfer" of a "capital asset" as understood under Section 2 (47) (v) and/ or 2 (47) (vi) of the Income Tax Act. It is to be noted that the definition of "transfer" under Section 2 (47) does not apply to a transfer of stock-in-trade as it is purely in relation to a transfer of a "capital asset" and in the absence of a specific or deeming provision, the transfer of such stock-in-trade would occur only when the risks and rewards of ownership is being transferred under the general law. Consequently, to avoid the effect of the above adverse decisions rendered in the context of "Capital Asset" as detailed in Para C above, the Land Owner can opt to convert the land and treat the same as stock in trade in his/its books

It is to be noted that the above treatment of lands of the Owners as stock-in-trade will avoid all the risks and problems arising out of such interpretations that an agreement to sell and/or a development agreement by itself constitutes a 'transfer' within the meaning of Section 2(47)(v) read with Section 45 of the Income tax Act 1961 as held by the Bombay High Court in the case of Charturbuj Dwarakadas Kapadia Vs CIT (2003) 260 ITR 491 (Bom) and several other decisions as cited earlier. There will be no scope for invoking the provisions of Section 2(47)(v) and (vi) in such cases as they will be governed by the provisions of Section 2(47)(iv) read with Section 45(2) only.

i. It is possible for the Owners to treat their lands as stock-in-trade of a business in property transactions carried on by the Owners before they enter into development agreements with the Developers. It is to be noted that the assessee should do a positive act to evidence the conversion of a capital asset and its treatment as stock in trade as held by the Allahabad High Court in the case of Amrit Corp Limited Vs Addl CIT (2014) 226 taxmann 1(All HC).

ii. In the case of self development as the individual would be undertaking an organized systematic activity of development and sale, the individual could be construed as having undertaken an activity which is an "adventure in the nature of trade" and the entire income arising from the activity could be taxed under the head " profit and gains from business".

In order to minimize and postpone the tax burden the following steps should be adopted by the individual:

a) The immovable property in question hitherto held as investment asset (capital asset) and recorded as such by him in his books of account should be converted and treated by him as a business asset i.e. as stock-in-trade in his books of accounts and financial records. This act of conversion and treatment as stock-in-trade should be substantiated/ supported by a self declaratory affidavit duly notarised.

b) The market value of the immovable property on the date of conversion as above should be determined at the maximum value possible duly supported by a valuation certificate of an approved valuer.

c) The taxation in the case of individual would arise on the development as and when and in the year in which the immovable property held as stock-in-trade is sold or otherwise transferred under the explicit provisions under Section 45 (2) of the Income Tax Act. As per the provisions of the said Section the difference between the market value of the immovable property less indexed cost would be taxed under the head "Capital Gains" and the difference between the sale price and the indexed cost would be taxed under the head "Profits and Gains from Business and Profession" and such tax incidence would arise only in the year of sale or transfer of such stock-in-trade.

It is pertinent to note that the Kolkata Tribunal in the case of Octavius Steel and Company limited Vs. ACIT(2002) 83 ITD 87 has held that Section 45(2) supersedes all the provisions including Section 45(1) and provides for charging of Capital Gains in the year when such converted stock in trade is sold or otherwise transferred.

In the case where the individual intends to enter an agreement for joint development

with the Builder on an area sharing or an agreement for revenue sharing, such an agreement should be entered into by the said individual only after the said immovable property is converted and treated as stock-in-trade in his books of accounts and financial statements. This would eliminate the applicability of the incidence of capital gains tax on the individual as on the date of entering the joint development agreement itself as has been held by a catena of decisions given below-

iii. In the case of a Firm, LLP or company (the assessee) which intends to exploit the excess land owned by it and originally acquired for the purpose of present business operations and treated as fixed assets/ investments in the books, the said assessee should take the following steps before it intends to develop the said property on its own or through a developer

Apply for change in its Objects to include the object of real estate development

Apply for change of name to indicate real estate as one of its main objects

Change the disclosure of the immovable property to the extent being developed from Fixed Asset to Current Asset

Pass a Journal entry in the books of account with an explicit narration disclosing the conversion of the immovable property and its treatment as stock-in-trade in the books of account.

Once the capital asset gets converted and treated as stock-in-trade in the hands of the individual, firm, LLP, Company as the case may be, care should be taken to insert the following clauses in the agreement for joint development or revenue share as the case may be –

a) The fact of the immovable property being held as a business asset and disclosed as stock-in-trade in the books of the owner.

b) The fact that the legal ownership, domain and control continue to vest in the owner till such time it is transferred to the prospective buyers of apartments, villas etc in the project.

c) The fact that the licence given to the developer to enter and commence the development is in the nature of a licence referred to under Section 52 of Indian Easements Act, 1882 and cannot be construed as a possession given by the Owner to the Developer in part performance of the agreement of the nature referred to under section 53A of the Transfer of Property Act, 1882

d) The Development contemplated in the Agreement is not in the nature of a Partnership as contemplated either under the Indian Partnership Act, 1932, or under the Income Tax Act, 1961.

e) The fact that the owner should be allowed uninterrupted and unhindered right to inspect the development without the prior permission of the developer during normal working hours.

f) The Developer will be given the power to do all acts. deeds and things for the development of the property including the right to enter into agreements for sale and raise finances on the developers share in the development but his power to execute the deeds of sale in favour of the purchasers of the developers share can be invoked only after the Developer hands over the Owners Share in a habitable condition.

iv. In such cases only the provisions of Section 2(47)(iv) read with Section 45(2) come into operation and there is no scope for invoking provisions of Section 2(47)(v) and (vi) or any reference being made to Section 53-A of the Transfer of Property Act 1882 through Section 2(47)(v). The profits and gains arising out of such conversion into stock-in-trade will be governed by the provisions of Section 45(2). This would mean that the capital gains arising to the Owners on the date of such conversion to stock-in-trade will get quantified at that stage itself but its chargeability to tax will arise only when sales or transfers otherwise of such stock-in-trade take place subsequently. It should be clearly noted that such subsequent sales or transfers otherwise will be of stock-in-trade only and provisions of Section 2(47) cannot be invoked for such subsequent sales or transfers of stock-in-trade.

v. The profits and gains earned on subsequent sales affected by the Owners of their surplus flats / apartments (other than what are kept for their own use) will be taxed as business income only. In the normal course, these sales would have been made within a period of two (earlier three years) from the date of completion of the project and they would have been subjected to tax as "short term capital gains" only and the tax incidence would have been the same on the Owners.

There are catena of judicial decisions which have held that there will be no transfer as on the date of entering into Development Agreement or as on date of handing over possession to the Developer in cases where the Owner was holding and treating the immovable property as stock in trade or on prior to the date of entering into the Development Agreement. The decisions to be noted in this regard are:

- R Gopinath (HUF) v. ACIT (2010) 5 Taxmann.com ITA Nos. 29 & 30/ MDS/ 2008rendered by the ITAT Chennai 'A' Bench on 24th July, 2009 also reported in 133 TTJ (Chennai) 595.
- Ramesh Abaji Walavalkar v. AddIn CIT 150 TTJ 725 Mum Trib. (D Bench)
- Vidyavihar Containers Ltd v. Dy. CIT (2011) 133 ITD 363 (Mum. Trib)
- DCIT vs Crest Hotels Ltd (2001) 78 ITD 231 (Chennai Bench).
- Fardeen Khan Vs ACIT 11(1) Mumbai- ITA No 1588/1589 of 2013 (ITAT F Bench Mumbai) rendered on 25-2-2015 and reported in 169 TTJ 398 and in (2015) 58 taxmann.com 186.
- Dheeraj Amin Propreitor J V Builders Vs ACIT Circle 2(1) Mangalore ITAT NO 1709/Bang/ 2013 rendered on 30-6-2015.

In a related decision in the case of ACIT Central Circle-8 (Hyd) vs. Medravathi Agro Farms (P) Ltd (2015) 63 taxmann.com 274 (Hyd-Trib"B" Bench) rendered on 22/05/2015, it has been held that the transfer of land to the Developer or his nominees related to the Developer's share as per Joint Development Agreement will be taxed under the head" Capital Gains", while super built area along with the undivided share of land retained by the Owner would be taxed under the provisions of Section 45(2) i.e., by the presumption that the Owner has converted the capital asset into "Stock-in-Trade" on the date of entering into the Joint Development Agreement .Consequently, it has been held that the Capital Gains and business income would be chargeable to tax in the hands of the assessee company in a pro-rata basis as and when the built-up area is sold along with the proportionate share of land . While rendering this decision, the Tribunal has relied on the decision of ACIT vs. Hill Country Properties Ltd (2015) 57 taxmann.com 400 (Hyd).

F. TRANSFER TAKES PLACE ONLY WHEN THE BUILDER/ DEVELOPER TAKES POSSESSION OF THE IMMOVABLE PROPERTY PURSUANT TO ENTERING INTO THE DEVELOPMENT AGREEMENT

It is to be noted that transfer u/s 2(47)(v) of the Income Tax Act, 1961 refers to any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882. In other words, for Section 2(47)(v) to be invoked, the transaction in question has to first fall under the rigours of the provisions of Section 53A of the Transfer of Property Act, 1882. On a reading of the provisions of Section 53A of the Transfer of Property Act, 1882 one of the essential conditions to invoke the provision of the said Section is that the transferee should have performed or be willing to perform his part of the contract. Based on the reading of the said Section, there have been several conditions rendered by Judicial Authorities which have held that "Transfer" will take place only when the Builder actually takes possession of the Schedule Property by commencing construction on the same.

Some of the decisions which have upheld the above analogy are detailed below:

The Hyderabad Tribunal in case of Fibars Infratech Pvt. Ltd vs. ITO Ward 1(2) Hyderabad (ITAT Hyderabad), ITA. No. 477/Hyd/2013, rendered on 03.01.2014 has also held that handing over possession of the property is only one of the conditions for invoking sec 53A of the Transfer of Property Act and

is not the sole and isolated condition. The developer i.e. the transferee should be ready and willing to perform his obligation under the terms of the agreement and should have done some act, deed or thing to indicate the willingness. When there was a factual finding that the builder had not even of the Income Tax Act read with section 53 A of the Transfer of Property Act cannot be invoked. While rendering this decision the Tribunal has taken note of the decisions in the case of Chaturbhuj Dwarkadas Kapadia, Jasbir Singh Sarkaria, Maya Shenoy and Dr T K Dayalu referred to elsewhere in thisarticle. The said decision has further been followed in the case of ABVS Prakash Vs The Asst CIT Hyderabad Central Circle – 1 ITA No 462/Hyd/2013 rendered by the ITAT Hyderabad "B" Bench on 27-2-2014 in the case of Binjusaria Properties (P) Ltd Vs ACIT (2014) 45 taxmann.com 115 (Hyd Trib) also reported in (2014) Tax Pub (DT) 2438(Hyd "B" Trib) and in the case of ACIT Central Circle 5 Hyderabad Vs R Srinivas Rao (2014) 50 taxmann.com 178 (Hyd Trib) rendered on 28-8-2014 reported in 40 ITR (Trib) 266 (Hyd 'B' Trib).

Further, it is of significant interest to note that the Hyderabad- A Bench has in the case of Ranjith Reddy Vs Dy CIT (Hyd) Circle 6(1) in ITA Nos. 290,292,336/ Hyd/2012/rendered on 7/6/13 reported in 144 ITD 461 (Hyd "A" Trib) held that there is no transfer as defined under Section (2)(47) (v) of the Income Tax Act read with Section 53 A of the Transfer of Property Act in the case of an agreement in the nature of Joint Development as on the date of signing the agreement, if there has been no progress or construction since the signing of the development agreement. While rendering this decision the Tribunal has clearly distinguished the decisions of Charturbuj Dwarakadas Kapadia Vs CIT (2003) 260 ITR 491 (Bom) and Dr Maya Shenoy (2009)124 TTJ 692(Hyd) (Supra).

The Chennai"D" Tribunal in the decision of Smt Sowcar Janaki v ITO (2013 27 ITR (Trib) 226 has also recognized the analogy of the Hyderabad Tribunal.

The Mumbai Tribunal has in the case of Dilip Anand Vazirani Vs ITO (2015) 57 taxmann.com 142 held that there will be no 'transfer" as on the date of the development agreement as the agreement only confers a licence to the builder to enter the property for construction but actual possession is not delivered to the builder till he commences construction. This decision is in line with the principles laid down by the decisions referred to in the previous para.A similar view has been taken by the Mumbai Tribunal in the case of General Glass Co Private Limited v. Dy. CIT (2007) 108 TTJ 0854/ 2007 14 SOT 0032 (Mum.)

Where the Developer took possession of assessees' land and started development work, said transaction was to be treated as transfer of right in property covered under Section 2(47)(v).

-Bertha T Almeida v. Income Tax Officer (2015) 53 taxmann.com 522 (Bom)

The above decisions could be the life line on which the Owners of properties who have entered into Joint Development Agreements can depend upon to postpone the incidence of Capital Gains till the date on which the Developer enters the property to commence construction activity as per the terms of the Development agreement. These decisions will be of immense help to cases who wish to postpone the "Transfer" to a period after 01/04/2012 so as to get the benefit of the provisions of the Section 50D of the Income Tax Act, 1961.

G. TRANSFER DOES NOT TAKE PLACE EITHER IN THE YEAR OF ENTERING INTO DEVELOPMENT AGREEMENT OR IN THE YEAR OF COMMENCEMENT OF CONSTRUCTION BUT ONLY IN THE YEAR OF RECEIPT OF CONSIDERATION BY THE OWNER IN THE FORM OF OBTAINING POSSESSION OF THE OWNER'S SHARE OF SUPER BUILT UP AREA.

There are a few decisions which have held that the license given to a Builder/Developer is only a permissive possession given to him/it for the limited purpose of carrying out the development as a "licensee" and hence such possession cannot be deemed to be a possession given in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 so as to invoke the provisions of Section 2(47)(v) of the Income Tax Act, 1961.

CIT V G Saroja (2008), 301 ITR 124(Mad)- No registration or possession given-Taxable event does not happen till such time

CIT Vs Attam Prakash & Sons(Del HC) IT Reference Nos 250-251 0f 1988 – delivered on August 8, 2008-(2008) 175 Taxman 499 (Del)-Mere grant of

permissive right to Builder does not amount to "Transfer".

CIT-I vs Naju Daru Deboo (2013) 38 taxmann.com 258(All), 218 Taxmann 473(All) rendered 16-9-2013- Capital gain as a result of a joint development agreement can arise only at the point of receipt of consideration by the Owner and not on the date of entering into the Joint Development Agreement.

It is interesting and relevant note that the High Court of Bombay at Goa has in the case of CIT Karnataka (Central) Bangalore v Shri Sadia Shaikh (Tax Appeal No. 11 & 12 of 2013) rendered on 2nd December 2013 reported in (2014) 56(I) ITCL 147 (Bom HC) has held that possession given to a developer in pursuance of a Development Agreement cannot be regarded as a transfer under section 2(47) of the Income Tax Act read with section 53A of the Transfer of Property Act. The court seems to have based its decision on the fact that the entire control of the property, the license to construct on the property and the occupation certificate was given only in the name of the owner of the property.

Vijaya Productions P Ltd Vs Addl CIT(2012) 14 ITR (Trib) 614(Chennai), (2012) 134 ITD 19(Chennai Trib)™: 144 TTJ 1 (Chennai Trib)- Date of entering into the agreement cannot be regarded as the date of transfer where the consideration is paid to the developer by way of allotment of shares in a Joint Venture Company incorporated between the Land Owners and the Developers.

In a recent decision in the case of - Sujauddin Kasimsab Sayyed v.ITO [2020] 114 taxmann.com 168 (Mum-Trib) ITAT Mumbai Bench 'G' it has been held that Immovable Property is considered to be transferred on the date of execution of registered document and not on the date of delivery of possession.

Further the Apex Court has in the case of M/s. Seshasayee Steels P. Ltd v. ACIT, Company Circle VI (2), Chennai (SC) Civil Appeal No.9209 of 2019 rendered on 04/12/2019 held that handing over possession to the transferee does not amount to handing over control of land – Section 53 A is a legal concept, - transfer does not take place till the legal control is handed over. This decision can be used for buttressing the view that there can be no transfer of the Developers Share of land till the date of actual execution of the Deed of Conveyance in favour of the Developer and/or his nominees.

H. CONSIDERATION FOR THE PURPOSE OF TRANSFER

Having determined the point of incidence of tax on the Land Owner who has entered into Development Agreement the incidental issue to be discussed and concluded is the value to be deemed as "Consideration" received/accrued by the Land Owner for transfer of the Developer's portion of divided/ undivided share of land, for the purpose of computation of capital gains for the Land Owner. In this regard there are two methods which could be taken as the most likely and prudent methods to arrive at the deemed value of consideration.

One of the methods is to be adopt the cost of construction of the Owners Share which is basically the replacement value of the land to be transferred by the Owner to the Developer and/or his/its nominees. This is duly supported in the following cases-

The Bangalore ITAT "A" Bench has in the case of ITO v/s M.S Nagaraj ITA No. 676/Bang/2011 vide its judgement rendered on 01.12.2014 reported in 52 taxmann.com 511 confirmed the analogy of the decisions in the case of Dr. T.K Dayalu and Ved Prakash Rakhra (Supra), by holding that the "transfer" takes place on the date of entering into Joint Development and the consideration for the purpose of transfer is the cost of construction to be incurred by the developer on the Owner share of super built up area. It is important to note that this judgement all though rendered after the provisions of Section 50D came into force relates to an assessment year which is prior to the year in which Section 50D was introduced.

It is relevant to note the High Court of Karnataka has in the case of CIT Mysore Vs Khivraj Motors (2015) 62 taxmann.com 305 rendered on July 17th 2015 held that the cost of construction incurred by the Developer on the sale of Super Built area of the Land Owner in a joint development is to reckoned as per the value agreed to between the Developer and the Owner and not as per the project cost incurred by the Developer which could include many expenses which are not directly related to the construction activity.

The above analogy has also found judicial benediction in the following cases-

- Smt. Pratima Reddy vs. ITO, ward-6(4) (2012) 25 Taxmann.com 264 (Hyd)
- CIT v. Vasavi Pratap Chand and Sidharth P Chand (2017) 398 ITR 316 (Delhi)
- Udai Hospitals Pvt Ltd vs ITO. Ward 17(3), Hyd, (ITAT "B" Bench) ITA No. 1755/Hyd/2017 rendered on 28/09/2018
- Atluri Usha Rani vs Asst CIT - ITA Nos 1379 and 1544/Hyd/2016 rendered on 20/12/2017.
- CIT and Another vs Ved Prakash Rakhra(2015) 370 ITR 762 (Kar)- Exchange Value specified in the development agreement to be considered as deemed value of consideration and not the actual cost incurred by the Developer.
- P Madhusudhan Vs ACIT (2019) 419 ITR 194 (Mad)

The other method is adopting the value as determined under Section 50D of the Income tax Act, 1961 as the deemed value of consideration of the Owner for transfer of the land to the Developer and/or his/its nominees pertaining to the Developer's share. This method can be adopted for all Development Agreements entered into after 01/04/2012 or in such cases where the Development Agreement has been entered into earlier than the said date but in which cases the Builder/Developer has actually commenced construction after 01/04/2012.

In accordance with the provisions of this Section the deemed value of consideration to the Owner for transfer of the Developer's share of right, title and interest in land shall be based on the market value of the land as on the date of transfer. The option to adopt this method has found judicial benediction in the following cases:

B V Narayana Reddy v. Asst CIT (2015) TaxPub (DT) 4553 (Hyd 'B' - Trib) - TS- 5405- ITAT-2016(Hyd Trib)

ACIT vs M/s Shankar Vittal Motor Co. Ltd. ITA No.35/Bang/2015 rendered on 18/03/2016.

It is also to be noted that the CBDT had issued a Circular F.No.225/58/2016/ITA.II dated 29/02/2016 under which was regarding the payment of tax on Joint Development Agreement under the Income Tax Act,1961.In Para 3 of the said Circular, it is clearly stated that the landowner is liable to pay tax on the value of land in the year Joint Development agreement was entered into. This Circular gives a clear indication that Assessee can adopt valuation method as per Section 50D to offer capital gain arising from the transfer of Developer's share in land. (Circular is enclosed as Annexure-I)

I. IMPLICATION OF SECTION 45(5A)

Section 45(5A) was introduced by the Finance Act 2017 and applies to Development Agreement entered into on or after 01-04-2017.This Section was introduced to give relief to the landowners on the incidence of Capital Gain Tax which was arising on them on the date of signing the development agreement, which the revenue was insisting upon based on a catena of decisions mentioned elsewhere in the article.

However, even though objective of the Section was to mitigate the hardship of the land owner from the payment of capital gain tax even before he received the consideration in terms of his share of super built-up area, the Section may not achieve the desired result from the following reasons: -

(i) The Section is only applies to Individual/HUF who is an owner of the Capital Asset which is subject matter of Development. Therefore, if the owner of the Capital Asset i.e., Immovable Property is owned by a Firm/AOP/LLP/Company, the said section would have no application. Consequently, where any of these entity entered into Development Agreement for development of immovable property owned by it and treated it is a fixed asset/investment in its books and Capital Asset for Income Tax purpose, such entities can be exposed to the levy of capital gain tax on the date of execution of development agreement or on the date of handing over possession to the developer to carry out the development activity, based on the analogy rendered by various decisions mentioned elsewhere in the article.

(ii) A careful reading of the provision would indicate that though the charge of Capital Gain is postponed to the year in which the project is complete as manifested by the issue of a completion certificate by the Competent Authority, the transfer of the Developer's share

in land occurs on the date of executing the "Specified Agreement". In other words, the provisions of the Section only fortifies the view taken by the various courts that the transfer of owner's share of land to the developer and/or nominees occurs at the point of execution of the development agreement.

(iii) The consideration which is deemed as the full value of consideration for the purpose of transfer is the "Stamp duty value" (guideline value) of the land or building received by the land owner as his share plus non-refundable deposit if any. This would create a higher tax incidence as the alternate method of choosing the guideline value of the land which is being transferred as per the Provision of Section 50D cannot be adopted henceforth by the landowners who are Individual/HUF. Instead, they now have to adopt the guideline value of the land/building as the case may be received on return as on the date of issue of completion certificate which could be higher.

(iv) The Section applies only to development agreement in the nature of area sharing agreement and not in the nature of revenue sharing agreement, as can be discerned from the definition of term "Specified Agreement" as defined in explanation (ii) of the Section 45(5A).

(v) The provisions of the Section have been held to be prospective in the case "Adinarayana Reddy Kummeta vs ACIT Circle-11(1), Hyderabad [2018] 91 taxmann.com 360 [Hyderabad-Trib.] In effect, any Individual or HUF who wishes to take the advantage of the Provisions of this Section in cases where Development Agreement has been entered into before 01-04-2017 may not be eligible to do so.

(vi) As the " Transfer" takes place on the date of execution of the " Specified Agreement", care should be taken to ensure that if the Assessee wants to invest in bonds to claim deduction under Section 54EC or in House Property to claim deduction under Section 54/54F, the time stipulated in the said Sections would commence from the date of entering into the Specified Agreement".

(vii) The Developer has been mandated to deduct tax at source at 10% on landowner as per the provisions of Section 194-IC of the Income Tax Act, 1961. The said Section clearly refers to payment to a resident of any sum by way of consideration, not being a consideration in kind i.e., non-refundable deposit received by the land owner. Consequently, the landowner would have to carry forward the TDS to claim credit for the same in the year in which he is liable to pay Income Tax as per the Provisions of Section 45(5A) of the Income Tax Act,1961 , which in accordance of the Provisions of Section 199 r/w Rule 37BA of the Income Tax Rules.

J. APPLICABILITY OF SECTION 50C TO TRANSFER OF DEVELOPMENT RIGHTS

It has been held by the Mumbai Tribunal in the case of Sri Akhatar Hussain Vs ITO ITA No 541 of 2010 and ITA No 706 of 2010 reported in (2011) 140 TTJ 413 that the provisions of Section 50C are applicable to transfer of Development Rights also as they fall within the deeming provisions of Section 2(47) relating to transfer. A similar ruling has been given by the Mumbai Tribunal in DCIT vs Jai Trikanand Rao(2014) 149 ITD 112 (Mum J Trib), in the case of Chiranjeev Lal Khanna v ITO(2011) 132 ITD 474, (2012) 144 TTJ 607 (Mum) and in the case of Arlette Rodriques vs ITO (2011) 39(II) ITCL 328.

However, in a recent decision of ITO Vs Balkawade Sadanand Dhanaji (2015) 66 (II) ITCL 410 (Pune A Trib), the Tribunal has held that Section 50C will not apply to development rights but will apply only to sale of land or building.

Further in the decision in the case of M/s Voltas Ltd Vs ITO Ward 7(3)(4) (2016)74 taxmannn.com 99 rendered on 16-9-2016 , the Mumbai Tribunal has held that the provisions of Section 50 C will not apply to transfer of development rights in land as the wordings of Section 50C clearly indicate that the transfer should be of land and building or both and does not include rights therein.

This is further followed by a decision in the case of - ITO vs. SBI Staff Vaibhav Co-op HSG Ltd. ITA No. 5324/ Mum/2016 (arising out of ITA No. 75324/Mum/2016) rendered on 19th June 2019.

The law is therefore not clear on this aspect.

K. WHETHER THE INCOME FROM SALE OF SUPER BUILT-UP AREA ALONG WITH UDI IN LAND REPRESENTING THE OWNER'S SHARE CAN BE TAXED AS INCOME FROM BUSINESS HOLDING THAT IT IS AN ADVENTURE IN THE NATURE OF TRADE

The Revenue can take a view that where the Owner gets multiple units/apartments towards his share in the Project and further markets the same as an organised activity the income generated by the Owner by sale of units/apartments can be treated as "an adventure in nature of trade" by the Owner and consequently taxed as "Business income".

In this regard reference could be made to the decision of the Calcutta High Court in the case of Rungta Properties (P.) Ltd vs Pr.CIT (2017) reported in 83 taxmann.com 106 and the Karnataka High Court in the case of M.V. Chandrashekar vs Dy.CIT (2004) reported in 91 ITD 543, wherein it has been held that the income generated by the Land Owner/s from sale of his share of units/apartments will have to be taxed as income from "Capital Gain".

L. TREATMENT OF THE TRANSACTION BETWEEN THE LAND OWNER AND THE DEVELOPER AS AN ASSOCIATION OF PERSONS(AOP)

The Revenue can take a view that the development of the property by the Developer on the specific permission/license granted by the Land Owner and sharing of the super built up area between the Land Owner and the Developer, is a joint activity undertaken by both the parties for sharing the profits from the Project and consequently they can regard the arrangement between the parties as an Association of Persons and tax the profits derived from the Project accordingly.

In this regard it is pertinent to state that for an arrangement between the parties to be regarded as an Association of Persons, both the parties should be responsible for sharing all the risks and rewards relating to and arising out of development.

It is of relevance to note that while the entire responsibility and liability towards defect in title of the immovable property which is subject to development is on the Land Owner, the entire responsibility and liability towards construction and related activities is on the Developer. In fact, there is a clear indemnity Clause in the Development Agreement wherein, the Land Owner and the Developer indemnify each other with regard to the responsibility and liability as mentioned above. As the liability attached to their respective rights, responsibilities and obligations are clearly distinct and defined, the arrangement between them, cannot be held as an "Association of Persons".

There are catena of decisions which have held that the development of a property under a Joint Development Method does not constitute an Association of Persons between the Owner and the Developer and the same are listed below:

- Faqir Chand Gulati vs Uppal Agencies Pvt. Ltd. & Anr (2014) TaxCorp(LI) 2618 (SC)
- Hyosung Corporation, (2009) 314 ITR 343 (AAR)
- VAN OORD ACZ. BV, (2001) 248 ITR 399 (AAR)

While rendering the above decisions the Courts referred to the decisions of the Apex Court in the cases of:

- Indira Balkrishna (1960) 39 ITR 546 (SC)
- Murugesan and Bros as held in the case of (1973) 88 ITR 432 (SC), which had laid down the law with respect to an "Association of Persons".

M. REVENUE SHARING ARRANGEMENTS-TAX IMPLICATIONS AND OTHER ISSUES.

1. Nature of agreement, arrangement-

There is the emerging trend in the Real Estate Industry wherein the Land Owners and Developers enter into a Revenue Sharing Agreement/ Arrangement to share the proceeds arising from the development of immovable property belonging to the Land Owner. Under these agreement/ arrangements

i. The Land Owner and Developer agree to share the "Distributable Revenue" in a specified percentage. The term "distributable revenue" is specifically defined in the development agreement apart from other terms and conditions.

ii. Various terms such as "Gross Revenue", "Distributable Revenue", "Pass through Charges", the mode and method of sharing the revenue etc, are defined in the agreement.

- "Gross Revenue" shall mean the total revenue accruing and arising to the "Project" by way of receipts from Purchaser/s/Allottee/s in the "Project" including the basic sale price on consideration, "Pass Through Charges", "Additional Charges", "Floor Rise Charges", "Premium Location Charges" and "Other Charges".
- "Distributable Project Revenue" shall mean and include the "Gross Revenue" accruing and arising to the "Project" by way of receipts from Purchaser/s/ Allottee/s in the "Project" including the basic sale price on consideration, "Additional Charges", "Floor Rise Charges", "Premium Location Charges" and "Other Charges" other than "Pass Through Charges" but shall not include the marketing fee payable to the Developer, the cost of interest and compensation paid to the Purchaser/s/ Allottee/s relating to project construction and development which shall be borne by the Developer only and the compensation paid to the Purchaser/s/Allottee/s on claims relating to title which shall be borne by the Owner only.
- "Pass Through Charges" shall refer to all statutory charges, fees and expenses, such as club membership fees and charges, external electrification charges, Power backup charges, , payments / contributions received from the customers towards electricity, water, sewerage deposit and other connection related charges, maintenance security deposit, advance maintenance charges, Reticulated Gas connection and related charges and deposits, association deposit, GST and any future taxes levied by any Governmental Authority, stamp duty, registration charges, and all such other similar statutory charges, fees and costs which would be collected / recovered from the customers in relation to the "Saleable Area "as a contribution from the customers and for the onward transfer / deposit to the concerned Government Authority or "Association of Allottees" in the "Project".

iii. The Land Owner and the Developer join together in a tripartite agreement with the ultimate purchaser of the apartment wherein the Land Owner agrees to convey undivided right, title and interest in land to and in favour of the prospective purchaser of apartments and the Developer agrees to convey the specified super built up area being constructed on the land in favour of ultimate purchaser of the apartments.

iv. A General Power of Attorney is executed by the Land Owners in favour of the Developer giving him the powers to do all acts, deeds and things in pursuance to the Revenue Sharing Agreement/Arrangement including the power to sell the UDI in land in favour of the prospective purchasers.

v. The agreement could be worded in a manner to indicate that the revenue share accruing to the Land Owner is in essence only for the transfer of the undivided share of right, title and interest in land and the revenue share of the Developer is for transfer of specified super built up area.

vi. The insurable interest of the super built up area being constructed on the land would be on the Developer during the period of construction and till the date of its transfer.

vii. The legal ownership, domain and control of the land remains vested with the Land Owner and no portion of it will be transferred to the Developer or his nominees as the case maybe.

viii. There is no allocated area designated as Owner's share and Developer's share as the case maybe.

If the agreement is drafted keeping the above principles in mind, it can be ensured that the Land Owner pays tax as " Business Profits" only at the point of transfer of risks and rewards of ownership in favour

of the transferees i.e., the purchaser of apartments, which event would occur either at the point of execution of Sale Deed or handing over possession of the apartment whichever is earlier.

Further by entering into Revenue Sharing Agreement/ Arrangement the possibility of levy of GST on the Owner's share of revenue does not arise. Whereas, in the case of Joint Development Agreement based on area share, there is a need for the Developer to levy GST on the Owner's share of super built up area as mandated by circulars issued by the relevant authorities.

2. Issues arising out of Revenue Sharing Agreement

   i. Point of incidence of tax on the owners.

   As the revenue share derive from the Land Owners is essentially and in essence for the transfer of 100% undivided share of right, title and interest in the land in favour of the ultimate purchasers of Apartments/units in the Project, the revenues shall be recognized by the Land Owners only at the point of transfer of risks and rewards of ownership of divided/undivided share of land to the purchasers of units i.e., at the point of conveyance or possession whichever is earlier.

   ii. Point of incidence of tax on the Developers who are not contractors

   It is been held in the following cases where the Developer is outsourced the entire construction activity to the contractor, revenue can be recognized by the Developer only at the point of transfer risks and rewards of ownership to the ultimate purchasers of the units in the Project.

   - S N Builders and Developers Vs ACIT 4(1) Bangalore ITA No 487/Bang/2013 rendered on 11-4-2014.
   - Prestige Estate Projects Ltd V DCIT ITA 218/ Bang/2009 (ITAT Bangalore)
   - CIT Vs Rema Country Holdings Pvt Ltd ITA No 1041 and 1042/2006 order dated 29-9-2011 (Kar HC)
   - ACIT v Layer Exports (P) Ltd (2017) 53 TR 416 (Mumbai- Trib)
   - Shivalik Buildwell (P) Ltd v CIT (2013) 40 taxman.com 219 (Gujarat)
   - Paras Buildtech India (P) Ltd v CIT (2016) 382 ITR 630 (Delhi)
   - CIT v Excel Industries Ltd (2013) 358 ITR 295 (SC)

   iii. Applicability of Section 50 D

   As in the case of Revenue Sharing Agreement, there is no "transfer" contemplated between the Owner and the Developer as there is no defined "Owners share" and " Developers Share", the provisions of Section 50D will not be applicable.

   iv. Applicability of Section 45(5A)

   The term "specified agreement" defined in the explanation (ii) under the Section 45(5A) applies to an area sharing agreement and not to a revenue sharing arrangement.

   v. Tax Deducted at Source on the Land Owner and the Developer by end customers/purchasers.

   In the case of Revenue Sharing Agreement, it is a normal practice for the entire consideration received from the prospective purchasers of the units including the pass-through charges to be deposited in one common bank account normally opened in the name of the Project. The share of the revenue of the Land Owner Developer will then be transferred to respective bank accounts of the Land Owner and the developer usually opened in the same bank. The Revenue to be transferred to the account of the Developer includes all the pass through charges.

   Due to above mechanism of receipt of monies and distribution, there has been a practice of allowing the buyers of units to deduct tax at source under Section 194 IA only in the name of the Developer. The Developer in turn deducts tax at source at the rates specified under Section 194IA on the Land Owner to the extent of his/its distributable share of revenue.

   This practice in opinion of the Author is not correct as it indicates the Developer is a transferee for the entire Owners share of revenue whereas the actual transferees are the numerous end buyers of its units. It would therefore be appropriate to intimate the buyers to deduct tax at source both in the name of the Owner and the Developer to the extent of their respective revenue share.

However, the recent mandate by the RERA Authorities in certain states that there can be only one bank account for a Project can create several practical issues.

L. ALTERNATE STRUCTURES TO BE EVOLVED

Taking into consideration the various factors including the levy of stamp duty on Developments agreements and the Power of Attorney incidental thereto, the ineligibility for set off of stamp duty on subsequent sales to the ultimate customers, the various judicial decisions referred to above which seek to pre-pone the incidence of tax on the Land Owner even before he receives the consideration for development of land, the incidence of GST on the Owners Share of Super Built Area being constructed by the Developers in lieu of the undivided/divided share of land being conveyed to the Developers and/or their nominees, the incidence of GST on the supply of development rights by the Land Owner to the Developers etc , it is for professionals like us to put on the thinking caps and evolve a suitable structure which could minimise the impact of the above.

I am detailing below a few options which could be explored in the case of potential Joint Development/s.

I. Formation of a partnership firm between the Land Owner and a Developer

The above methodology could be adopted ideally in cases where a development is conceptualised on a revenue sharing model that is where there is no identifiable area between the Land Owners and Developer post development and where the agreement is to share the gross revenues other than taxes and deposits between the land Owner and Developer in an agreed ratio.

This scheme is conceptualised as follows:

i. The land Owner contributes the immovable property into a partnership firm at a value which is equivalent to the guideline value (Circle Rate) of the property. On such value being recorded in the books of the firm there would be an incidence of Capital Gain tax on the land Owner to the extent of difference between the value recorded in the books of the firm and the indexed cost. As the property will be recorded at an enhanced value in the books of the firm, the same value will be recorded as an expenditure of the firm as and when the property is sold or otherwise transferred. The sharing of the capital gains tax and the benefit derived from the differential tax benefit derived from the firm, will be shared between the Owner and Developer as agreed upon.

ii. The contribution of immovable property into the firm would be in accordance with Section 14 of the Indian Partnership Act 1932 and would therefore be recognised and treated from thereon as the firm's property.

It is to be noted that the act of contribution of an immovable property in to the firm will entail payment of stamp duty at the rate applicable to conveyance in the State of West Bengal. Further it will also entail the payment of registration fee of 1% as prescribed under the table of registration fees issued under Section 78 of the Registration Act, 1908 and register the property in the favour of the firm so as to enable and entry in Book 1 maintained by the Sub-Registrars under the Registration Act, 1908. This would help in securing a better title to the property and in getting the Khata of the property transferred in the name of the firm.

iii. The Developer should also become a partner in the said firm by making his initial financial contribution as agreed upon.

iv. It is to be clearly provided in the partnership deed that the entire cost of construction of the development would be borne by the Developer.

Further the clause on profit sharing would be worded in a manner so as to ensure that the land Owner would be entitled to draw as profits, a fixed percentage of the gross revenue exclusive of GST and deposits less the proportionate Income Tax to be borne by him. Similarly, it would be provided that the Developer would be entitled to draw as profits, a fixed percentage of the gross revenue less the construction cost less the proportionate Income Tax payable borne by him excluding GST and deposits.

v. The Developer would be giving an unbridled right as a partner of the firm to all acts, deeds and things necessary for the purpose of development as he would have done as a power of attorney

holder under conventional development agreement.

vi. The firm would have a common bank account referred to as the principal bank account for the collection of revenue i.e. the instalments towards consideration from the buyers including moneys towards taxes and deposits.

The share of revenues attributed to the Owner excluding the amounts received towards GST, Deposits and other pass through charges etc will be transferred understanding instructions to the bank to another bank account opened in the name of the firm to be exclusively operated by the owners from which the Owner would be entitled to draw his share of revenue/ profits as the case may above.

The Developer would either continue to spend for the development of the property from the said principal bank account or transfer his share of revenues to another designated bank account opened in the name of the firm from which the entire construction cost and other relevant expenses would be defrayed.

The GST and deposits collected from time to time i.e pass through charges would be left in the principal bank account of the firm and paid to the respective statutory authorities and bodies as per time lines prescribed.

vii. The Partnership deed would also have a specific indemnity clause between the partners indemnifying each other of possible ill effects on the firm in the event of their partnership share being attached or affected due to losses incurred by them in business/es other than that of the firm.

viii. The clause on dissolution would be worded in a manner so as to ensure that the land reverts back to the partner who has originally contributed it as capital contribution on dissolution until a threshold limit of cost incurred on development is reached by the Developer. The rights on the land at various stages of development in the event of dissolution can be detailed in the partnership deed.

ix. The firm would then convert and treat the immovable property introduced by the Owner which was a Capital Asset in his hands as capital contribution into the firm as mentioned above into stock in trade in its books. This event could be timed to be simultaneous with the approval of sanction plans, other permissions, clearances, etc obtained for the project.

This would ensure that the tax on the profits out of the development would get taxed as Capital Gains and Business income only at the point when such stock in trade is sold or otherwise transferred under the specific provisions of Section 45(2) of the Income Tax Act.

This would also be in line with the revenue recognition as mandated under AS 9 issued by Institute of Chartered Accountants of India.

It is to be noted that in the case of Developers developing housing projects on their own account as a commercial venture wherein the construction activity it outsourced to contactors, it has been held that the recognition of revenue as per the principles laid down in AS 9 issued by the ICAI is in order. Reference in this regard can be made to the following decisions-

Dy. CIT V Sudhir V Shetty (2014) 35 ITR (Trib) 115 (Mum "H" Tribunal)

S N Builders and Developers Vs ACIT 4(1) Bangalore ITA No 487/Bang/2013 rendered on 11-4-2014

Prestige Estate Projects Ltd V DCIT ITA 218/Bang/2009 (ITAT Bangalore)

CIT Vs Rema Country Holdings Pvt Ltd ITA No 1041 and 1042/2006 order dated 29-9-2011 (Kar HC)

Case referred- CIT Vs Hyundai Heavy Industries Company Ltd (2007) 161 Taxman 191 (SC)- assessee has a choice to select project completion or percentage completion method for recognising revenue.

Under the above scheme as there is no transfer or deemed transfer of immovable property by the Owner in favour of Developer during the period of development and as there is no necessity for a Power of Attorney to be given to the Developer as would have otherwise been done in a conventional development agreement, the ramifications arising out of the stamp duty applicable to development agreements and the

adverse judicial tax decisions mentioned elsewhere in this article would be practically eliminated.

II) Formation of a Limited Liability Partnership between the Owner and the Developer

As a partnership suggested above could involve the effect of unlimited liability being foisted on the firm and possibly its other partners, in case the Owner and Developer do not have a credible knowledge of each other's background it would be preferable to form a Limited Liability Partnership as against a Partnership firm suggested above.

However, as a Limited Liability Partnership is different legal entity and although there is an enabling provision for a partner to contribute tangible, movable, immovable or intangible property or other benefit u/s 32(1) of the LLP Act 2008, it could be possible only through a registered conveyance thereby involving stamp duty and registration charges. It is significant to note that the stamp act of various states do not have a specific article dealing with the applicability of stamp duty on the immovable properties owned by the firm when the firm is converted to and registered as an LLP and in the absence of such article, it is anybody's guess as to what rate of stamp duty would become applicable when an immovable property is contributed by a partner into an LLP as his/its capital contribution. It should be examined as to whether an LLP would be treated as a firm under the Stamp Act and Rules of the States which do not have a specific article for this purpose.

The other aspects which could affect the scheme evolved as in the case of a Limited Liability Partnership suggested above would be as follows:

i. Under the Limited Liability Partnership Act, the value of the property brought in as capital contribution by the partners to be recorded in the books of Limited Liability Partnership would be described under the Limited Liability Partnership Rules as specifically provided u/s 32(2) of the Limited Liability Partnership Act.

As per Rule 23 (2) of the Limited Liability Partnership Rules, 2009 the value of contribution of the immovable property would be as determined by a practicing Chartered Accountant/Cost Accountant/ Approved Valuer from the panel maintained by the Central Government. Consequently, there could be incidence of capital gains u/s 45(5) of the Income tax Act, 1961 in the initial stage itself. It is to be noted that the definition of "Firm" u/s 2(23) of the Income Tax Act includes a Limited Liability Partnership as defined in the Limited Liability Partnership Act, 2008 (6 of 2009) and definition of a "Partner" shall include a partner of a Limited Liability Partnership.

ii. The other aspects mentioned in the case of a firm in Para I above would equally be applicable to a Limited Liability Partnership.

iii. There could also be an impediment for immediate conversion of a firm into an LLP as although there is no stipulation in the LLP Act or LLP Rules, there is a mention in Form No 17 which is a part of the procedure for conversion of a firm to an LLP, that the firm should have been in existence for atleast one financial year and that a no objection certificate should be obtained from the Income Tax Authorities along with the application.

III) Developer to act as a Contractor

Under this method the land owner would hand over the responsibility of construction of the entire super built area to the builders through a construction contract. The Builder/ Developer would be performing his/its role as a contractor and not as a developer although such contractor would perform the same functions as that of a developer.

The agreement would state that the contractor would recover the fee due to him for construction by way of a right to sell a specified percentage of undivided share of land and super built area which will be referred to as "contractor's share".

The entire land would continue to be owned by the owners and the entire receipts including that

of the contractor's share would be disclosed as sales revenue in the owner's hand. From the said revenue the owner will reduce the fee paid to the contractor towards construction including the GST charged by him, which will be equal to the sale proceeds derived from transfer of the contactor's share. The contractor shall declare the contract receipts as his income and reduce the actual cost of construction incurred by him to arrive at his profit.

The GST from the buyers would be collected in the name of the owner and deposited to the respective authorities accordingly.

A Power of Attorney would be given to the contractor to do all acts, deeds and things as would normally have been done by a developer and such Power of Attorney would confer the status to the contractor as "an agent coupled with interest" as understood under Section 202 of the Indian Contract Act, so that the owner would not be able to revoke such Power of Attorney during the period of construction except for specific circumstances mentioned therein.

It is to be noted that as the owner would continue to hold the legal and possessory right on the property till it is ultimately transferred to the buyers, the revenue from such sales would be recognized only as and when transfer of property takes place.

In such an arrangement the Developer being a contractor will declare his/its revenue under the percentage of completion method while the Owner can declare his/its revenue as per the principles laid down in AS 9 issued by the ICAI. It is be noted that even as per the Income Computation and Disclosure Standards III relating to construction contracts issued by the CBDT to be effective from 1-4-2015, the said standard applies only to the income for a construction contract of a contractor.

Conclusion:

This article attempts to bring about various issues pertaining to the Direct Tax implication on development of immovable property through the mechanism of Development Agreements under the Area Sharing and the Revenue Sharing Models.

This Article has not dealt with the impact of indirect taxes i.e., GST on transfer of development rights and works contract and the GST applicability on the end purchasers of units/apartments and has also not dealt with various aspects of RERA which are relevant to the aforesaid models of development

It is critical to understand that each case should be thoroughly analysed keeping in mind the objectives of the parties concerned and the plethora of taxes which could affect the transaction before the same is documented either as an Area Sharing Agreement or a Revenue Sharing Agreement.

INCOME TAX SETTLEMENT COMMISSION

CA K.K.CHHAPARIA, FCA

1. INTRODUCTION

1.1. Recently, our Hon'ble Finance Minister Mrs. Nirmala Sitharaman has announced 'Vivad Se Vishwas Scheme' in her Budget Speech 2020. This Speech is however applicable only after assessment order has been passed and the matter is pending before appellate authorities. Again, this Scheme has its own limitations. For instance, one may not take advantage of 'Telescoping theory', 'Peak Credit Theory', 'Real Income Theory without application of deeming provisions' etc. At this point, I find worthwhile to write an Article on Settlement Commission – various practical aspects, procedures and relevant provisions. Unlike, 'Vivad Se Vishwas Scheme', one may approach Settlement Commission only when assessment proceedings are pending. Further, the Settlement Commission has got wide powers to determine real income and while doing so, they may ignore additional 'deemed income' and consider 'Peak Credit' and 'Telescoping'. Some practical instances as to when to approach Settlement Commission are given below :

1.2. Example 1: A business group inflate expenses of say Rs. 5 crore in Company A in Year 1, and ploughs back the money in books in Company B in Year 2 through bogus share capital. Now, if the group receives 148 notice for both the company, there can be situation that Rs. 5 crore is added in both the company. If the additions are sustained in appeal, there can be penalty and prosecution provisions. Now, there can be an alternative. The assessee moves ITSC involving both the company and makes offer of additional income of Rs. 5 crore in Company A in year 1, and takes advantage of telescoping theory and shows that Rs. 5 crore was utilized for mobilizing share capital in Company B in year 2. In that case, the assessee is not required to make offer additional income of Rs. 5 Crore in Company B. Further, there may not be any penal implications on the same.

1.3. Example 2: C company was in control of an entry operator. It raised share capital/premium of Rs. 15 Crores in FY 2012-13 and entire money was utilized in bogus investments. In FY 2014-15, a business house named D Group took over the company through some complex structure, and the bogus investments were thus purchased by some bogus entities in that year and the funds realised on sale of such bogus investments was utilised by D Group. On the basis of some FIU informations, 148 notice was received for both the years. In Year 1, on the basis of some bogus share capital and in the Year 2 on the basis of some bogus credit entries on account of sale of shares. Now, the Assessing Officer wants to make additions of Rs. 15 Crores each in both the years. The assessee may approach Settlement Commission and take advantage of Telescoping Theory.

1.4. Example 3: E Enterprises, a proprietorship firm was engaged in contracting business. It had to incur some unofficial expenses to get the contracts and accordingly, it used to take some bogus purchase bills to generate unofficial cash. During a Survey proceedings, some loose sheets were found which indicated the name of the parties from whom bogus purchase bills were usually taken. However, no document evidencing bogus payments were found, though Cash Statement of few days were found, which indicated such unofficial payments. In these kind of cases, it may be very tough that the Assessing Officer passes assessment order taking holistic view. The assessee may approach SC, who have power to assess on the basis of real income, without going strictly by rule of evidence.

1.5. Example 4: ABC Pvt. Ltd. was engaged in real estate activities. It had to take some unsecured loans in cash (say Rs. 5 crores) for the purpose of real estate activities and such loans were repaid in cash. During Search and Survey proceedings, some loose sheets were found which indicated the name of the parties from whom loans were taken and repaid in cash. Now, the Assessing Officer wants to make additions of Rs. 5 crores and also wants to initiate penalty under section

271D and 271E of the Act. The assessee may approach SC, who have power to assess on the basis of real income and also have power to waive penalty.

1.6. Again, we may find instances wherein assessee received huge amount of income in cash, which may be subject to penal provisions u/s 271DA of the Act read with 269ST of the Act. It may have incurred Cash Expenses exceeding limits prescribed u/s 40A(3) or may not have deducted TDS on payments, etc. In these circumstances, Settlement Commission may be advisable who have power to assess on the basis of real income and also have power to waive penalty.

1.7. There may be end number of other examples, like applying peak credit theory, income of entry operators etc, wherein Settlement Commission is advisable.

1.8. However, one could approach the Settlement Commission, before proceedings for assessment are completed. However, even when assessment order has earlier been passed, but a fresh 148 proceedings has started, assessee is entitled to approach Settlement Commission. A detailed discussions on this issue has been made in subsequent paras.

1.9. In the given background, now let me discuss the various aspects of Settlement Commission.

2. PREAMBLE

2.1. Chapter XIX – A of Income Tax Act, 1961 provides for settlement of cases. The Settlement Commission was set off in the year 1976 on the basis of recommendation of Direct Tax Enquiry Committee headed by former Chief Justice of India, Shri K.N. Wanchoo. The Committee in Chapter 2, entitled "Black money and tax evasion", Paragraphs 32 to 34 of its report, inter-alia observed as under:"*In the administration of fiscal laws, whose primary objective is to raise revenue, there has to be room for compromise and settlement. A rigid attitude would not only inhibit a one-time tax-evader or an unintending defaulter from making a clean breast of his affairs, but would also unnecessarily strain the investigational resources of the Department in case of doubtful benefit to revenue, while needlessly proliferating litigation and holding up collections. We would, therefore, suggest that there should be a provision in the law for a settlement with the taxpayer at any stage of the proceedings."*

2.2. Based on the above recommendations, the Settlement Commission was set up for settling across the board, tax liabilities in complicated cases with doubtful benefit to revenue and thereby ensure a mechanism to avoid protracted and endless litigation and save avoidable strain on investigational resources of the Income-tax Department.

2.3. Presently, the ITSC has seven branches, three in Delhi, two in Mumbai and one each in Chennai & Kolkata. Each bench has three members and headed by Vice Chairman. The Principal Bench at Delhi is headed by Chairman.

3. FEATURES OF SETTLEMENT COMMISSION

3.1 It is a quasi judicial body (*as per section 245L*) and is a premier Alternative Dispute Resolution (ADR) body in India.

3.2 Objective: to settlement liabilities in complicated cases & avoiding prolonged litigation, so as to allow a one-time tax evader or an unintending defaulter to make clean breast of his affairs.

3.3 Only assessee can approach the settlement authority.

3.4 The application for settlement can be made only during the pendency of the assessment proceedings.

3.5 The orders of the ITSC are final and not appealable. The orders are only subject to judicial review in terms of Articles 136 and 226 of the Constitution. Thus, time consuming litigation in regular appellate procedure is avoided by Department and assessee as well.

3.6 If the disclosure of the applicant is "Full and True", benefit of immunity from penalties and prosecution are available to the assessee. There may be some arguments regarding complex cases. However, the Bench expects that no material facts should be suppressed.

3.7 The proceedings are not open to public. Confidentiality of assessee's disclosure is maintained as the same could be used only in the Settlement Commission except as provided in section 245 HA (3) of the Act. The order of the Settlement Commission is not answerable to audit, executive or parliament.

4. LAWS & LEGISLATURE

Provisions related to Settlement Commission are included in Chapter XIX-A: Settlement of Cases Income Tax Act, 1961 from section 245A to section 245M of Income Tax Act 1961 and Rules 44C, 44CA & Rule 44D of Income Tax Rules 1962 and Income-tax Settlement Commission (Procedure) Rules, 1997

5. ELIGIBILITY

An applicant can approach Income-tax Settlement Commission, if the following conditions are satisfied

5.1 Condition -1 [Pendency of assessment proceedings - Sec 245C (1)]

An applicant can approach the Income Tax Settlement Commission in respect of a particular assessment year only if there is assessment proceedings is pending against him before an Assessing Officer on the date of filing of application, i.e. no assessment order is passed by the A.O. and the statutory time-limit for passing of assessment order for that year has not lapsed.

The various situations, when the assessment proceedings are deemed to be initiated / pending have been provided in Sec 245A (b) and are summarized below:

	Section	Assessment Proceedings	Deemed to be initiated from
147	Income Escaping Assessment	Assessment or Reassessment or Re-computation	Date of issue of notice u/s 148
254	Case before Appellate Tribunal		Date of Order,
263/264	Revision of assessments by [Principal] Commissioner	Fresh Assessment	setting aside or cancellingprevious assessment
153A	Assessment in case of search or requisition / related persons	Assessment or Reassessmentfor years mentioned u/s 153A(1)(b)	Date of issue of notice u/s 153(1)(A)
	Any other than above	Assessment or Reassessment	First day of the assessment year

5.2 Condition – 2 [Minimum assessment of tax - Proviso to sec 245C (1)]

The additional amount of income tax on the income that the applicant intends to disclose before the Commission for all the assessments years included in the application exceeds Rupees 10 lakhs. Such tax & interest thereon shall be paid before filing of application. Proof shall be attached.

However, cases involving Search assessment proceedings, the additional amount of income tax shall be Rupees 50 Lakhs.

5.3 Condition – 3 [Once in life time – Sec 245 K (2)]

In respect of application made on or after 1-6-2007, if application is allowed to be proceeded with u/s. 245D(1), assessee shall not be entitled to make an application ever again. The scope of this section is further widen w.e.f. 1-6-2015 that any person related to the person who has already approached the Settlement Commissions once, also cannot approach settlement commissions subsequently. The definition of related persons has also been expanded.

5.4 Condition – 4 [True and Full disclosure – Sec 245 H(1)]

As per Sec 245H (1), the Settlement commission has power to give immunity from penalty/prosecution provision, if the following conditions are satisfied

1. co-operates with the proceedings of the commission
2. makes true and full disclosure of his income,
3. The manner in which such income has been derived. There is no need to substantiate the manner of earnings, which is a requirement for lower rate of penalty u/s 271AAB of the Act.

6. PREPARATION FOR APPLICATION FOR SETTLEMENT

6.1 Settlement application is to be filed only in the prescribed Form No.34-B notified under the Income Tax Rules, 1962, which is to be signed by the applicant himself.

6.2 On the date of making application, A.O. shall be intimated in prescribed Form No. 34BA.

6.3 The application must contain a "Full and True" disclosure of his income which has not been disclosed before the AO. This is the most important criteria.

6.4 The applicant must explain the manner in which such income has been derived. "Manner" of deriving undisclosed is one of the most important criteria.

6.5 The application should be accompanied by the proof of payment of additional Tax and interest under section 234B and 234C on it. The interest on the additional tax is chargeable till the date of admission of the application.

6.6 The application has to be accompanied by a copy of Challans of payment of tax which have to be attested by the applicant.

6.7 The application is also to be accompanied by the evidence of payment of the prescribed fee. At present the Amount of the fee is Fixed at Rs. 500/-.

6.8 If the applicant submits any documents or statements or other papers, to rely on, he shall submit in the form of Paper Book. Such paper book shall be submitted in seven copies. Such documents and papers shall be attested by the applicant as true copy. Paper Book containing such papers shall be properly

- Indexed: giving brief description & the authority before whom filed,
- Numbered: in continuation to the previous paper book, if any,
- Binded: the preferred binding is spiral.

7. PROCEDURE ON RECEIPT OF APPLICATION:

7.1 Section 245D(1) provides that a notice be issued by the ITSC to the applicant within 7 days of filing of application, to explain as to why his application be allowed to be proceeded with.

7.2 Within 14 days of filing an application, ITSC has to decide whether to admit the application or to reject the same. If no order is passed within 14 days, application shall be deemed to be admitted.

7.3 After the application has been admitted, the Commission calls for the report of the Commissioner of Income Tax under section 245D (2B) within 30 days of filing of application and CIT has to furnish report within 30 days of receipt of communication.

7.4 The Commission may treat an application as valid by passing an order under Section 245D (2C), If the report of the Commissioner is not received within the period of 30 days from the day the letter from the Commission is received by the Commissioner, or on the basis of satisfaction of the Commission, on the basis of the report of the Commissioner.

7.5 The order of the Commission is to be passed within 15 days of the expiry of the period of 30 days given to the Commissioner for submitting the report.

7.6 The Commission is required to give an opportunity to the applicant before treating the application as invalid under Section 245D (2C).

7.7 Once an application has been held as valid, the Commission forwards the confidential part of the application to the Commissioner calling for his report under Rule 9 of the Income Tax Settlement Commission (procedure) Rules, 1997. This report is to be submitted by the Commissioner within 45 days. The Commission can allow further time, if needed by the Commissioner depending upon the facts of the case.

7.8 Provisions of sub-section (3) of S. 245D empowers the ITSC to call for a report on further investigation by CIT, if felt necessary.

7.9 Upon receipt of the Rule 9 Report, a copy of the same is sent to the applicant for submitting rejoinder on such report. A copy of rejoinder sent by the applicant is shared with the Commissioner.

7.10Where a fact, which is not borne out by or is contrary to the record relating to the case, is alleged in the Settlement application (including the annexure and the statement or other .documents accompanying such annexure), it shall be stated clearly and concisely and supported by a duly sworn affidavit.

7.11 The Members of the Commission then issue notice and fix hearing on a particular day and at a specified time. On the day of hearing, the applicant or his authorised representative and the Commissioner of Income Tax (or Assessing Officer) or his representative, namely Commissioner of Income Tax (Departmental Representative) appear before the Bench of the Settlement Commission. The Commission may ask the parties to further produce documents and submission. It may also ask the Commissioner to carry out further inquiry.

7.12 After considering both sides, the Commission then passes the final settlement order under Section 245D (4), in writing. The settlement order provides for the terms of settlement which includes determining the amount of additional tax and interest thereon and the manner of payment. The order may provide for payment of installments, with interest. It also provides for levy of penalty, or waiver from penalty under the Income Tax Act or the Wealth Tax Act.

7.13 The Settlement order under Section 245D (4) can be rectified by the Commission to correct mistakes apparent from records within 6 months of the order. However, where the effect of the rectification is to alter the tax liability of the applicant, due opportunity has to be given to the applicant as also the Commissioner.

8. EFFECT OF SETTLEMENT COMMISSION ORDER [Section 245I]

8.1 Section 245I provides that every order passed u/s 245D(4) shall be conclusive as to matters stated therein. Further, no matter covered by such order can be reopened in any proceedings under the Act or any law for time being in force except as otherwise provided under Chapter XIX-A. The order u/s 245D(4) is final and no appeal or revision is provided under the Act.

8.2 In many instances the orders have been challenged by either the assessee or the department before Hon'ble High Court by way of writ under Article 226. Though such a writ is maintainable, it is not an appeal or review by Hon'ble High Court of order of the Hon'ble Settlement Commission. It has been held that decision cannot be challenged but the decision making process can be examined by the Hon'ble High Court.

8.3 The Settlement Commission has exclusive jurisdiction in respect of year(s) for which order Sec 245D(4) has been passed by it.

9. CONCLUSION

In the last few months, the Government is coming out with Schemes/Instructions to reduce litigations. As a step towards further management of litigations, CBDT vide Circular No. 17/2019 dated 08th August 2019 has enhanced monetary limits for filing Appeals/SLP in Income Tax Matters by the department before ITAT, High Court and Supreme Court to Rs. 50 Lakhs, 1 Crore and 2 Crores respectively. Recently, the Government has come out with 'Vivad Se Vishwas Scheme'. The number of cases selected for scrutiny for A.Y. 2018-19 is significantly lower than in the past. I also find that recently, Directorate of Income Tax(System) had put limitations on powers of Assessing Officers to issue notices u/s 133(6) or 148 of the Act vide direction dated 28.02.2020. The said direction provide that the field officer should not carry out any enquiry under section 133(6) of the Act or issue notice under section 148 of the Act on the basis of the data presently available in either AIMS Module of the ITBA or the AIR information earlier shown In the ITD till further directions are issued.

The Faceless e-assessment Scheme is also intended to reduce litigations and curtail the powers of the Assessing Officers. All these shows that the Government is willing to reduce litigations. I personally believe that with the introduction of new tax rates in the form of Section 115BBE or new penalty provisions, going forward, the settlement commission will be one of the most important area of practice.

The Settlement Commission is a platform to avoid never ending litigation. In Para 1.2 of my article, I have given several instances wherein the assessee may be liable to tax even in respect of income which he has not earned or there may be duplicacy of tax on same income. Thus, Settlement Commission gives a unique opportunity to take advantage of telescoping of income and get taxed on real income without having burden of penalty and prosecution. However, as mentioned earlier it is once in a lifetime opportunity and the intention of the assessee should be to come out clear by making true and full disclosure of additional income.

I remember that one of the retired member of the Settlement Commission described the concept of Settlement Commission in few words as below:

REASSESSMENT UNDER INCOME-TAX ACT,1961

CA RAMESH KUMAR PATODIA

1. Reopening of assessments is an important tool under the Income-tax Act, 1961 whereby the Income-tax department is able to tax those assesses who have either not filed their return of income or have not declared income properly. The provisions regarding reopening are generally contained in Section 147 to 153 of the Income-tax Act, 1961. The general rule is that once the assessment for a particular year is completed, it becomes final. However, if the Assessing officer later on discovers that any income has escaped assessment then by observing due process of law he can imitate proceedings for reopening the assessment.

   Section 147 of the Act is couched with a very clear and unambiguous language that Assessing Authority can resort to reopen the assessment if it has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. While inserting the words "has reason to believe", the legislature has made an affirmative attempt to circumscribe these powers by making it amply clear that these powers are to be exercised bonafide to farther interest of the revenue and not to transgress these powers in a casual and cavalier manner. Emphasis on the recitals "has reason to believe" pre-supposes that the AO on scrutinizing the available materials for resorting to such powers may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The belief must be held in good faith; it cannot be a mere pretence. The question came up before the Constitution Bench of Hon'ble Apex Court in Calcutta Discount Co. Ltd. Vs. ITO [1961] 41 ITR 191 (SC), wherein it was observed that it is the duty of the assessee to disclose all the primary facts which have a bearing on the liability of the income earned by the assessee being subjected to tax. It is for the Assessing Officer to draw inferences from the facts and apply the law determining the liability of the assessee. The assessee cannot draw the conclusions drawn by the Assessing Officer and once the conclusion is drawn and the assessment order framed, the Assessing Officer cannot at a later point of time form a different opinion by giving a second thought to the facts disclosed by the assessee, holding that he committed an error in computing taxable income and reopen the assessment under section 147.

2. The important points regarding reopening of assessments are as follows: -

   a. Reasons must be recorded in writing prior to issuance of notice and the recorded reasons must have a live link with the formation of belief that the income has escaped assessment. It has been the experience in dealing with the reopening cases, that the reasons are hardly recorded in accordance with the law. They are worded very loosely and do not spell out the correct intention of the Assessing officer and this benefits the assessee. Once the notice for reopening an assessment is received, the best course of action to deal with the notice is to get the reasons for reopening the assessment and instead of trying to attack the notice on factual issues; if the notice is challenged on legal issues then the case is most likely to emerge in favour of the assessee.

   b. The Apex Court in the case of GKN Driveshafts (India) Ltd Vs ITO (2003) 259 ITR 19(SC) has spelt out the procedure to be adopted for challenging the jurisdiction for reassessment. Where reasons are required to be recorded, the AO is obliged to part with copy of the recorded reasons, if required by the assessee. He is also bound to hear the objections, if any, to jurisdiction raised by the assessee in a speaking order. It is only at that stage, it is open to the assessee after such order to question jurisdiction by way of writ or participate in further proceedings under protest retaining his objections to jurisdiction, so as to be able to agitate the issue of jurisdiction in appeal.

c. If the reopening notice has been issued beyond four years from the end of the assessment year, then it has to be seen whether there is any omission or failure on part of the assessee to disclose fully and truly all material facts necessary for completion of assessment. It has been held by a number of cases that the said fact of omission or failure on part of the assessee to disclose fully and truly must be reflected in the reasons recorded in writing itself and cannot be reflected in the affidavits or any other communication. Reasons recorded in writing are very vital and they cannot be supplemented with explanation at a later date. Reassessment proceedings cannot be initiated for a roving and fishing enquiry and the reasons must clearly disclose the mind of the assessing officer. The jurisdiction to assume reopening is amenable to challenge in a writ court and this proposition now seems to be settled with the decision of the Apex Court in the case of Jeans Knit Private Ltd Bangalore Vs DCIT (2016) SCC Online SCC 1536(SC) wherein it was held that the judgement of Chabil Das Agarwal was not applicable since writ against Notice u/s 148 is maintainable as held in Calcutta Discount case.

d. Very often, it is seen that the approval/Sanction of the Commissioner in writing wherever it is required to be obtained is either not obtained or even if it is obtained it is in a very vague manner without any application of mind and in these type of cases, courts have consistently taken a view that the reopening of assessment is in valid because there cannot be said to any reason to believe to lead to escapement of income.

e. Whether fresh return to be filed –there is no need to file any fresh return if the return which has already been filed doesn't require any further disclosure and a letter can be filed to this effect.

f. Copy of the reasons must be served on the assessee. It has been the experience that the assessing officers avoid giving reasons recorded in writing. However, once the return is filed, then the AO is bound to be given the copy of the reasons recorded in writing and failure of the mandatory process of law is liable to lead to notice being declared illegal. It has been held in Allana Cold Storage Ltd Vs ITO (2007) 287 ITR 1(Bom) and Kamlesh Sharma Vs B L Meena, ITO (2007) 287 ITR 337(Del) that where the AO had not given copy of the recorded reasons to the assessee, the notice was liable to be quashed. The Bombay High Court in the case of CIT Vs Videsh Sanchar Nigam Ltd (2012) 340 ITR 66(Bom) held that where an assessment is made without giving copy of the reasons to the assessee on his request, such assessment would be bad in law.

g. After the reasons are received, the best course of action is to file objections in details on all the issues and invite an Objection order which is required to be passed by the AO prior to commencement of reassessment proceedings

h. Once the objection order is received, then the course of action to be followed is to be decided – as to whether writ petition be filed with the Court to get the notice quashed or the normal assessment route is to be followed. If there are defects in the reopening on legal issues, then the best course of action is to challenge the reopening notice before a Court of law.

3. Section 147 and Section 154 proceedings whether can be simultaneously initiated and continued.

   Both the reassessment and rectification proceedings cannot go on simultaneously. If the AO makes an allegation that the income chargeable to tax has escaped assessment because of omission or failure to disclose fully and truly all material facts necessary for assessment, then simultaneous rectification proceedings would be contrary to such a case as something which is on record cannot be said to omitted to be disclosed.

4. The reassessment proceedings can be started on account of various reasons such as

   i. Audit Objection,

   ii. Change in Law,

   iii. Order of High Court/Supreme Court,

   iv. Change in Assessing Officer,

   v. Information from other departments like Sales-tax/ Customs/ Excise/Enforcement Directorate/ other agencies,

vi. Circular issued by CBDT and

vii. other reasons.

5. Difference between Proceedings u/s 148 and u/s 263

The revisional power u/s 263 cannot be exercised in respect of a matter which falls within the power to assess the escaped income. The revising authority, in other words, should not trench upon the powers which are expressly reserved to the AO u/s 147. The commissioner, in exercise of its revisional jurisdiction should not ignore such specific power (Bidar Saharan Karkhane Ltd Vs State of Karnataka (1988) 174 ITR 389,393.

6. Maintainability of writ petition

The question of maintainability of writ petition in the presence of an alternate remedy available has come up time and again before the courts. The general principle as laid down in various judgments is that in the presence of an alternate efficacious remedy provided under a statute, it is not open to a party to approach the High Court under article 226 without exhausting the alternate remedy. Certain exceptions to this rule have been laid out, namely, writ jurisdiction may be exercised in cases where there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

Article 226 of the Constitution, clauses (1) and (2), are as below:

(1) Notwithstanding anything contained in article 32, every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territories directions, orders or writs, including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-Warranto and Certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or any person also be exercised by any High Court exercising jurisdiction in relating to the territories within which the cause of action, wholly or in part, arises for the exercise of the such power, notwithstanding that the seat of the such Government or authority or the residence of such person is not within those territories."

The Apex Court in the case of ChhabilDass Agarwal 357 ITR 357 [2013] referred to a series of judgments on the issue to explain the law on maintainability of writ petitions in the presence of an alternate statutory remedy as follows:

a. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court, when an efficacious alternative remedy is available, is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner, and he approached the High Court without availing the same, unless he makes out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under article 226.

b. Though article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

c. While it can be said that the court has recognised some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice,

the proposition laid down in some cases that the High Court will not entertain a petition under article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance, still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

d. The Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner (Appeals).

e. The writ court ought not to have entertained the writ petition filed by the assessee, wherein he had only questioned the correctness or otherwise of the notices issued under section 148, the reassessment orders passed, and the consequential demand notices issued thereon.

This judgment of the Supreme Court has been given in facts where an alternate remedy was available to the assessee to appeal against the order of reassessment under the statute and the assessee did not give any reasons as to why the alternate remedy was not availed of. It is submitted that in case the assessee wants to challenge a notice for reassessment on the ground that any pre-condition required for reassessment under section 147 has not been fulfilled, he may still approach a High Court under article 226 of the Constitution after following the procedure laid down in GKN Driveshafts (India) Ltd. case (supra) since no remedy has been provided under the Act for challenging a notice for reassessment. There are several judgements which have been pronounced since then and the accepted judicial verdict is that notice u/s 148 can be challenged in a writ petition under Article 226 of the Constitution of India.

Also, in a case where reassessment order has been passed without giving a reply on the objections raised by the assessee, the order being passed in contravention of principles laid down in GKN Driveshafts (India) Ltd. case (supra) is liable to be quashed in a writ petition under article 226.

7. There are several important decisions which have been pronounced right since the constitution bench decision in the case of Calcutta Discount Co Ltd (Supra) and they are briefly discussed hereinunder: -

A) Calcutta Discount Co Ltd -(1961) 41 ITR 191(SC)

The Apex court held that twin conditions must be satisfied in case the reassessment proceeding is initiated beyond four years from the end of the assessment year where the original assessment was completed u/s 143(3)(though the Apex court was dealing with the law as it stood then) and they are: -

I) There must have been an omission or failure to disclose fully and truly all material facts necessary for the assessment and

II) such omission or failure must have resulted in the escapement of income.

The apex court noted that there must be a finding to this effect about the above two points and without this the reassessment is not justified.

b) GKN Driveshaft (India) Ltd Vs ITO (2003) 259 ITR 19(SC)- the procedure to be followed upon receipt of notice for reassessment has been explained in this judgement and it has been consistently followed by all the authorities as well as judiciary.

c) Hindustan Lever Limited Vs R B Wadkar- (2004) 268 ITR 332(Bom)

Reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No addition can be made to those reasons. No inference can be allowed to be drawn based on the reasons not recorded. It is for the AO to disclose and open his mind through the reasons recorded by him and he has to speak through the reasons. The reasons recorded must be clear and unambiguous. He must disclose in

the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for the assessment for that assessment year so as to establish the vital link between the reasons and evidence. The vital link is safeguard against arbitrary reopening of the concluded assessment.

d) Asst CIT v. Rajesh Jhaveri Stock Brokers Pvt Ltd(2007) 291 ITR 500(SC). – In case of intimation u/s 143(1)(a) – no opinion can be said to have been formed and consequently, the reopening is justified. The expression "reason to believe" in section 147 would mean cause or justification. If the AO has cause or justification to know or suppose that income had escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. What is required is reason to believe but not the established fact of escapement of income. For taking steps under Section 147 only reason to believe is required.

e) ITO v. Lakhmani Mewal Das (1976) 103 ITR 437(SC) – Reason to believe explained. The reason for formation of the belief contemplated by section 147 (a) for reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between a material coming to the notice of the ITO and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly material facts. The reason for the formation of belief must be held in a good faith and should not be a mere pretence. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of assessment after lapse of many years is a serious matter.

The court relied on earlier decision in the case of Chhugamal Rajpal Vs S P Chaliha (1971) 79 ITR 603(SC). The case related to name lending. The AO vaguely referred to report received from Commissioner of Income tax Bihar and Orissa and he stated that it appears that the persons are name lenders and transactions are bogus. Further the commissioner also gave mechanical approval to the reopening and thus the reopening was not justified.

f) ITO Vs Madnani Engineering Works Ltd (1979) 118 ITR 1(SC)-

The reassessment in this case was held to be invalid because the counter affidavit of the department did not disclose the full facts as according to him it would cause prejudice to the interest of the revenue and would frustrate the object of reopening of the assessment. The assessee had produced in the original assessment proceedings all the hundis on the strength of which it had obtained loans from creditors as also entries in the books of account showing payment of interest and it was for the ITO to investigate and determine whether these documents were genuine or not.

g) Calcutta High Court -ITO, I Ward Hundi Circle, Calcutta Vs A R Private Ltd (1980) 125 ITR 177(Cal)- reopening on the basis of secret circular containing names of name lenders alleged to have carried bogus transactions and there was no indication that alleged name lenders had entered into bogus transactions with the assessee or the confession related to the assessee or to the relevant assessment years. Notice for reopening was invalid.

FACELESS E-ASSESSMENT

CA NIRAV SHETH, FCA

1. INRODUCTION

1.1. 'Artificial Intelligence, Machine Learning, Advanced Data Analytics, Complex Algorithms based Automated Allocation System, Automated Examination Tool, Hash Function, Video Telephony and the list goes on.

1.2. No, any science fiction movie or any space science mission are not being talked about here.

1.3. Only the 'phraseology' and 'terminology' being used in the recent Official Gazetted Notification No. 61 /2019 issued by the Ministry of Finance on 12-9-2019, bringing to fore the 'New Scheme of e assessment 2019', is being referred to here.

1.4. On 7-10-2019, delivering on the promise made to taxpayers in the budget speech of the Hon'ble Finance Minister, the faceless e-Assessment scheme of the Income-tax assessments for the AY 2018-19 and onwards has been launched by the Hon'ble Revenue Secretary, with the inauguration of the National e-Assessment Centre (NeAC) in New Delhi.

1.5. In the first phase, the Income-tax department has selected 58,322 cases for scrutiny under the 'New Scheme of e-Assessment-2019' and the corresponding 'e-Scrutiny Notices under section 143(2) of the Income-tax Act have been electronically served on or before 30-09-2019 for the AY 2018-19.

1.6. Earlier on 14th August 2019, just before Independence Day, CBDT has mandated that any communication with taxpayers will now have to be only through electronic means bearing an identification number to counter tax harassment charges. All such communication issued on or after October 1, 2019 shall carry a computer-generated Document Identification Number (DIN) duly quoted in the body of such communication. Also the notices issued by the department not carrying any name designation of the Assessing Officer (AO).

1.7. The earlier cases of manual correspondence will have to be uploaded on the dedicated Income Tax Business Application (ITBA) platform. This will allow authorities to see in real time the actions of assessing officers, the kind of communication he sends out, the number of notices or summons. This will bring more accountability.

1.8. CBDT has also specified exceptional circumstances where the communication may be issued manually with checks. Communications will be allowed to be issued manually only after recording reasons in writing and with the prior written approval from The Chief Commissioner or Director General of Income-tax concerned.

1.9. In cases where manual communication is required to be issued, the reason for issue of manual communication without DIN has to be specified along with the date of obtaining written approval of The Chief Commissioner or Director General of Income-tax in a particular format.

1.10. Further, CBDT has also laid down the timelines and procedure by which such communication issued manually will have to be regularised and intimated to the Principal Director General of Income-tax (Systems).

1.11. A taxpayer can treat any communication without an identification number as invalid.

1.12. Taxpayers' responses will also have to be electronically updated, bringing down any physical interface between tax officers and taxpayers. All pending assessments - where notices were issued manually prior to the circular - would be identified and the notices sent would be uploaded on portal by October 31, 2019.

1.13. To maintain proper audit trail of all communication, the CBDT has laid down parameters specifying the manner in which any

communication issued by any income-tax authority relating to assessment, appeals, orders, statutory or otherwise, exemptions, enquiry, investigation, verification of information, penalty, prosecution, rectification, approval etc. to the assessee or any other person will be dealt with.

1.14. Recently, notices are received by some of the tax payers directly from "Assistant Commissioner of Income tax (e-verification)"

1.15. The CBDT on 12th September 2019, notified the much talked about e-assessment procedure vide Notification no. 61/2019. The stakes were high, as it was expected to reduce the red-tapism in the country, during an assessment proceeding. This notification was quickly followed up by another Notification vide 62/2019, giving effect to the Income Tax E-Assessment Scheme, 2019.

1.16. The new Scheme is applicable only in relation to assessment proceedings under section 143(3). Therefore, it does not apply to other assessment/ reassessment proceedings under the Act. Clause 2(iii) defines "assessment" to mean only the regular assessment as per Sec. 143(3) of the Act. Thus, it is seen that the following categories of assessments are kept outside the purview of the Scheme –

(a) Reassessment u/s. 147.

(b) Assessment u/s. 153A in case of search.

(c) Best judgment assessment u/s. 144.

1.17. This article attempts to cover both these notifications and provides the reader with a bird's eye view of the E-assessment scheme.

2. PERSONAL HEARINGS BEFORE THE TAX OFFICERS

2.1. Rule 11 of the new Scheme specifically prohibits personal appearance of the Assessee or the authorised representative before the income tax authority at the NEC, REC or any units set up under this Scheme.

2.2. However, where a modification is proposed in the draft assessment order and an opportunity is provided to the Assessee by serving a notice, the Assessee or his Authorised Representative shall be entitled to seek personal hearing so as to make oral submissions. However, such personal hearings have to be exclusively through Video Conferencing only.

2.3. The Scheme provides that the Board shall establish suitable facilities for video conferencing at such locations as may be necessary.

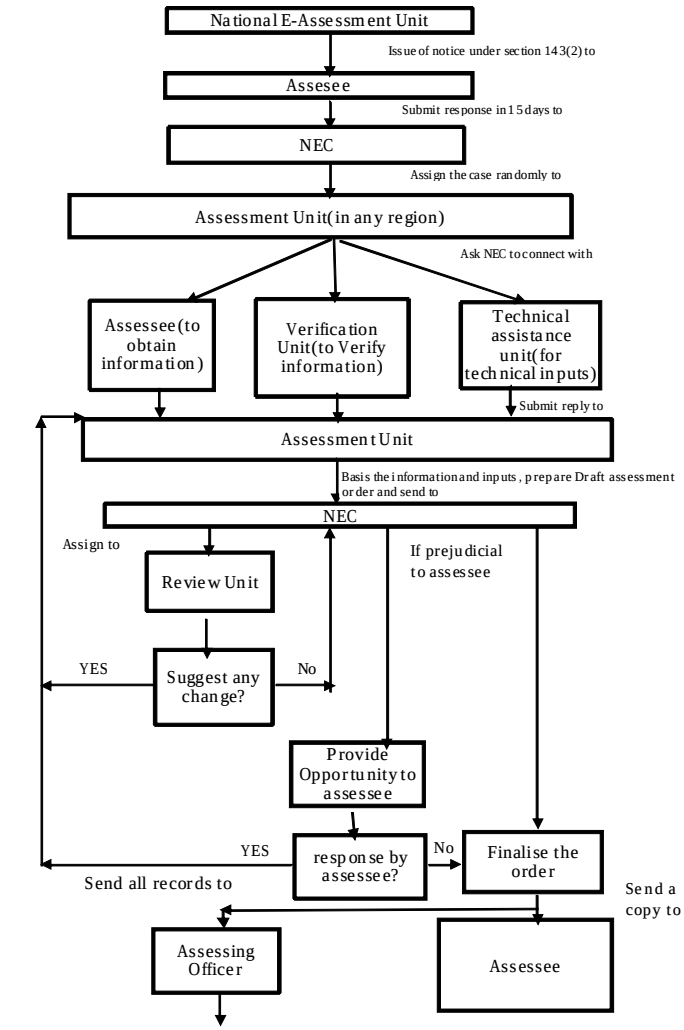
3. PROCESS AND PROCEDURE OF FACELESS E-ASSESSMENT

3.1. The Centralized Processing Centres, National E-assessment Centre, Regional E-Assessment Centres, Assessment Units, Verification Units, Technical Units and Review Units shall be set up to facilitate the conduct of e-assessment. All these Centres have been assigned their role-play in the Notification as summarised below:

E- Assessment Centres and Units	
National e-Assessment Centre ('NEC')	To facilitate the conduct of e-assessment proceedings in a centralised manner.
Regional e-assessment Centres('REC')	To facilitate the conduct of e-assessment proceedings in the cadre controlling region of Principle Chief Commissioner
Assessment Units	To perform the function of making assessment which includes identification of material points/ issues in the ITR, seeking information/ clarification on such points, analysis of material furnished by Assessee and making of draft order.
Verification Units	To perform function of verification including enquiry, cross verification, examination of books of accounts,
	witness etc.
Technical Units	To provide technical assistance which includes assistance/ advice on legal, accounting , forensic, valuation, transfer pricing etc.
Review Units	To review the draft assessment order i.e. to check whether the relevant facts, legal points & judicial pronouncements etc. have been properly incorporated in the draft assessment order.

3.2. Further flow chart to understand procedure of E-assessment Scheme is given below for easy reference:

Procedure of E-assessment Scheme



For:
a)penalty proceeding b)recovery of demand c) rectification of mistake d)appeal effect orders, e)submission of remand report, f)representation before appellate authority g) launch of prosecution

4. INDIAN TAX ADMINISTRATION

5. CONCEPT OF 'DYNAMIC'/ 'SHARED' JURISDICTION

5.1. Dynamic/ Shared jurisdiction can be under stood as the concept where the two or more authorities exercises jurisdiction in respect of different aspects of one case.

After this scheme, the jurisdiction of a taxpayer would be as follows:

Jurisdiction in respect of	To be exercised by
Processing of ITR under section 143(1) of the Act	CPC
Assessment under section 143(3) of the Act	NEC along with REC & Allocated unites
All proceeding other than the above two	Jurisdictional AO

5.2. Further the Scheme provides that NEC, shall after completion of records, transfer all electronic records of the case to the Jurisdictional AO for imposition of penalty, collection and recovery of demand, rectification of mistake, giving effect to appellate orders, submission of remand reports, proposals seeking sanction for launch of prosecution.

6. WHETHER ASSESSEE CAN VOLUNTARILY OPT OUT OF THIS SCHEME?

6.1. Rule 5(xxi) of the new Scheme provides that notwithstanding anything contained in para (xx), the NEC may, at any stage of the assessment, if considered necessary transfer the case to the AO having jurisdiction over such case

6.2. The above para provides an exception where the assessment under section 143(3) of the Act is not completed under this Scheme and the NEC transfers the case to jurisdictional AO, if doing so is considered necessary by the NEC.

6.3. The possible reason which may make it necessary for the NEC to transfer the case to the jurisdictional AO could be where the case involves extreme and therefore, ought to be handled by one single officer instead of a multiple units.

6.4. Therefore, the Assessee whose ITR involves extreme complications may be able to request the NEC that its case be transferred to the jurisdictional AO for assessment.

7. Few FAQ's

Q. What is Income Tax Business Application (ITBA) module?

A. The Income-tax Department has developed an integrated platform i.e. 'Income-tax Business Application' (ITBA) module for electronic conduct of various functions/ proceedings including assessments.

This is integrated with the e-filing portal which is used by the assessee to electronically communicate with the Income-tax Department.

During the course of assessment proceeding, Assessing Officer is required to send communications through the 'Assessment Module' of ITBA which is delivered in e-filing account of the concerned assessee.

Upon receipt of departmental communication, assessee is able to submit the response along with the attachments by uploading the same through his e-filing account on the e-filing portal (www.incometaxindiaefiling.gov.in).

Q. Is India the first country to implement 'e-Assessment' system of conducting assessments ?

A. India is not the first country to implement the 'e-Assessment' system of conducting assessments, and various other countries like Mexico, Norway, Singapore and Brazil are already doing it.

Q. How are Scrutiny Notice/Requisitions under the New Scheme of e-Assessment 2019 different from those under the existing Scrutiny Notices/ Requisitions under e-Proceedings?

A. The Scrutiny Notices/Requisitions under the New Scheme of e-Assessment 2019 are issued by NeAC and not by the jurisdictional assessing officer.

The scrutiny notices/requisitions issued under the New Scheme of e-Assessment 2019 will mandatorily contain a Document Identification Number (DIN) and the scrutiny notices/requisitions issued without having DIN will be treated as nonest in Law.

Q. What are the three 'specified types of responses', which the assessee may file in response to a query raised in Intimation under section 143(1)(a) of the Income-tax Act

A. The three 'specified types of responses', which the assessee may file in response to a query raised in Intimation under section 143(1)(a) of the Income-tax Act are:

- Agree
- Partially Agree
- Disagree

Q. What are the crucial and important points which the assessee should keep in mind while submitting responses to queries raised by assessing authority in scrutiny notice/ questionnaire under section 143(2) /148/ 142(1) of the Income-tax Act?

A. The crucial and important points which the assessee should keep in mind are discussed as under:

- Submission of Partial Responses: If the assessee is submitting its response on piecemeal basis, then he needs to choose *'response type'* as *'partial'.*
- Submission of Full Response: If the submissions are made on piece- meal basis, then there would be multiple *'partial responses'*, After submitting his 'last partial response', the assessee needs to update the 'Response type' to 'Full Response' instead of *'Partial response',* and if. the assessee wants to file just one response to the scrutiny notice then he may opt for the *'response type'* as *'Full Response'.*

Brief Remark to Response: The assessee may also furnish a brief 'remark' to its response under the tab 'Response/Remark', not exceeding the character limit of 4000 characters. Previously this limit was 1000 characters only.

Attachments: The assessee may also upload supporting documents as Attachment by choosing

different specified categories of attachments mentioned in the dropdown list.

In case, the supporting documents to be attached don't fit into any of the specified categories in the drop-down list then the assessee may choose 'Others' option in the drop down list, for attaching such documents.

While attaching the supporting documents, the assessee needs to be careful about the names of the Attachment i.e two attachments should not be same, also while naming the character limit should not exceed 100 characters.

Q. What is the maximum 'number' of attachments which can be attached along with a single 'response'?

A. The maximum number of attachments or files which can be attached along with a single 'response' is 'TEN' (10).

While submitting a single response, in case the maximum specified limit of attachments of 10 pdf files gets exhausted then the assessee should opt for another 'partial response' so as to continue with uploading the remaining attachments.

Q. What is the maximum 'size' of one attachment which can be attached along with a single 'response'?

A. The maximum 'size' of one attachment which can be attached along with a single 'response' is '50 MB'.

In case the size of one attachment file exceeds the maximum specified size of 50 MB, then the assessee should split the attachment into two or more file attachments, in such a manner that the size of one attachment does not exceed 50MB. These files may be named as 'File name, 1', 'File name, 2', 'File name, 3', and so on.

Q. What is the maximum time limit for filing all the 'e-responses' by the assessee under the 'e-proceedings' functionality ?

A. The maximum time limit for filing all the 'e-responses' by the assessee under the 'e-proceedings' functionality is seven days prior to the Time-Barring (TB) date of the regular assessment.

If there is no Time Barring date, then the AO can on his volition close the e-submission, whenever the final order or decision is under preparation to avoid last minute submissions.

However, the AO on sufficient reasonable cause, can also re-enable the e-submission by the assessee in both TB and non- TB situations.

Q. In case of electronic communication what would be the address for service of notice or any other communication as prescribed under section 282 of the Income-tax Act, 1961?

A. Rule 127 of the Income-tax rules, 1962 prescribes the addresses to which the notice or any other communication may be delivered or transmitted. Sub-rule (2) of rule 127 defines the addresses for communication delivered or transmitted electronically as:

- e-mail address available in the income-tax return furnished by the addressee to which the communication relates
- the e-mail address available in the last income-tax return furnished by the addressee
- in the case of addressee being a company, e-mail address of the company as available on the website of Ministry of Corporate Affairs
- any e-mail address made available by the addressee to the income-tax authority or any person authorised by such income-tax authority

8. CONCLUSION

8.1. Moving to digital from the decades-old system of manual scrutiny, the tax department would use data analytics, artificial intelligence, machine learning and other latest tools to ascertain misreporting or evasion. Income tax department had already started gathering data from various sources including ITR. Presently the data required to be filed in various ITRs has increased to a great extent. The new Income Tax Return (ITR) forms for Assessment Year 2019-20 came with a set of changes—essentially more detailed disclosures—

taxpayers have to contend with. For instance details required in the Newly added Schedule with respect to share holding (Sch SH-1 & SH-2 of ITR 6) and details of assets and liabilities (Sch AL-1 & AL -2 of ITR 6) of unlisted company and start-ups. This will help Income Tax department to check evasion and eliminate loopholes on the one hand and it will also going to help the Income Tax department in faceless assessment on the other hand.

8.2. The media coverage of National e-Assessment Scheme has been unprecedented. There has been wide coverage in the print and electronic media as well as on the social media like twitter, facebook etc. and the response has been encouraging and positive. The Hon'ble Prime Minister, Finance Minister and large number of eminent policy maker, tax advisor have hailed it as a mile stone for taxation reforms in India to a major step in improving the ease of doing business. The faceless assessment is going to be the new face of Income-tax Department as this scheme is likely to be expanded substantially as time goes by.

8.3. In times to come, assessee may also be provided pre-filled return forms as part of the government's initiative to simplify procedures. However, it may also turn out to be a case where *"Multiplicity could hamper Simplicity".* Looking at the past experience, it will be a challenging task for tax payers/consultants to convey intention of particulars of income and expenses in proper submissions and in such a way that intended argument works atleast in favour of genuine tax payers.

RECENT APEX COURT RULINGS OF PRACTICAL DAY TO DAY USE

Compiled by
Adv KAPIL GOEL

1. Case of DCIT vs T.Jayachandran (Civil Appeal 4341/ 2018 ORDER dated 24/04/2018) real income theory , consistency in criminal court and income tax findings and agreement by conduct etc 406 ITR 1

"....3) Brief facts:- (a) The Respondent - an individual and the proprietor of M/s Chandrakala and Company, is a stock broker registered with the Madras Stock Exchange. He is stated to be an approved broker of the Indian Bank. The assessment years under consideration herein are 1991-92, 1992-93 and 1993-94 respectively. During all these relevant assessment years the Respondent acted as a broker to the Indian Bank in purchase of the securities from different financial institutions. (b) It is the case of the Revenue that the Indian Bank, in order to save itself from being charged unusually high rate of interest on borrowing money from the market, lured Public Sector Undertaking (PSUs) to make fixed term deposit with it on higher rate of interest. The rate of interest offered to the PSUs for making huge term deposits was to the extent of 12.75% of interest on fixed deposit against the approved 8% rate of interest in accordance with the RBI directions. (c) In order to pay higher interest to the PSUs who made a fixed term deposit with the Indian Bank, the bank requested the Respondent to purchase securities on its behalf at a prescribed price which was unusually high but adequate to cover the market price of the securities, brokerage/incidental charges to be levied by the Respondent on these transactions, apart from covering the extra interest payable to the PSUs. The Respondent, on the instructions of Indian Bank, purchased securities at a particular rate quoted by the Bank and sold them to Indian Railways Finance Corporation. Bank of Madura was the routing bank through which the securities were purchased and sold to Indian Bank for which Bank of Madura charged service charges. The Respondent was paid commission in respect of transactions done on behalf of Indian Bank. Under instructions from Indian Bank, a portion of the amount realized from the security transactions carried on behalf of Indian Bank was paid by way of additional interest to certain Public Sector Undertakings (PSU) on the deposits made with the Indian Bank and out of eight PSUs three has confirmed the receipt of such additional interest through demand drafts.

The Assessing Officer, vide order dated 25.01.1996, raised a demand for a sum of Rs. 14,73,91,000/- with regard to the sum payable to the PSUs while holding that the Respondent has not acted as a broker in the transactions carried out for the Indian Bank rather as an independent dealer and that there was no overriding title in favour of the PSU¡¯s with regard to the additional amount earned out of the securities transactions and it is a case of application of income after accrual and, hence, the said amount is liable to be assessed as the income of the Respondent.

It is pertinent to note that in the meanwhile criminal proceedings which were initiated with respect to the present transactions in question against the Respondent along with others bearing No. CC 17 of 1997, was decided on 27.04.2004 by the CBI court. The court, while acquitting the Respondent has observed that the relationship between the Indian Bank and the Respondent is that of principal-agent and with regard to the transactions in question the Respondent acted in the capacity of a broker and not as an individual dealer. However, the Tribunal refused to rely on the evidence produced in the trial court on the ground that the assessment proceedings are different from the criminal proceedings and the evidence adduced in the trial court couldn¡¯t be relied to absolve the Respondent from the tax liability. The High Court, vide order dated 29.10.2012, set aside the order of the Tribunal while relying on the evidence given in the criminal case in this regard. Hence, this appeal is filed before this Court.

Point(s) for consideration:- 4) The only point for consideration before this Court is whether on the facts

and circumstances of the present case the High Court was right in holding that the alleged additional interest payable to PSUs cannot be assessed as income of the Respondent?

Proposition laid down by Apex court:

The conduct of the Respondent in the transaction in question cannot be termed to be strictly within the normal course of business and the irregularities can be noticed from the manner in which the whole transactions were conducted. However, the same cannot be basis for holding the Respondent liable for tax with regard to the sum in question and what is required to be seen is whether there accrued any real income to the Respondent or not¡¦

It is required to be seen in what capacity the Respondent held the said amount-independently or on behalf of the Indian Bank. The Assessing Officer, while passing order dated 25.01.1996, has held that there exists no agreement between the Respondent and the Indian Bank about the payment of additional interest to the PSUs and there was no overriding title in respect of the additional interest for the PSUs. However, the position in this regard is very much settled that an agreement need not be in writing but can be oral also and the same can be inferred from the conduct of the parties

At the outset, learned counsel appearing on behalf of the Revenue contended that the proceedings under the Income Tax Act are independent proceedings and the High Court committed a grave error in relying on the findings of the criminal Court. We do not find any force in the contention of the appellant herein as the High Court has not held that the findings of the criminal court are binding on the Revenue authorities. Rather the High Court was of the view that the findings arrived at by the criminal court can be taken into consideration while deciding the question as to the relationship between the parties to the case. When the findings are arrived by a criminal court on the evidence and the material placed on record then in absence of anything shown to the contrary, there seems to be no reason as to why these duly proved evidence should not be relied upon by the Court. The High Court has specifically appraised the findings given by the CBI Court in this regard. The relationship between the Indian Bank and the Respondent is very much clear by the evidence led during the criminal proceedings¡¦.

Consequently, the conduct of the parties, as is recorded in the criminal proceedings showing the receipt of amount by the broker, the purpose of receipt and the demand drafts taken by the broker at the instance of the bank are sufficient to prove the fact that the Respondent acted as a broker to the Bank and, hence, the additional interest payable to the PSUs could not be held to be his property or income.

The income that has actually accrued to the Respondent is taxable. What income has really occurred to be decided, not by reference to physical receipt of income, but by the receipt of income in reality. Given the fact that the Respondent had acted only as a broker and could not claim any ownership on the sum of Rs. 14,73,91,000/- and that the receipt of money was only for the purpose of taking demand drafts for the payment of the differential interest payable by Indian Bank and that the Respondent had actually handed over the said money to the Bank itself, we have no hesitation in holding that the Respondent held the said amount in trust to be paid to the public sector units on behalf of the Indian Bank based on prior understanding reached with the bank at the time of sale of securities and, hence, the said sum of Rs. 14,73,91,000/- cannot be termed as the income of the Respondent. In view of the above discussion, the decision rendered by the High Court requires no interference…"

2. Recently Apex court in case of Peerless Finance 416 ITR 1 has propounded that "The "theoretical" aspect of the present transaction is the fact that the assessee treated subscription receipts as income. The reality of the situation, however, is that the business aspect of the matter, when viewed as a whole, leads inevitably to the conclusion that the receipts in question were capital receipts and not income."

3. Hon'ble Supreme Court in the case of Maruti Suzuki 416 ITR 613 . The facts in this case are that Suzuki Motors Corporation, and MSIL constituted a joint venture with shareholding of 70% and 30%. Such joint venture was incorporated as Suzuki Motor India Ltd. Subsequently w.e.f. 8.6.2005 its name was changed to SPIL. On 28.11.2012 SPIL has filed its return of income. Upto this date no amalgamation had taken

place. On January 29, 2013 a scheme for amalgamation of SPIL and MSIL was approved by the Hon'ble High Court w.e.f. 1.4.2012. The terms of approval scheme provided that all liability and duties of the transferor company shall stand transferred to transferee company without any act or deed. On scheme being coming into effect, the transferor company was to stand dissolved without winding up. The scheme stipulated that the order of amalgamation will not be construed as an order granted exemption from the payment of stamp duty or taxes, or any other charges, if any payable in accordance with law. The AO has initiated the assessment proceedings by issuance of notice under section 143(2) on 26.9.2013 followed by a notice under section 142(1) of the Act to the amalgamating company. MSIL participated in the assessment proceedings of erstwhile amalgamating entity i.e. SPIL through its authorised representative and officers. The assessment was framed. Thereafter during the appellate proceedings before the Tribunal the assessee took an objection that final assessment order was passed on 31.10.2016 in the name of SPIL which was amalgamated with MSIL. The assessee took an objection that the assessment order has been passed in the name of company which ceased to exist and the assessment order is void ab initio. This plea of the assessee was accepted by the Tribunal. This order of the Tribunal was upheld by the Hon'ble High Court. Ultimately issue travelled upto the Hon'ble Supreme Court. While taking cognizance of the submissions, and the proposition laid down in various High Courts' decisions, the Hon'ble Supreme Court made the following observations: "19. While assessing the merits of the rival submissions, it is necessary at the outset to advert to certain significant facets of the present case: (i) Firstly, the income which is sought to be subjected to the charge of tax for AY 2012-13 is the income of the erstwhile entity (SPIL) prior to amalgamation. This is on account of a transfer pricing addition of Rs. 78.97 crores; (ii) Secondly, under the approved scheme of amalgamation, the transferee has assumed the liabilities of the transferor company, including tax liabilities; (iii) Thirdly, the consequence of the scheme of amalgamation approved under Section 394 of the Companies Act 1956 is that the amalgamating company ceased to exist. In Saraswati Industrial Syndicate Ltd., (supra) the principle has been formulated by this Court in the following observations: "5. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or 'amalgamation' has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly 'amalgamation' does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: Halsbury's Laws of England (4th edition volume 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity." (iv) Fourthly, upon the amalgamating company ceasing to exist, it cannot be regarded as a person under Section 2(31) of the Act 1961 against whom assessment proceedings can be initiated or an order of assessment passed; (v) Fifthly, a notice under Section 143 (2) was issued on 26 September 2013 to the amalgamating company, SPIL, which was followed by a notice to it under Section 142(1); (vi) Sixthly, prior to the date on which the jurisdictional notice under Section 143 (2) was issued, the scheme of amalgamation had been approved on 29 January 2013 by the High Court of Delhi under the Companies Act 1956 with effect from 1 April 2012; (vii) Seventhly, the assessing officer assumed jurisdiction to make an assessment in pursuance of the notice under Section 143 (2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2 April 2013, the amalgamated company MSIL had addressed a communication to the assessing officer intimating the

fact of amalgamation. In the above conspectus of the facts, the initiation of assessment proceedings against an entity which had ceased to exist was void ab initio. 20. In Spice Entertainment, (supra) a Division Bench of the Delhi High Court dealt with the question as to whether an assessment in the name of a company which has been amalgamated and has been dissolved is null and void or, whether the framing of an assessment in the name of such company is merely a procedural defect which can be cured. The High Court held that upon a notice under Section 143 (2) being addressed, the amalgamated company had brought the fact of the amalgamation to the notice of the assessing officer. Despite this, the assessing officer did not substitute the name of the amalgamated company and proceeded to make an assessment in the name of a non-existent company which renders it void. This, in the view of the High Court, was not merely a procedural defect. Moreover, the participation by the amalgamated company would have no effect since there could be no estoppel against law : "11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exit w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the Income tax authorities to substitute the successor in place of the said 'dead person'. When notice under Section 143 (2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record. Instead, the Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings an assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law. 12. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of Section 292B of the Act." Following the decision in Spice Entertainment, (supra) the Delhi High Court quashed assessment orders which were framed in the name of the amalgamating company in: (i) Dimension Apparels (supra); (ii) Micron Steels; and (supra) (iii) Micra India (supra). 21. In Dimension Apparels, (supra) a Division Bench of the Delhi High Court affirmed the quashing of an assessment order dated 31 December 2010. The Respondent had amalgamated with another company and thus, ceased to exist from 7 December 2009. The Court rejected the argument of the Revenue that the assessment was in substance and effect in conformity with the Act by reason of the fact that the assessing officer had used correct nomenclature in addressing the Assessee; stated the fact that the company had amalgamated and mentioned the correct address of the amalgamated company. It was the Revenue's contention that the omission on the part of the assessing officer to mention the name of the amalgamated company is a procedural defect. The Delhi High Court rejected this contention. In doing so, it relied on the holding in Spice Entertainment, (supra) where the High Court expressly clarified that "the framing of assessment against a non-existing entity/ person" is a jurisdictional defect. The Division Bench also relied on the holding in Spice Entertainment (supra) that participation by the amalgamated company in proceedings does not cure the defect as "there can be no estoppel in law", to affirm the quashing of the assessment order. 22. In Micron Steels, (supra) a notice was issued to Micron Steels Pvt Ltd (original assessee) after it had amalgamated with Lakhanpal Infrastructure Pvt Ltd. A Division Bench of the Delhi High Court upheld the setting aside of assessment orders, noting that Spice Entertainment (supra) is an authority for the proposition that completion of assessment in respect of a non-existent company due to the amalgamation order, would render the assessment a nullity. 23. In Micra India, (supra) the original assessee Micra India Pvt. Ltd had amalgamated with Dynamic Buildmart (P) Ltd. Notice was issued to the original assessee by the Revenue after the fact of amalgamation had been communicated to it. The Court noted that though the assessee had participated in the assessment, the original assessee was no longer in existence and the assessment officer did not the take the remedial measure of transposing the transferee as the company which had to be assessed. Instead, the original assessee was described as one in existence and the order mentioned the transferee's name below that of the original assessee. The Division Bench adverted to the judgment in Dimension Apparels (supra) wherein the High Court had discussed the ruling in Spice Entertainment (supra). It was held that this was

a case where the assessment was contrary to law, having been completed against a non-existent company." on'ble Supreme Court thereafter took note of the judgment in the case of Sky Light Hospitality Vs. ACIT, 259 taxman 390 (SC). This judgment was pressed in service by the Revenue to point out that if an order was framed in accordance with law in the name of amalgamating company, then it would amount to mistake, defect or omission which is curable under section 292BB of the Income Tax Act. Hon'ble Supreme Court has dealt with this judgment and explained its impact. Hon'ble Supreme Court ultimately upheld the judgment of Hon'ble Delhi High Court in the case of Maruti Suzuki (supra) and held that assessment order passed subsequently in the name of non-existing company would be without jurisdiction and a nullity. Concluding paragraph of the judgment are worth to note. They read as under: "33. In the present case, despite the fact that the assessing officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two learned judges which dismissed the appeal of the Revenue in Spice Enfotainment (supra) on 2 November 2017. The decision in Spice Enfotainment has been followed in the case of the respondent while dismissing the Special Leave Petition for AY 2011-2012. In doing so, this Court has relied on the decision in Spice Enfotainment (supra). 34. We find no reason to take a different view. There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency uniformity and certainty. To detract from those principles is neither expedient nor desirable."

4. Supreme court in case of M/S DALMIA POWER LIMITED & ANR order dated December 18, 2019

4.6 Pursuant thereto, the Schemes were sanctioned by the NCLT, Chennai vide Orders 16.10.2017, 20.10.2017, 26.10.2017, 28.12.2017, 10.01.2018, 20.04.2018 and 01.05.2018; and, vide Orders dated 18.05.2017 and 30.08.2017 by the NCLT, Guwahati. Accordingly, the Schemes attained statutory force not only inter se the Transferor and Transferee Companies, but also in rem since there was no objection raised either by the statutory authorities, the Department, or other regulators or authorities, likely to be affected by the Schemes. 4.7 As a consequence, when the companies merged and amalgamated into another, the amalgamating companies lost their separate identity and character, and ceased to exist upon the approval of the Schemes of Amalgamation.2 4.8 Every scheme of arrangement and amalgamation must provide for an Appointed Date. The Appointed Date is the date on which the assets and liabilities of the transferor company vest in, and stand transferred to the transferee company. The Schemes come into effect from the Appointed Date, unless modified by the Court. This Court in Marshall Sons & Co. (India) Ltd. v. ITO held that where the Court does not prescribe any specific date but merely sanctions the scheme presented, it would follow that the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date". It was held that: "14. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide viz. 1-1-1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it — as has happened in this case — it should follow that the date of amalgamation/date of transfer is the

date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the Court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation." It was further held that pursuant to the Scheme of Arrangement and Amalgamation, the assessment of the Transferee Company must take into account the income of both the Transferor and Transferee Companies. The Court observed as follows: "15. The counsel for the Revenue contended that if the aforesaid view is adopted then several complications will ensue in case the Court refuses to sanction the scheme of amalgamation. We do not see any basis for this apprehension. Firstly, an assessment can always be made and is supposed to be made on the Transferee Company taking into account the income of both the Transferor and Transferee Companies. Secondly, and probably the more advisable course from the point of view of the Revenue would be to make one assessment on the Transferee Company taking into account the income of both of Transferor or Transferee Companies and also to make separate protective assessments on both the Transferor and Transferee Companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balance-sheets may not be available for the Transferor and Transferee Companies. But that may not be an insuperable problem inasmuch as assessment can always be made, on the available material, even without a balance-sheet. In certain cases, best judgment assessment may also be resorted to. Be that as it may, we need not pursue this line of enquiry because it does not arise for consideration in these cases directly"

Also Held in above decision: Rules of procedure have been construed to be the handmaiden of justice.4 The purpose of assessment proceedings is to assess the tax liability of an assessee correctly in accordance with law.

Also Held : "Sub-section (1) of Section 170 makes it clear that it is incumbent upon the Department to assess the total income of the successor in respect of the previous assessment year after the date of succession. In the present case, the predecessor companies/transferor companies have been succeeded by the Appellants/transferee companies who have taken over their business along with all assets, liabilities, profits and losses etc. In view of the provisions of Section 170(1) of the Income Tax Act, the Department is required to assess the income of the Appellants after taking into account the revised Returns filed after amalgamation of the companies."

5. Odeon Builders Pvt. Ltd. ...Supreme court of India recent verdict reported at 418 ITR 315

Held approving CIT-A/ITAT order that "However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs.19,39,60,866/- was based

solely on third party information, which was not subjected to any further scrutiny.Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs.19,39,60,866/-, is directed to be deleted."

Allahabad high court order reported at 96 ITR 97 in turn relying on Constitution bench supreme court decision reported at 26 ITR 1:

Held:

1. The Income-tax Appellate Tribunal has submitted the following questions of law for the opinion of this court:

   "(1) Whether the assessee got reasonable opportunity to meet the case that the department had set up against it ?

   (2) Whether there was any material before the Tribunal for arriving at its conclusion that the concealed income of the assessee from black market transactions amounted to Rs. 85,937 ? "

2. These questions relate to the assessment year 1948-49. The assessee had returned a loss of Rs. 17,131. The Income-tax Officer completed the assessment on a net loss of Rs. 8,382. As a result of the voluntary disclosure scheme launched by the Government of India the assessee disclosed suppressed income of Rs. 45,000. After some negotiations with, the Income-tax Officer, the assessee increased the disclosure to Rs. 50,000. The Income-tax Officer, however, was not satisfied with the disclosure made by the assessee. He made inquiries and then informed the assessee that the concealed income was much more. The assessee did not agree. The Income-tax Officer after investigating into the matter ultimately made the assessment by holding that the concealed income for that year was Rs. 85,937. The assessee went up in appeal. The Appellate Assistant Commissioner held that the information possessed by the Income-tax Officer against the assessee was not disclosed to him and no opportunity was given to him to rebut the same. In this view, the matter was remanded to the Income-tax Officer for a further report. The Income-tax Officer entered into a series of correspondence with the assessee and ultimately submitted a remand report. The Appellate Assistant Commissioner heard the matter again and ultimately dismissed the appeal filed by the assessee. Aggrieved, the assessee went up to the Tribunal but failed. At the instance of the assessee a Bench of this court directed the Tribunal to draw up a statement of the case and refer the questions of law for the opinion of this court.

3. After remand of the case the Income-tax Officer in his letter dated 5th August, 1954, asked the assessee to produce such evidence as he may rely on that the following items were not his income :

   1. Rs. 75,947 extra profit received from M/s. Purshottam Das Kishore Bhai on sales of 4,555 maunds 30 seers of gur.

   2. Rs. 9,990 extra profit received from M/s. Jetha Lal Kishore Das on sales of 1010 maunds of gur.

4. The date for hearing was fixed for 17th August, 1954. On 16th August, 1954, the assessee sent a reply. He denied the allegation that he got Rs. 75,947 as extra profit from M/s. Purshottam D under the Income-tax Act. If the officer had been supplied any such information the information given to him was absolutely wrong and he would request him to examine such person in his presence with account books so that he might get the chance to cross-examine him and he may be able to establish that the information given to the Income-tax Officer was wrong and without any basis. On 3rd May, 1956, the Income-tax Officer sent a long letter to the assessee in the shape of a charge-sheet indicating the details of the transactions and accounts in which the assessee had received extra profits. In this letter no mention had been made of any witness having been examined or of the fact that the facts and figures in this letter are based upon the statements of any witnesses in the possession of the Income-tax Officer. On 26th June, 1956, the Income-tax Officer informed the assessee that if he desired to cross-examine the various parties, he could do so only before the respective Income-tax Officers before whom the variors parties were assessed. In that case, he requisite commission would be issued to the Income-tax Officers concerned. On 30th June, 1956, the assessee replied that if the Income-tax Officer wished to prove anything against him on any definite evidence, the evidence must be placed before him and he should be allowed the opportunity to cross-examine the person who might or who might not have made any statements against him. If he was furnished the copy of the statement made by any witness, he might let the Income-tax Officer know when he wished to cross-examine and if those witnesses could not be summoned he would go with his counsel to cross-examine them and in that case, as the witnesses were being examined on behalf of the

department, the department would have to bear his expenses and that of his counsel who would go to various places to cross-examine the witnesses. The Income-tax Officer, however, did not either furnish to the assessee the copies of the statements of the witnesses in his possession nor did he agree to bear the cost of the cross-examination being conducted outside Sitapur. It appears from the correspondence annexed to the statement of the case that the assessee made a request for being granted inspection of the record, but the Income-tax Officer did not allow this request.

5. On these facts the question arises whether the assessee was given an adequate opportunity to meet the material relied upon against him. At this stage it may be stated that the assessing authorities have largely based their conclusion upon reliance on the statements of Chinaman Lal Phool Chandra and Nagar Das Dayal Bhai. These witnesses proved the account books of their firms. The account books of the firms gave material upon the basis of which the authorities have come to the conclusion that the suppressed profits of the assessee were Rs. 85,000 and odd. It is thus evident that the statements of the witnesses and the account proved by them formed the foundation of the findings.

6. In Suraj Mall Mohta and Co. v. A. V. Viswanatha Sastry, (1954] 26 I.T.R. 1 (S.C.) the Supreme Court has ruled that assessment proceedings before the Income-tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at.

   The assessee has a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal. This right has not been taken away by any express provision of the Income-tax Act.

7. In Dhakeshwari Cotton Mills v. Commissioner of Income-tax, [1954] 26 I.T.R. 775, 783 (S.C.) the Supreme Court re-emphasised that the principles of natural justice are applicable to the proceedings under the Income-tax Act. It observed :

   " It is... ...surprising that the Tribunal took from the representative of the department statement of gross profit rates of other cotton mills without showing the statement to the assessee and without giving him an opportunity to show that that statement had no relevancy whatsoever to the case of the mill in question."

8. From these cases it is apparent that the principles of natural justice are applicable to assessment proceedings. The elementary principle of natural justice is that the assessee should have knowledge of the material that is going to be used against him so that he may be able to meet it. Here, the Income-tax Officer was placing reliance on the statements of certain witnesses. He had permitted the assessee to cross-examine the witnesses, but he did not supply copies of the statements of .those witnesses although the assessee had requested for it. He did not even supply the substance of the contents of the statements as recorded. The learned standing counsel took us through the correspondence between the Income-tax Officer and the assessee but in none of the letters of the Income-tax Officer there was any indication as to what was the name of the witnesses, much less any semblance of indication as to what he had stated. Under these circumstances the mere grant of the permission to cross-examine those witnesses was an eye-wash. The assessee could not have effectively cross-examined any particular person. The direction that he will issue a commission was illusory. The assessee was not told the names of witnesses or apprised of the contents of their statements. It is clear that an adequate opportunity to cross-examine was denied. Even if we accept, for the sake of argument, that in law the requirements of natural justice are satisfied by supplying the substance of the statement sought to be relied upon, even that was not done in this case. The Income-tax Officer had refused to give copies of the statements of the witnesses on the view that they formed part of the record. Even so, he refused permission to the assessee to inspect the record. It is evident that the proceedings were vitiated by violation of the principles of natural justice.

9. We answer the first question in the negative, in favour of the assessee and against the department. In view of this answer, question No. 2 has become of academic importance only and is left unanswered.

10. The assessee would be entitled to costs which we assess at Rs. 200. The- fee of the learned counsel for the department is also assessed at the same amount."

6. Decision of Hon'ble Supreme Court in the case of Andaman Timber Industries versus CCE reported in (2015) 62 Taxmann.com 3, wherein Hon'ble court observed as under:

"According to us, not allowing the assessee to crossexamine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this oppor tunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority."

5. Judge Constitution bench ruling in case of of MohinderSingh Gill v. Chief Election Commissioner, AIR 1978 SC 851. In para 8 of the judgment it has been observed as under:

"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at p. 18): Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."

7. The Hon'ble Supreme Court in the case of CIT vs. Laxman Das Khandelwal [2019] 108 taxmann.com 183 (SC), held as follows:- A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the no (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid. t as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Hotel Blue Moon's case (supra). The issue that however needs to be considered is the impact of Section 292BB of the Act. g to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself."

8. Recent judgement of the Hon'ble Apex Court PCIT Vs M/S I-Ven Interactive Ltd Civil Appeal No. 8132 of 2019(arising out of SLP (C) No.3530/2019 order dated 18.10.2019,wherein it was held that where mere mentioning the new address in the return of income without specifically intimating the assessing officer qua change of address and without getting the PAN

database changed, is not enough and sufficient. the Hon'ble Apex Court has held that in absence of any specific intimation to the assessing officer qua change of address or change of name of the assessee, the AO is justified in sending the notice under section 143(2) at the available address mentioned in the PAN Database of the assessee, especially when the return has been filed under E-module scheme.

9. The Hon'ble Supreme Court in the case of CIT vs. Sinhgad Technical Education Society (2017) 397 ITR 344 (SC) held as under :

"Held, dismissing the appeals, (i) that the Tribunal permitted the assessee to raise the additional ground on the ground that it was a jurisdictional issue taken up on the basis of facts already on record, that under section 153C of the Act, incriminating material which was seized had to pertain to the assessment years in question, and that the documents which were seized did not establish any corelation, document-wise, with these four assessment years.

The Tribunal found that the material disclosed in the satisfaction note belonged to assessment year 2004-05 or thereafter. The Tribunal rightly permitted this additional ground to be raised and correctly dealt with the ground on the merits as well. The High Court was right in affirming this view of the Tribunal. Decision of the Bombay High Court in CIT v. Sinhgad Technical Education Society [2015] 378 ITR 84 (Bom) affirmed.

(ii) That the assessment order passed by the Assessing Officer covered eight assessment years. For six assessment years the assessment was under section 153C of the Act. The assessment order was set aside only in respect of four of those assessment years and on a technical ground. The objection pertaining to the four assessment years in question did not relate to the other tax assessment years, namely, 2004-05 and 2005-06. Nor did this decision have a bearing in respect of assessment for assessment year 1999-2000 or assessment year 2006-07. The necessary consequence would be that the conclusions of the Assessing Officer in his assessment order regarding the activities of the trust not being genuine and not carried out in accordance with the trust deed or cancellation of registration, denial of benefits of sections 11 and 12 would not be affected by this judgment."

10. Section2(12A) : Books of account –Entries in loose papers/ sheets are irrelevant and inadmissible as evidence – Offences and prosecution – Settlement Commission [Ss.132, 143(3), 245D, Evidence Act, S. 34] Common Cause (A Registered Society) v. UOI (2017) 394 ITR 220 (SC)

Held: Entries in loose papers/ sheets are irrelevant and inadmissible as evidence. Such loose papers are not "books of account"? and the entries therein are not sufficient to charge a person with liability. Even if books of account are regularly kept in the ordinary course of business, the entries therein shall not alone be sufficient evidence to charge any person with liability. It is incumbent upon the person relying upon those entries to prove that they are in accordance with facts. Finding of Settlement Commission disregarding such evidence as inadmissible and unreliable. The materials in question were not good enough to constitute offences to direct the registration of a first information report and investigation therein. (C.B.I. v. V. C. Shukla (1998)3 SCC 410 (SC) followed).

Common Cause (A Registered Society) v. UOI (2017) 394 ITR 220 (SC)

11. Recent judgment of the Supreme Court in the case of Principal Commissioner of Income Tax (Central) -1 vs NRA Iron & Steel Pvt. Ltd 2019 SCC OnLine SC 311, wherein it has been held as under: "This Court in the land mark case of Kale Khan Mohammad Hanif v. CIT and, Roshan Di Hatti v. CIT laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assesse, and there would be no further burden on the revenue to show that the income is from any particular source. 8.3. With respect to the issue of genuineness of transaction, it is for the assessee to prove by cogent and credible evidence, that the investments made in share capital are genuine borrowings, since the facts are exclusively within the assessee's knowledge The

Delhi High Court in CIT v. Oasis Hospitalities Pvt. Ltd., held that : "The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68. Those are: (i) identity of the investors; (ii) their creditworthiness/investments; and (iii) genuineness of the transaction. Only when these three ingredients are established prima facie, the department is required to undertake further exercise."

In Sumati Dayal v. CIT this Court held that:

"if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory, there is prima facie evidence against the assessee, vis., the receipt of money, and if he fails to rebut the same, the said evidence being unrebutted can be used against him by holding that it is a receipt of an income nature. While considering the explanation of the assessee, the department cannot, however, act unreasonably" ii. In CIT v. P. Mohankala this Court held that: "A bare reading of section 68 of the Income tax Act, 1961, suggests that (i) there has to be credit of amounts in the books maintained by the assessee ; (ii) such credit has to be a sum of money during the previous year ; and (iii) either (a) the assessee offers no explanation about the nature and source of such credits found in the books or (b) the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory. It is only then that the sum so credited may be charged to Income-tax as the income of the assessee of that previous year. The expression "the assessee offers no explanation" means the assessee offers no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. The burden is on the assessee to take the plea that, even if the explanation is not acceptable, the material and attending circumstances available on record do not justify the sum found credited in the books being treated as a receipt of income nature." 11. The principles which emerge where sums of money are credited as Share Capital/Premium are : i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as discharge the primary onus. ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders. iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."

12. 5 judge bench Supreme court decision on interpretation of taxing statutes:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 3327 OF 2007
COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI
...APPELLANT(S)
VERSUS
M/S. DILIP KUMAR AND COMPANY & ORS.
...RESPONDENT(S)
J UDGMENT
N . V . RAMA NA , J .

12. We may, here itself notice that the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption notification is too obvious to require any elaboration. Nonetheless, in a nutshell, we may mention that, as observed in Surendra Cotton Oil Mills Case (supra), in the matter of interpretation of charging section of a taxation statute, strict rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a charging section, the one favourable to the assessee need to be applied. There is, however, confusion in the matter of interpretation of exemption notification published under taxation statutes and in this area also, the decisions are galore1 In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. Insofar as taxation statutes are concerned, Article 265 of the Constitution3 prohibits the State from extracting tax from the citizens without authority of law. It is

axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/ interpreted to include those, which were not intended by the Legislature.

After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statue including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State. There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/ assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view."

13. Legislative intent has crucial role to interpret the statute as held by Hon¡¯ble supreme Court decision in case of
CRIMINAL APPEAL NOS.1217-1219 OF 2017
[Arising out of S.L.P. (Crl.) Nos. 2640-2642 of 2016]
Ms. Eera
Through Dr. Manjula Krippendorf
... Appellant(s)
Versus
State (Govt. of NCT of Delhi) & Anr. Respondent(s)
In its order dated July 21, 2017 has observed as under:

"24. It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the ¡®Lakshman Rekha¡¯ has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon¡¯s case, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon¡¯s case.¡±

While so holding the Hon¡¯ble Supreme Court has emphasised that ¡°Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation

is best which makes the textual interpretation match the contextual¡±. .

In Commissioner of Income Tax, Bangalore Vs. J.H. Gotla Yadagiri AIR 1985 SC 1698 Hon¡¯ble Apex Court propounded that though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than injustice, then such construction should be preferred to the literal construction. In Oxford University Press v. Commissioner of Income Tax (2001) 3 SCC 359, Mohapatra, J. has opined that interpretation should serve the intent and purpose of the statutory provision. . In that context, the learned Judge has referred to the authority in State of T.N. v. Kodaikanal Motor Union (P) Ltd. (1986) 3 SCC 91 wherein this Court after referring to K.P. Varghese v. ITO[(1981) 4 SCC 173 and Luke v. IRC (1964) 54 ITR 692 has observed:-

"The courts must always seek to find out the intention of the legislature. Though the courts must find out the intention of the statute from the language used, but language more often than not is an imperfect instrument of expression of human thought. As Lord Denning said it would be idle to expect every statutory provision to be drafted with divine prescience and perfect clarity. As Judge Learned Hand said, we must not make a fortress out of dictionary but remember that statutes must have some purpose or object, whose imaginative discovery is judicial craftsmanship. We need not always cling to literalness and should seek to endeavour to avoid an unjust or absurd result. We should not make a mockery of legislation. To make sense out of an unhappily worded provision, where the purpose is apparent to the judicial eye ¡®some¡¯ violence to language is permissible.¡±

In Seaford Court Estates Ltd. vs. Asker [1949] 2 All ER 155 hallowed by time, outlining the duty of the Court to iron out the creases, it was enunciated, that whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity, the caveat being that the English language is not an instrument of mathematical precision. It was held that in an eventuality where a Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that or have been guilty of some or other ambiguity, he ought to set to work on the constructive task of finding the intention of the Parliament and that he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give ¡°force and life¡± to the intention of the legislature. The Supreme Court, in the case of CIT v. Amarchand N. Shroff , administered a caution that a fiction should not be stretched beyond the purpose for which it was enacted. The said caution was also noticed by the Supreme Court in the case of CIT v. Ajax Products Ltd. [19651 55 ITR 741.

14. IN THE SUPREME COURT OF INDIA CIVIL APPEAL NO. 625 OF 2020

KISHORE JAGJIVANDAS TANNA JANUARY 24, 2020

The appellant has rightly responded and argued before us that it was for the authorities and not the appellant to verify and ascertain which authority had retained the cash. The burden was not on the appellant as he would have no information regarding the whereabouts of the seized cash. Accordingly, the appellant had written a letter dated 04.05.2009 requesting the respondents to refund the cash. Having considered the aforesaid factual matrix, we do not think that the reasoning in the impugned judgment can be sustained. The first reason is fallacious as Writ Petition No. 721 of 1988 was partly allowed with a direction to the assessing officer to pass a fresh order under Section 132(5) of the Act after following the procedure and Rule 112-A of the Rules. Direction for refund was applicable if no notice would be issued within the time stipulated. In any case, the learned judges had the option to treat the writ petition as an execution application or could have given liberty to the appellant to file an execution application which as per the law of limitation can be filed within 12 years. This aspect has been completely over-looked and not been given due consideration. The second reason is also without merit, as we would elucidate. Remedies by way of writ under Article 226 of the Constitution of India are extraordinary remedies exercised under the plenary jurisdiction conferred by the Constitution on the superior courts.

The Constitution does not prescribe any limitation period for invoking writ jurisdiction, as by very nature this atypical extraordinary jurisdiction is discretionary and equitable, which puts it on a different footing from ordinary civil proceedings. This astir flexibility is required to ward off unfairness and clear the way to render equitable justice, which might not be achievable on strict application of the law on limitation. This would be true in matters with unusual circumstances, as writ jurisdiction offers a designed and venerate remedy against violations and for protecting and enforcing fundamental rights and also statutory rights under Article 226 of the Constitution. Long back Aristotle had acknowledged that "the nature of the equitable" is "a correction of law where it is defective owing to its universality". This is the reason why all things are not determined by law, as for some things it is impossible to lay down a uniform law and therefore, a decree of flexibility is needed. (See the dissenting opinion of Justice Breyer of the Supreme Court of the United States in Paula Petrella v. Metro-Goldwyn Mayer, Inc., et al.) Referring to the exercise of writ jurisdiction in Tilokchand and Motichand and Others v. H.B. Munshi and Another,1 Hidayatullah C.J. had held that there is no lower and upper time limit for entertaining the writ petition, and "each case must be considered on its own facts. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary jurisdiction with utmost expedition". In other words, writ petitions should be filed within a reasonable period which period has to be considered with reference to the facts of a particular case. Therefore, as courts of equity, we have evolved a principle of practice, and not as a rule of law, not to enquire into belated and stale claims, notwithstanding that no period of limitation is prescribed either by the Constitution or by the Limitation Act. These principles enable the writ court to administer justice on the principles of equity, justice and good conscious Delay could reflect acquiescence and acceptance. In U.P. v. Arvind Kumar Srivastava2, reference was made to U.P. Jal Nigam v. Jaswant Singh3 which had referred to a passage of Halsbury's Laws of England (para 911, pg. 395) to observe: "12. ... 'In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.'"

Laches emphasises on prejudice caused by delay and also by negligence whereby a third party could be affected or the position of parties has undergone a change or a parallel right has been created. In Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service,4 this Court had referred to Lindsay Petroleum Co. v. Hurd5 in which Sir Bens Peacock had elucidated:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in, either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a

balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

15. In Shankara Cooperative Housing Society Ltd. v. M. Prabhakar,6 this Court had highlighted and specified the following principles which are to be applied when the writ court examines the issue of delay, laches and acquiescence:

"54. The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are: (1) There is no inviolable rule of law that whenever there is a delay, the Court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.

(2) The principle on which the Court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because Court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners. (3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy.

(4) No hard-and-fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts. (5) That representations would not be adequate explanation to take care of the delay."

16. In the facts of the present case, the respondents do not and cannot dispute that they have to refund the seized amount. Further, considerable delay and failure to make the payment constitutes and is inseparable from the cause of action as the delay and negligence is on the part of the authorities. The appellant does not seek setting-aside or quashing of an adverse order, no third-party rights are involved and the respondents' exfacie would not suffer due to a change of position. Prayer for compliance of a valid and legal order passed cannot be equated with prayers made in repeated representations seeking a change of position. Acquiescence is not apposite to patience as acquiescence is not just standing-by, and refers to assent on being aware of the violation or reflects conduct showing waiver.

Laches is this case would require sheer negligence of the nature and type which would render it unjust and unfair to grant relief.

When, the liability to pay Rs.4,99,900/- is acknowledged and accepted, then to deny relief by directing payment in terms of the order under Section 132(5) of the Act would be unjust, unfair and inequitable. Statute mandates the respondents to make payment. To be fair to the counsel for the respondents, it was conceded that an appropriate order may be passed to do justice."

15. Case of CIT vs Mahindra and Mahindra Ltd (Civil Appeal No 6949-6950/2004 order dated 24/04/2018) 404 ITR 1: on meaning of loan, amortization , difference between trading and other liability u/s 41(1) and section 28(iv) scope etc;

"... The short point for consideration before this Court is whether in the present facts and circumstances of the case the sum of Rs. 57,74,064/- due by the Respondent to Kaiser Jeep Corporation which later on waived off by the lender constitute taxable income of the Respondent or not?

10) The term ¡°loan¡± generally refers to borrowing something, especially a sum of cash that is to be paid back along with the interest decided mutually by the parties. In other terms, the debtor is under a liability to pay back the principal amount along with the agreed rate of interest within a stipulated time. 11) It is a well-settled principle that creditor or his successor may exercise their ¡°Right of Waiver¡± unilaterally to absolve the debtor from his liability to repay. After such exercise, the debtor is deemed to be absolved from the liability of repayment of loan subject to the conditions of waiver. The waiver may be a partly waiver i.e., waiver of part of the principal or interest repayable, or a complete waiver of both the loan as well as interest amounts. Hence, waiver of loan by the creditor results in the debtor having extra cash in his hand. It is receipt in the hands of the debtor/ assessee. The short but cogent issue in the instant case arises whether waiver of loan by the creditor is taxable

as a perquisite under Section 28 (iv) of the IT Act or taxable as a remission of liability under Section 41 (1) of the IT Act. 12) The first issue is the applicability of Section 28 (iv) of the IT Act in the present case. Before moving further, we deem it apposite to reproduce the relevant provision herein below:- ¡°28. Profits and gains of business or profession.¡ªThe following income shall be chargeable to income-tax under the head ¡°Profits and gains of business profession¡±,— x x x (iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession; x x x¡± 13) On a plain reading of Section 28 (iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of Rs. 57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, in our view, in no circumstances, it can be said that the amount of Rs 57,74,064/- can be taxed under the provisions of Section 28 (iv) of the IT Act. 14) Another important issue which arises is the applicability of the Section 41 (1) of the IT Act. 15) On a perusal of the said provision, it is evident that it is a sine qua non that there should be an allowance or deduction claimed by the assessee in any assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under Section 41 of the IT Act. The objective behind this Section is simple. It is made to ensure that the assessee does not get away with a double benefit once by way of deduction and another by not being taxed on the benefit received by him in the later year with reference to deduction allowed earlier in case of remission of such liability. It is undisputed fact that the Respondent had been paying interest at 6 % per annum to the KJC as per the contract but the assessee never claimed deduction for payment of interest under Section 36 (1) (iii) of the IT Act. In the case at hand, learned CIT (A) relied upon Section 41 (1) of the IT Act and held that the Respondent had received amortization benefit. Amortization is an accounting term that refers to the process of allocating the cost of an asset over a period of time, hence, it is nothing else than depreciation. Depreciation is a reduction in the value of an asset over time, in particular, to wear and tear. Therefore, the deduction claimed by the Respondent in previous assessment years was due to the deprecation of the machine and not on the interest paid by it.

16) Moreover, the purchase effected from the Kaiser Jeep Corporation is in respect of plant, machinery and tooling equipments which are capital assets of the Respondent. It is important to note that the said purchase amount had not been debited to the trading account or to the profit or loss account in any of the assessment years. Here, we deem it proper to mention that there is difference between ¡®trading liability¡¯ and ¡®other liability¡¯. Section 41 (1) of the IT Act particularly deals with the remission of trading liability. Whereas in the instant case, waiver of loan amounts to cessation of liability other than trading liability. Hence, we find no force in the argument of the Revenue that the case of the Respondent would fall under Section 41 (1) of the IT Act. 17) To sum up, we are not inclined to interfere with the judgment and order passed by the High court in view of the following reasons: (a) Section 28(iv) of the IT Act does not apply on the present case since the receipts of Rs 57,74,064/- are in the nature of cash or money. (b) Section 41(1) of the IT Act does not apply since waiver of loan does not amount to cessation of trading liability. It is a matter of record that the Respondent has not claimed any deduction under Section 36 (1) (iii) of the IT Act qua the payment of interest in any previous year..¡±

16. TAPARIA TOOLS LTD. VS JCIT (2015)372 ITR 605(SC) :iv) The principle that emerges from Madras Industrial Investment Corporation Limited v. Commissioner of Income Tax [1997] 4 SCC 666 is that normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the IT Department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over

a period of ensuing years, it can be allowed only if the principle of 'Matching Concept' is satisfied, which upto now has been restricted to the cases of debentures. In the instant case, the assessee did not want spread over of this expenditure over a period of five years as in the return filed by it, it had claimed the entire interest paid upfront as deductible expenditure in the same year. In such a situation, when this course of action was permissible in law to the assessee as it was in consonance with the provisions of the Act which permit the assessee to claim the expenditure in the year in which it was incurred, merely because a different treatment was given in the books of account cannot be a factor which would deprive the assessee from claiming the entire expenditure as a deduction. It has been held repeatedly by this Court that entries in the books of account are not determinative or conclusive and the matter is to be examined on the touchstone of provisions contained in the Act [See – Kedarnath Jute Manufacturing Co. Ltd. v. Commissioner of Income Tax (Central), Calcutta [1972] 3 SCC 252; Tuticorin Alkali Chemicals & Fertilizers Ltd., Madras v. Commissioner of Income Tax, Madras [1997] 6 SCC 117; Sutlej Cotton Mills Ltd. v. Commissioner of Income Tax, Calcutta [1978] 4 SCC 358; and United Commercial Bank, Calcutta v. Commissioner of Income Tax, WB-III, Calcutta [1999] 8 SCC 338;

17. Recent Apex court verdict in Hero Cycles case 379 ITR 347 "(i) Insofar as loans to the sister concern / subsidiary company are concerned, law in this behalf is recapitulated by this Court in the case of 'S.A. Builders Ltd. v. Commissioner of Income Tax (Appeals) and Another' [2007 (288) ITR 1 (SC)]. Once it is established that there is nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. It further held that no businessman can be compelled to maximize his profit and that the income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman.

(ii) Applying the aforesaid ratio to the facts of this case as already noted above, it is manifest that the advance to M/s. Hero Fibres Limited became imperative as a business expediency in view of the undertaking given to the financial institutions by the assessee to the effect that it would provide additional margin to M/s. Hero Fibres Limited to meet the working capital for meeting any cash loses. It would also be significant to mention at this stage that, subsequently, the assessee company had off-loaded its share holding in the said M/s. Hero Fibres Limited to various companies of Oswal Group and at that time, the assessee company not only refunded back the entire loan given to M/s. Hero Fibres Limited by the assessee but this was refunded with interest. In the year in which the aforesaid interest was received, same was shown as income and offered for tax. (iii) Insofar as the loans to Directors are concerned, it could not be disputed by the Revenue that the assessee had a credit balance in the Bank account when the said advance of Rs. 34 lakhs was given. Remarkably, as observed by the CIT (Appeal) in his order, the company had reserve/surplus to the tune of almost 15 crores and, therefore, the assessee company could in any case, utilise those funds for giving advance to its Directors. (CIT v. Dalmia Cement (B.) Ltd [2002 (254) ITR 377] referred)

18. Hon'ble Supreme court in Mangalore Ganesh Beedi Works 378 ITR 640 case has held that:

"…. In D. S. Bist & Sons v. CIT[11] it was held that the Act does not clothe the taxing authorities with any power or jurisdiction to re-write the terms of the agreement arrived at between the parties with each other at arm's length and with no allegation of any collusion between them. 'The commercial expediency of the contract is to be adjudged by the contracting parties as to its terms.'

19. The Hon'ble Supreme Court in case of Sanjeev Lal vs. CIT 365 ITR 389 while considering the question as to whether the date on which agreement for sale was executed could be considered the date on which the property was transfer has held in para 20 to 25 as under:-

"20. The question to be considered by this Court is whether the agreement to sell which had been executed on 27th December, 2002 can be considered as a date on which the property i.e. the residential house had been

transferred. In normal circumstances by executing an agreement to sell in respect of an immovable property, a right in personam is created in favour of the transferee/vendee. When such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee, in whose favour the right in personam is created, has a legitimate right to enforce specific performance of the agreement, if the vendor, for some reason is not executing the sale deed. Thus, by virtue of the agreement to sell some right is given by the vendor to the vendee. The question is whether the entire property can be said to have been sold at the time when an agreement to sell is entered into. In normal circumstances, the aforestated question has to be answered in the negative. However, looking at the provisions of Section 2(47) of the Act, which defines the word "transfer" in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred. Relevant portion of Section 2(47), defining the word "transfer" is as under:

'2(47) "transfer", in relation to a capital asset, includes,-

(i) ** ** **

(ii) the extinguishment of any rights therein; or. . . . .'

21. Now in the light of definition of "transfer" as defined under Section 2(47) of the Act, it is clear that when any right in respect of any capital asset is extinguished and that right is transferred to someone, it would amount to transfer of a capital asset. In the light of the aforestated definition, let us look at the facts of the present case where an agreement to sell in respect of a capital asset had been executed on 27th December, 2002 for transferring the residential house/ original asset in question and a sum of Rs. 15 lakhs had been received by way of earnest money. It is also not in dispute that the sale deed could not be executed because of pendency of the litigation between Shri Ranjeet Lal on one hand and the appellants on the other as Shri Ranjeet Lal had challenged the validity of the Will under which the property had devolved upon the appellants. By virtue of an order passed in the suit filed by Shri Ranjeet Lal, the appellants were restrained from dealing with the said residential house and a law-abiding citizen cannot be expected to violate the direction of a court by executing a sale deed in favour of a third party while being restrained from doing so. In the circumstances, for a justifiable reason, which was not within the control of the appellants, they could not execute the sale deed and the sale deed had been registered only on 24th September, 2004, after the suit filed by Shri Ranjeet Lal, challenging the validity of the Will, had been dismissed. In the light of the aforestated facts and in view of the definition of the term "transfer", one can come to a conclusion that some right in respect of the capital asset in question had been transferred in favour of the vendee and therefore, some right which the appellants had, in respect of the capital asset in question, had been extinguished because after execution of the agreement to sell it was not open to the appellants to sell the property to someone else in accordance with law. A right in personam had been created in favour of the vendee, in whose favour the agreement to sell had been executed and who had also paid Rs.15 lakhs by way of earnest money. No doubt, such contractual right can be surrendered or neutralized by the parties through subsequent contract or conduct leading to no transfer of the property to the proposed vendee but that is not the case at hand.

22. In addition to the fact that the term "transfer" has been defined under Section 2(47) of the Act, even if looked at the provisions of Section 54 of the Act which gives relief to a person who has transferred his one residential house and is purchasing another residential house either before one year of the transfer or even two years after the transfer, the intention of the Legislature is to give him relief in the matter of payment of tax on the long term capital gain. If a person, who gets some excess amount upon transfer of his old residential premises and thereafter purchases or constructs a new premises within the time stipulated under Section 54 of the Act, the Legislature does not want him to be burdened with tax on the long term capital gain and therefore, relief has been given to him in respect of paying income tax on the long term capital gain. The intention of the Legislature or the purpose with which the said provision has been incorporated in the Act, is also very clear that the assessee should be given some relief. Though it has been very often said that common sense is a stranger and an incompatible partner to the

Income Tax Act and it is also said that equity and tax are strangers to each other, still this Court has often observed that purposive interpretation should be given to the provisions of the Act. In the case of Oxford University Press v. CIT [2001] 247 ITR 658/115 Taxman 69 this Court has observed that a purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax. It has also been said that harmonious construction of the provisions which subserve the object and purpose should also be made while construing any of the provisions of the Act and more particularly when one is concerned with exemption from payment of tax. Considering the aforestated observations and the principles with regard to the interpretation of Statute pertaining to the tax laws, one can very well interpret the provisions of Section 54 read with Section 2(47) of the Act, i.e. definition of "transfer", which would enable the appellants to get the benefit under Section 54 of the Act.

23. Consequences of execution of the agreement to sell are also very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/ transferee, when the agreement to sell had been executed.

24. Thus, a right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27th December, 2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated. 25. In view of the aforestated peculiar facts of the case and looking at the definition of the term 'transfer" as defined under Section 2(47) of the Act, we are of the view that the appellants were entitled to relief under Section 54 of the Act in respect of the long term capital gain which they had earned in pursuance of transfer of their residential property being House No. 267, Sector 9-C, situated in Chandigarh and used for purchase of a new asset/ residential house."

Thus, it was held by the Hon'ble Supreme Court that when agreement to sale in respect of immoveable property is executed a right in personae is created in favour of the vendee and thereby the vendor is restrain from selling the property to someone else because the vendee gets the legitimate right to enforce specific performance of the agreement.

20. MARUTI SUZUKI INDIA LTD.
(EARLIER KNOWN AS MARUTI UDYOG LTD.) CIVIL APPEAL NO.11923 OF 2018 FEBRUARY 07, 2020.

9. The two issues which need to be answered by us in these appeals are:

"(i) Whether the ITAT had committed an error of law in upholding the disallowance of the amount of Rs.69,93,00,428/which represented MODVAT credit of Excise Duty that remained unutilised by 31st March, 1999 i.e. the end of the relevant accounting year ?

(ii) Whether the ITAT has committed an error of law in upholding the disallowance of Rs.3,08,99,171/ in respect of Sales Tax Recoverable Account, under Section 43B of the Incometax Act ?"

When we analyse provision of Section 43B of the Act the provision indicates that deduction thereunder is to be allowed on fulfilment of the following conditions:

"a.there should be an actual payment of Excise Duty whether "by way of tax, duty, cess or fee, by whatever name"; b.such payment has to be "under any law for the time being in force"; c.the payment of such sum should have been made by the assessee; d.irrespective of the method of accounting regularly employed by the assessee, deduction shall be allowed while computing the income tax for the previous year "in which sum is actually paid" by the assessee; e.the expression "any such sum payable" refers to a sum for which the assessee incurred liability in the previous year even though such sum might not have been

payable within that year under the relevant law." 13. The crucial words in Section 43B(a) are "any sum payable by the assessee by way of tax, duty, cess or fee...". We need to examine as to whether unutilised credit under MODVAT Scheme was sum payable by the assessee. 16. As per Section 43B(a) of Income Tax Act, deduction is allowed on "any sum payable by the assessee by way of tax, duty, cess or fee." The credit of Excise Duty earned by the appellant under MODVAT scheme as per Central Excise Rules, 1944 is not sum payable by the assessee by way of tax, duty, cess. The scheme under Section 43B is to allow deduction when a sum is payable by assessee by way of tax, duty and cess and had been actually paid by him.

17. Furthermore, the deductions under Section 43B is allowable only when sum is actually paid by the assessee. In the present case, the Excise Duty leviable on appellant on manufacture of vehicles was already adjusted in the concerned assessment year from the credit of Excise Duty under the MODVAT scheme. The unutilised credit in the MODVAT scheme cannot be treated as sum actually paid by the appellant. The assessee when pays the cost of raw materials where the duty is embedded, it does not ipso facto mean that assessee is the one who is liable to pay Excise Duty on such raw material/inputs. It is merely the incident of Excise Duty that has shifted from the manufacturer to the purchaser and not the liability to the same.

18. We thus, conclude that the unutilised credit under MODVAT scheme does not qualify for deductions under Section 43B of the Income Tax Act."

21. Case of ITO vs Techspan India Pvt Ltd (Civil Appeal No 2732/2007 order dated 24/04/2018) 404 ITR 10 on section 148, concept of change of opinion

"...The only point for consideration before this Court is whether the re-opening of the completed assessment is justified in the present facts and circumstances of the case?

The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words ¡®reason to believe¡¯ in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order. 9) Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review. 10) To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection. 11) It is well settled and held by this court in a catena of judgments and it would be sufficient to refer Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd. (2010) 320 ITR 561(SC) wherein this Court has held as under:- ¡°5¡¦.where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe"¡¦.. Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. 6. We must also keep in mind the conceptual difference between power to

review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. 7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.

Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings..."

OPERATION CLEAN MONEY ASSESSMENTS- POSTSCRIPT

(Perspective on : Its Various aspects e.g infirmities in revenue's approach ; unexplained income charge, section 115BBE applicability , penal provisions of section 270A & 271AAC & its stay of demand etc)

ADV. KAPIL GOEL

ADV. SANDEEP GOEL

1. Hindsight (Recall of events)

When demonetization was last announced on 08.11.2016 , SBN's and consequential cash deposits subsequent to that attracted lot of attention as to its tax treatment under the provisions of Income Tax Act,1961 (Act). On social & other platforms it was hot topic in end of calendar year 2016 as to whether said cash deposit would only attract 30% rate as existing prior to amendment in section 115BBE in December 2016 (operative w.e.f AY 2017-2018) and no penalty u/s 270A would be levied on income offered in return filed u/s 139(1) of the Act. Then to penalize errant taxpayers having unsubstantiated or hidden business income in form of cash/asset etc detected by revenue as such, only rate was increased was from 30 to 60% in section 115BBE of the Act keeping its corpus and foundation intact (refer statement of objects and reasons to Taxation Laws (Second Amendment) Bill, 2016 (26/11/2016) (received assent of the President on 15/12/2016)). That is base factor to invoke section 115BBE of the Act, remained unaltered, which requires *primordial* existence of jurisdictional fact of correct and valid invocation of section 68 to section 69D of the Act.Now when provisions of section 68 to section 69D itself remained unchanged pre & post 2016 and only rate of tax in section 115BBE was doubled to 60% in December 2016 , it remained very much important as to whether such increase by 100% in rate was constitutionally valid , remains a unresolved enigma. This is also dealt in succeeding paragraphs. Now when much water has already flown down the river as already ITR's of those period stands filed , scrutinized and assessed in just completed assessments creating colossal and high pitched demands , opening a Pandora box of litigation , would be antithesis to government policy of less litigation (refer Supreme court in 400 ITR 9 highlighting national litigation policy) and would be in oppugnation to sage observations of Apex court in recent ruling in case of Maruti Suzuki case (reported at 416 ITR 613) that *"There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."* One wonders as to whether these assessments of OCM cases would answer to much desired *expectations of consistency, uniformity and certainty.*

2. Various Shades and Aspects of these assessments

2.1 Scrutiny assessments u/s 143(2)/143(3): It remains a matter of ongoing legal debate when a case is scrutinized in Computer aided scrutiny selection CASS u/s 143(2) of the Act that too without any intimation to taxpayer as to his case is taken for limited or complete scrutiny and its reasons, which are no where displayed when seminal notice of section 143(2) is generated by computer and till assessment completion , thus flouting mandate of CBDT instruction of 19& 20/2015 (dated 29.12.2015) , whether such non communication by itself has any fatal impact on assessment made. In author's opinion, since purpose of said instruction is public welfare and mitigation of harassment, its scrupulous and strict implementation is called for and any deviation therefrom must result in making the assessment as null and void. There have been few instances where case has been picked for limited scrutiny on sole "cash

withdrawal" reason and no addition is made for same and addition is made for "cash deposits" which is not reason of limited scrutiny in the case concerned , and case is not converted to complete scrutiny as per applicable CBDT guidelines , so that assessment may not pass legal muster in authors opinion for which reference can be made to

i) Delhi bench ITAT CBS international projects pvt ltd (order dated 28.02.2019)

ii) Jaipur bench ITAT Late Smt Gurbachan Kaur (order dated 05.12.2019)

iii) Jaipur bench ITAT Manju Kaushik (order dated 09.12.2019)

iv) Lucknow bench ITAT Ravi Prakash Khandelwal (order dated 08.11.2019)

v) Mumbai G bench ITAT order in case of Su-Raj Diamod Dealers Pvt Ltd order dated 27.11.2019

vi) Mumbai D bench ITAT order in case of R&H Property Developer Pvt Ltd order dated 30.07.2019

Above litany of orders from various benches of ITAT across country remains ad-idem on impact of infraction of scope of CBDT instructions dealing with scope of limited scrutiny assessments that same would be nullity. Further in a recent case it was practically seen that in limited scrutiny assessment for reason of cash deposit which stood satisfactorily explained from sale consideration of immovable property , without any adverse inference on limited scrutiny reason, apparently exceeding the jurisdictional boundary of limited scrutiny assessment, penalty u/s 269SS is initiated which in authors opinion is prima-facie ultra vires to scope of limited scrutiny assessment and can be challenged on ground of *detournment de puvoir (misuse of power).*Even in a practical case it was observed that when only basis of issue notice u/s 143(2) to a firm was simplicitor PAN No of firm being reflected in concerned bank a/c where cash deposits was made, even when said firm got dissolved long back and said firm was validly converted to proprietary concern where said bank a/c was duly accounted and recorded in its books and said proprietary concern was filing its returns with said bank a/c, without making any independent inquiry etc assessment is made on said non existing firm hitherto dissolved which as per SC recent verdict in Maruti case (supra) is nullity and can't be validated.

2.2 <u>Merits of assessee's explanation versus alleged charge of section 68 etc</u>

Now comes important phase of OCM assessment where merits of assessee's explanation is traversed for its veracity on touchstone of section 68 to section 69d of the Act. When various assessment orders passed are categorized few illustrative cases can be compartmentalized as under:

i) Cases where presumptive scheme of section 44AD is opted by assessee;

ii) Cases where no books are there and no section 44AD is opted and earlier cash withdrawals etc is stated to be source of stated cash deposits;

iii) Cases where assessee is acting as a middlemen like a broker and owner of cash is somebody else and assessee is just acting like a conduit

iv) Cases where full fledged audited & regular books of accounts are maintained to support stated cash deposits in bank a/c (here source of cash deposits can be debtor realization , sales , etc)

One by one we deal with above case. Where presumptive scheme u/s 44AD is opted and there is no doubt on assessee's eligibility for the same , now merely because assessee is not able to satiate the SOP of CBDT which broadly speaking calls for historical analysis of cash deposits in assessee's past years can same without anything more and act as sole basis to implicate the entire cash sales (deposited in bank) already offered for taxation in presumptive scheme u/s 44AD of the Act as unexplained deemed income in section 68 of the Act. The basic edifice of presumptive scheme u/s 44AD is assessee would not be called to maintain books refer section 2(12A) of the Act and get them audited if profit shown by assessee is otherwise in accordance with prescription of section 44AD of the Act. Now subject matter of initiation of inquiry in OCM case here is factum of cash deposit which is further explained to be part of sales offered in presumptive scheme of section 44AD of the Act, same on basis of consistent decisions of various courts cant ipso facto be transformed as unexplained cash credit u/s 68 of the Act for various reasons. Firstly section 68 is a deeming fiction and same needs to interpreted in felicitous words from a ITAT verdict *that deeming fiction relates to that branch of jurisprudence which needs to be narrowly watched , zealously regarded and never to be pressed beyond its true*

limits. Secondly section 68requires existence of books and actual credit therein which are jurisdictional fact and without any books (refer section 2(12A) of the Act for definition of books) and without any credit therein, section 68 can't be pressed in service just because it is seemingly dearer to revenue due to its castigating implications in terms of exponential tax rate prescribed in section 115BBE of the Act. In other words when a deeming fiction like section 68 here is applied it is not allowable to deem that books are there or credit is there when same is otherwise lacking ex-facie. If deeming within deeming provision is allowed then it may lead to absurdity. (refer Madras high court decision in Karti Chidambram case on jurisdictional fact importance : Held it has succinctly observed that:"168.From the above judgments, it could be deduced that existence of jurisdictional fact is a sine qua non for exercise of power. A jurisdictional fact is one on existence or non;existence of which depends jurisdiction on a Court or tribunal or authority, as the case may be. If the jurisdictional fact does not exist, the Court, authority or officer cannot act. If a court or authority has wrongly assumes the existence of such fact, the order can be quashed by a writ of certiorari. 169.If the jurisdictional fact exists, the authority can proceed further and exercise his power and take a decision in accordance with law. No Court or tribunal, statutory authority can assume jurisdiction, in respect of a matter which the statute does not confer on it. Error on jurisdictional fact, renders the order, ultra vires and bad. In the case on hand, as rightly submitted by Mr.Gopal Subramanium, learned Senior Counsel, that in the light of sections 2(11) and 50 of the Black Money Act, 2015, jurisdictional fact to enquire does not exist and that the Principal Director of Income Tax/first respondent herein, has assumed jurisdiction that he can enquire into the matter under Section 55 of the Act, by issuing a show cause notice.") Thirdly even if books are there and actual credit is there which is so contemplated in section 68 of the Act , then also what is of primordial significance is objective and judicious and exclusive *opinion* of assessing officer which can't be substituted by any other authority's dictate or directions as here it is apparent that CBDT SOP has been main focal point of assessing officer's framing of purported opinion u/s 68 etc which in authors view is again acting on directions of other authority (refer Supreme court in Green World corporation case 314 ITR 81 on duty of AO in forming his own opinion) and is legally impermissible. Fourthly it can't be lost sight of that section 68 etc gives *discretion* to assessing officer by use of phrase MAY which discretion has to be on judicious & cumulative consideration of entire facts and not simply adding cash deposits in bank a/c because they are not answering to stipulated enumeration of CBDT SOP. Formation of opinion and usage of discretion in section 68 remains of pivotal importance and same can't be displaced by dictates and directions of other authority. Once anatomy of section 68 stands adumbrated above , it would become clear that an assessee validly opting for section 44AD of the Act can't be subjected to section 68 qua sales (= cash deposits) already offered to tax as it is patently double taxation.

Reference may be made to:

Further, regarding approach to be adopted by revenue authorities u/s 68, it maybe useful to make reference to full bench decision of P&H high court reported at 382 ITR 453 :

The Hon'ble Punjab & HaryanaHigh Court in a recent judgement in the case of CIT vsJawaharlal Oswal and Others (I.T.A. No. 49 of 1999, Judgmentdelivered on 29.01.2016) dismissed the Department's appeal byholding that suspicion and doubt may be the starting point of aninvestigation but cannot, at the final stage of assessment, takethe place of relevant facts, particularly when deeming provision issought to be invoked. The Hon'ble Court has observed , *"...The principle that governs a deeming provision is that the initial onuslies upon the revenue to raise a prima facie doubt on the basis ofcredible material. The onus, thereafter, shifts to the assessee toprove that the gift is genuine and if the assessee is unable toproffer a credible explanation, the Assessing Officer maylegitimately raise an inference against the assessee. If, however,the assessee furnishes all relevant facts within his knowledge andoffers a credible explanation, the onus reverts to the revenue toprove that these facts are not correct. The revenue cannot draw aninference based upon suspicion or doubt or perceptions ofculpability or on the quantum of the amount, involved particularlywhen the question is one of taxation, under a deeming provision.Thus, neither suspicion/doubt, nor the quantum shall determinethe exercise of jurisdiction by the Assessing*

Officer....Further adeeming provision requires the Assessing Officer to collect relevantfacts and then confront the assessee, who is thereafter, required toexplain incriminating facts and in case he fails to proffer a credibleinformation, the Assessing Officer may validly raise an inference ofdeemed income under section 69-A. As already held, if theassessee proffers an explanation and discloses all relevant factswithin his knowledge, the onus reverts to the revenue to adduceevidence and only thereafter, may an inference be raised, basedupon relevant facts, by invoking the deeming provisions of Section69-A of the Act. It is true that inferences and presumptions areintegral to an adjudicatory process but cannot by themselves beraised to the status of substantial evidence or evidence sufficientto raise an inference. A deeming provision, thus, enables the revenue to raise an inference against an assessee on the basis oftangible material and not on mere suspicion, conjectures or perceptions"

IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO. 4476 OF 2019 (Arising out of Special Leave Petition (Civil) No. 4210 of 2018) 63 MOONS TECHNOLOGIES LTD April 30, 2019

" WHERE THE CENTRAL GOVERNMENT IS SATISFIED"

37. *With regard to similar language that is contained in Section 237(b) of the Companies Act, 1956, this Court, in Barium Chemicals (supra), contained separate opinions as to what the phrase "in the opinion of" contained in Section 237(b) meant. In Rohtas Industries (supra), this Court adopted the test laid down by Hidayatullah, J. (as he then was) and Shelat, J. as follows:*

"Before taking action under Section 237(b)(i) and (ii), the Central Government has to form an opinion that there are circumstances suggesting that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any member or that the company was formed for any fraudulent or unlawful purpose or that the persons concerned in the formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members. From the facts placed before us, it is clear that the Government had not bestowed sufficient attention to the material before it before passing the impugned order. It seems to have been oppressed by the opinion that it had formed about Shri S.P. Jain. From the arguments advanced by Mr Attorney, it is clear that but for the association of Mr S.P. Jain with the appellant-company, the investigation in question, in all probabilities would not have been ordered. Hence, it is clear that in making the impugned order irrelevant considerations have played an important part. The power under Sections 235 to 237 has been conferred on the Central Government on the faith that it will be exercised in a reasonable manner. The department of the Central Government which deals with companies is presumed to be an expert body in company law matters. Therefore, the standard that is prescribed under Section 237(b) is not the standard required of an ordinary citizen but that of an expert. The learned Attorney did not dispute the position that if we come to the conclusion that no reasonable authority would have passed the impugned order on the material before it, then the same is liable to be struck down. This position is also clear from the decision of this Court in Barium Chemicals and Anr. v. Company Law Board and Anr. [(1966) Supp SCR 311]. (at p. 119) xxx xxx xxx The decision of this Court in Barium Chemicals case which considered the scope of Section 237(b) illustrates that difficulty. In that case Hidayatullah, J. (our present Chief Justice) and Shelat, J. came to the conclusion that though the power under Section 237(b) is a discretionary power the first requirement for its exercise is the honest formation of an opinion that the investigation is necessary and the further requirement is that "there are circumstances suggesting" the inference set out in the section; an action not based on circumstances suggesting an inference of the enumerated kind will not be valid; the formation of the opinion is subjective but the existence of the circumstances relevant to the inference as the sine qua non for action must be demonstratable; if their existence is questioned, it has to be proved at least prime facie; it is not sufficient to assert that those circumstances exist and give no clue to what they are, because the circumstances must be such as to lead to conclusions of certain definiteness; the conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct. In other words they held that although the formation of opinion by

the Central Government is a purely subjective process and such an opinion cannot be challenged in a court on the ground of propriety, reasonableness or sufficiency, the authority concerned is nevertheless required to arrive at such an opinion from circumstances suggesting the conclusion set out in sub-clauses (i), (ii) and (iii) of Section 237(b) and the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. Shelat, J. further observed that it is hard to contemplate that the Legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded; it is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. On the other hand Sarkar, C.J. and Mudholkar, J. held that the power conferred on the Central Government under Section 237(b) is a discretionary power and no facet of that power is open to judicial review. Our Brother Bachawat, J., the other learned Judge in that Bench did not express any opinion on this aspect of the case. Under these circumstances it has become necessary for us to sort out the requirements of Section 237(b) and to see which of the two contradictory conclusions reached in Barium Chemicals case is in our judgment, according to law. But before proceeding to analyse Section 237(b) we should like to refer to certain decisions cited at the bar bearing on the question under consideration. (at pp. 120-121) xxx xxx xxx "Coming back to Section 237(b), in finding out its true scope we have to bear in mind that that section is a part of the scheme referred to earlier and therefore the said provision takes its colour from Sections 235 and 236. In finding out the legislative intent we cannot ignore the requirements of those sections. In interpreting Section 237(b) we cannot ignore the adverse effect of the investigation on the company. Finally we must also remember that the section in question is an inroad on the powers of the company to carry on its trade or business and thereby an infraction of the fundamental right guaranteed to its shareholders under Article 19(1) (g) and its validity cannot be upheld unless it is considered that the power in question is a reasonable restriction in the interest of the general public. In fact the vires of that provision was upheld by majority of the Judges constituting the Bench in Barium Chemicals case principally on the ground that the power conferred on the Central Government is not an arbitrary power and the same has to be exercised in accordance with the restraints imposed by law. For the reasons stated earlier we agree with the conclusion reached by Hidayatullah, J. and Shelat, JJ. in Barium Chemicals case that the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-clause(1) or the persons mentioned in sub-clause (2) were guilty of fraud or misfeasance or other misconduct towards the company or towards any of its members is a condition precedent for the Government to form the required opinion and if the existence of those conditions is challenged, the courts are entitled to examine whether those circumstances were existing when the order was made. In other words, the existence of the circumstances in question are open to judicial review though the opinion formed by the Government is not amenable to review by the courts. As held earlier the required circumstances did not exist in this case." (at pp. 128-129)

38. *In Western U.P. Electric Power & Supply Co. Ltd. v. State of U.P. and Anr., (1969) 1 SCC 817, this Court dealt with a situation where the Indian Electricity Act, 1910 was amended by the U.P. Act 30 of 1961, by which, Section 3(2)(e)(ii) provided that the grant of a licence shall not, in any way, hinder or restrict the supply of energy by the State Government or the State Electricity Board within the same area where the State Government deems such supply "necessary in public interest". In that case, the High Court had observed that the State Government was the sole judge of whether the direct supply of energy was or was not in public interest, the nature of the power being subjective. This Court, in upsetting the High Court's view, held: "11. We are unable to agree with that view. By Section 3(2)(e) as amended by the U.P. Act 30 of 1961, the Government is authorised to supply energy to consumers within the area of the licensee in certain conditions: exercise of the power is conditioned by the Government deeming it necessary in public interest to make such supply. If challenged, the Government must show that exercise of the power was necessary in public interest. The Court is thereby not intended to sit in appeal over the satisfaction of the Government. If there be prima facie evidence on which a reasonable*

body of persons may hold that it is in the public interest to supply energy directly to the consumers, the requirements of the statute are fulfilled. Normally a licensee of electrical energy, though he has no monopoly, is the person through whom electrical energy would be distributed within the area of supply, since the licensee has to lay down electric supply-lines for transmission of energy and to maintain its establishment. An inroad may be made in hat right in the conditions which are statutorily prescribed. In our judgment, the satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review."

39. Close upon the heels of these judgments, this Court, after considering Barium Chemicals (supra) and Rohtas Industries (supra), restated the test as to judicial review of administrative action in Rampur Distillery Co. Ltd. v. Company Law Board, [1970] 2 SCR 177 as follows: "The scheme of the section implies investigation and a decision on the matters set out therein. Section 326 lays down conditions by sub-section (1)(a) in which the Central Government may override the resolution of the general body of share-holders in certain specified conditions. Upon the Central Government is imposed a duty not to accord approval to the appointment or reappointment of a proposed managing agent in the light of clauses (a), (b) and (c) of sub-section (2). Though the sub-section is enacted in form negative, in substance it confers power upon the Government subject to the restrictions imposed by clauses (a), (b) and (c), to refuse to accord approval. Sub-section (2) imposes upon the Central Government the duty not to accord approval to appointment or re-appointment of a proposed managing agent unless the Government is satisfied that the managing agent is a fit and proper person to be appointed, that the conditions of the managing agency agreement are fair and reasonable and that the managing agent has fulfilled the conditions which the Central Government required him to fulfil. Thereby the Central Government is not made the final arbiter of the existence of the grounds on which the satisfaction may be founded. The satisfaction of the Government which is determinative is satisfaction as to the existence of certain objective facts. The recital about satisfaction may be displaced by showing that the conditions did not exist, or that no reasonable body of persons properly versed in law could have reached the decision that they did. The Courts, however, are not concerned with the sufficiency of the grounds on which the satisfaction is reached. What is relevant is the satisfaction of the Central Government about the existence of the conditions in clauses (a), (b) and (c) of sub-section (2) of Section 326. The enquiry before the Court, therefore, is whether the Central Government was satisfied as to the existence of the conditions. The existence of the satisfaction cannot be challenged except probably on the ground that the authority acted mala fide. But if in reaching its satisfaction the Central Government misapprehended the nature of the conditions, or proceeded upon irrelevant materials, or ignores relevant materials, the jurisdiction of the Courts to examine the satisfaction is not excluded. ....." (at p. 183)

In M.A. Rasheed and Ors. v. State of Kerala, [1975] 2 SCR 93, after following Rohtas Industries (supra), the test for judicial review of administrative decisions was stated most felicitously by Ray, C.J. thus: "Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the courts' own opinion of what is reasonable to the criterion of what a reasonable body might have decided. The courts will find out whether conditions precedent to the formation of the opinion have a factual basis." (at p. 99)

In Khudiram Das v. State of West Bengal, (1975) 2 SCC 81, this Court exhaustively set out parameters for judicial review of the subjective satisfaction of the detaining authority in a preventive detention case. This Court held:

"9. But that does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability. The courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the Executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority : if

it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied. Emperor v. Shibnath Bannerji [AIR 1943 FC 75 : 1944 FCR 1 : 45 Cri LJ 341] is a case in point. Then there may be a case where the power is exercised dishonestly or for an improper purpose : such a case would also negative the existence of satisfaction on the part of the authority. The existence of "improper purpose", that is, a purpose not contemplated by the statute, has been recognised as an independent ground of control in several decided cases. The satisfaction, moreover, must be a satisfaction of the authority itself, and therefore, if, in exercising the power, the authority has acted under the dictation of another body as the Commissioner of Police did in Commissioner of Police v. Gordhandas Bhanji [AIR 1952 SC 16 : 1952 SCR 135] and the officer of the Ministry of Labour and National Service did in Simms Motor Units Ltd. v. Minister of Labour and National Service [(1946) 2 All ER 201] the exercise of the power would be bad and so also would the exercise of the power be vitiated where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner. The satisfaction said to have been arrived at by the authority would also be bad where it is based on the application of a wrong test or the misconstruction of a statute. Where this happens, the satisfaction of the authority would not be in respect of the thing in regard to which it is required to be satisfied. Then again, the satisfaction must be grounded "on materials which are of rationally probative value". Machindar v. King [AIR 1950 FC 129 : 51 Cri LJ 1480 : 1949 FCR 827]. The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad. Pratap Singh v. State of Punjab [AIR 1964 SC 72 : (1964) 4 SCR 733]. If there are to be found in the statute expressly or by implication matters which the authority ought to have regard to, then, in exercising the power, the authority must have regard to those matters. The authority must call its attention to the matters which it is bound to consider."

In Tata Cellular v. Union of India (1994) 6 SCC 651, after an exhaustive review of the latest English judgments, this Court held: "77. The duty of the court is to confine itself to the question of legality. Its concern should be: 1. Whether a decision-making authority exceeded its powers? 2. committed an error of law, 3. committed a breach of the rules of natural justice, 4. reached a decision which no reasonable tribunal would have reached or, 5. abused its powers. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under: (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. (ii) Irrationality, namely, Wednesbury unreasonableness. (iii) Procedural impropriety. The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind [(1991) 1 AC 696], Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention"."

40. *In Bhikhubhai Vithlabhai Patel v. State of Gujarat, (2008) 4 SCC 144, this Court, in an elaborate judgment, referred to and followed several judgments, including Barium Chemicals (supra), in the context of Section 17 of the Gujarat Town Planning and Urban Development Act, 1976, by which, if the State*

Government is of opinion that substantial modifications in the draft development plan are necessary, it may publish such modifications. This Court held:

"20. The State Government is entitled to publish the modifications provided it is of opinion that substantial modifications in the draft development plan are necessary. The expression "'is of opinion' that substantial modifications in the draft development plan are necessary" is of crucial importance. Is there any material available on record which enabled the State Government to form its opinion that substantial modifications in the draft development plan were necessary? The State Government's jurisdiction to make substantial modifications in the draft development plan is intertwined with the formation of its opinion that such substantial modifications are necessary in the draft development plan. The State Government without forming any such opinion cannot publish the modifications considered necessary along with notice inviting suggestions or objections. We have already noticed that as on the day when the Minister concerned took the decision proposing to designate the land for educational use the material available on record were: (a) the opinion of the Chief Town Planner; (b) note dated 23-4-2004 prepared on the basis of the record providing the entire background of the previous litigation together with the suggestion that the land should no more be reserved for the purpose of South Gujarat University and after releasing the lands from reservation, the same should be placed under the residential zone. 21. It is true that the State Government is not bound by such opinion and is entitled to take its own decision in the matter provided there is material available on record to form opinion that substantial modifications in the draft development plan were necessary. Formation of opinion is a condition precedent for setting the law in motion proposing substantial modifications in the draft development plan. 22. Any opinion of the Government to be formed is not subject to objective test. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming its opinion. But there must be material based on which alone the State Government could form its opinion that it has become necessary to make substantial modification in the draft development plan. 23. The power conferred by Section 17(1)(a)(ii) read with proviso is a conditional power. It is not an absolute power to be exercised in the discretion of the State Government. The condition is formation of opinion—subjective, no doubt—that it had become necessary to make substantial modifications in the draft development plan. This opinion may be formed on the basis of material sent along with the draft development plan or on the basis of relevant information that may be available with the State Government. The existence of relevant material is a precondition to the formation of opinion. The use of word "may" indicates not only a discretion but an obligation to consider that a necessity has arisen to make substantial modifications in the draft development plan. It also involves an obligation to consider which of the several steps specified in sub-clauses (i), (ii) and (iii) should be taken. 24. The proviso opens with the words "where the State Government is of opinion that substantial modifications in the draft development plan and regulations are necessary, ...". These words are indicative of the satisfaction being subjective one but there must exist circumstances stated in the proviso which are conditions precedent for the formation of the opinion. Opinion to be formed by the State Government cannot be on imaginary grounds, wishful thinking, however laudable that may be. Such a course is impermissible in law. The formation of the opinion, though subjective, must be based on the material disclosing that a necessity had arisen to make substantial modifications in the draft development plan 25. The formation of the opinion by the State Government is with reference to the necessity that may have had arisen to make substantial modifications in the draft development plan. The expression: "as considered necessary" is again of crucial importance. The term "consider" means to think over; it connotes that there should be active application of the mind. In other words, the term "consider" postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word "necessary" means indispensable, requisite, indispensably requisite, useful, incidental or conducive, essential, unavoidable, impossible to be otherwise, not to be avoided, inevitable. The word "necessary" must

be construed in the connection in which it is used. (See Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edn., 2005.) 26. The formation of the opinion by the State Government should reflect intense application of mind with reference to the material available on record that it had become necessary to propose substantial modifications to the draft development plan."

42. *Thus, at the very least, it is clear that the Central Government's satisfaction must be as to the conditions precedent mentioned in the Section as correctly understood in law, and must be based on facts that have been gathered by the Central Government to show that the conditions precedent exist when the order of the Central Government is made. There must be facts on which a reasonable body of persons properly instructed in law may hold that it is essential in public interest to amalgamate two or more companies. The formation of satisfaction cannot be on irrelevant or imaginary grounds, as that would vitiate the exercise of power.*

So when we apply above to assessment framed in OCM cases applying section 68 etc requisite opinion on part of assessing officer as required in law and as highlighted in aforesaid inundated jurisprudence is grossly lacking when mere basis to draw adverse inference is alleged and stated statistical non justification as per criteria in CBDT SOP. The Hon'ble Supreme Court in Maneka Gandhi Vs. Union of India reported in 1978 AIR (SC) 597 has laid down the law that a public authority should discharge his duties in a fair, just and reasonable, manner and the principle of due process of law was recognized by the Hon'ble Supreme Court. Therefore the opinion of the Ld. AO has to be in consonance with that of the well settled judicial principles and cannot be arbitrarily made discarding the judicial precedent on the subject.

Even Madras high Court in a recent case of Sri Balamurugan Textile Processing (Tax Case Appeal No. 344 of 2009 order dated 15.07.2019) in context of section 68 of the Act has highlighted that *"15. In our considered view, recording of satisfaction by theAssessing Officer to invoke Section 68 of the Act is primordial and thesatisfaction to be recorded should be with the reasons to state as towhy the assessee's explanation is not found to be satisfactory. In theabsence of any such finding, invoking provision of Section 68 of the Acthas to be held to be perverse"* and further it is observed u/s 68 that "17. One more issue, which falls for consideration is whethermere book entries or journal entries by itself can be taken to haveresulted in income for the assessee. This issue was explained by theHon'ble Supreme Court in the case of CIT, Bombay City I Vs.Messrs. Shoorji Vallabhdas And Company [reported in 46 ITR144] stating that no doubt, the Income-tax Act takes into account twopoints of time at which the liability to tax is attracted, viz., the accrualof the income or its receipt; but the substance of the matter is theincome. If income does not result at all, there cannot be a tax, eventhough in book-keeping, an entry is made about a "hypotheticalincome", which does not materialise. Where income has, in fact, beenreceived and is subsequently given up in such circumstances that itremains the income of the recipient, even though given up, the taxmay be payable."

In the case of T. Jayachandran 406 ITR 1 , the Hon'ble Apex Courtheld that the *revenue has to see what income has really accrued, not by reference to physical receipt of income, but by the receipt of income in reality; that when the assessee had acted only as a broker and not allowing any claim of ownership, the receipt of money was only on behalf of his clients in trust; and that, therefore, such receipt cannot be termed to be the income of the assessee*.

For a similarprinciple, reliance is placed on the decision of the Hon'ble SupremeCourt in the case of Pearless General Finance & Investment Co. Ltd. vsCIT (2019), 416 ITR 1 (SC) wherein the Hon'ble Apex Court held that *it is not a theoretical aspect but the reality of the situation that has to beviewed as a whole,* which may lead to the conclusion that the receiptsin question were capital and not income.

Apropos interpretation of taxing statute which principle is apposite in our humble view in present case can be culled out as:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 3327 OF 2007
COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI
...APPELLANT(S)
VERSUS
M/S. DILIP KUMAR AND COMPANY & ORS.
...RESPONDENT(S)

JUDGMENT
N.V. RAMA NA, J.

12. We may, here itself notice that the distinction ininterpreting a taxing provision (charging provision) andin the matter of interpretation of exemption notificationis too obvious to require any elaboration. Nonetheless,in a nutshell, we may mention that, as observed in *Surendra Cotton Oil Mills Case* (supra), in the matterof interpretation of charging section of a taxationstatute, strict rule of interpretation is mandatory and ifthere are two views possible in the matter ofinterpretation of a charging section, the one favourableto the assessee need to be applied. There is, however,confusion in the matter of interpretation of exemptionnotification published under taxation statutes and inthis area also, the decisions are galore

In construing penal statutes and taxation statutes, theCourt has to apply strict rule of interpretation. Thepenal statute which tends to deprive a person of right tolife and liberty has to be given strict interpretation orelse many innocent might become victims ofdiscretionary decision making.Insofar as taxationstatutes are concerned, Article 265 of the Constitution3 prohibits the State from extracting tax from the citizenswithout authority of law. It is axiomatic that taxationstatute has to be interpreted strictly because Statecannot at their whims and fancies burden the citizenswithout authority of law. In other words, whencompetent Legislature mandates taxing certainpersons/certain objects in certain circumstances, itcannot be expanded/interpreted to include those, whichwere not intended by the Legislature.

After thoroughly examining the various precedents someof which were cited before us and after giving ouranxious consideration, we would be more than justified to conclude and also compelled to hold that every taxingstatue including, charging, computation and exemptionclause (at the threshold stage) should be interpretedstrictly. Further, in case of ambiguity in a chargingprovisions, the benefit must necessarily go in favour ofsubject/assessee, but the same is not true for anexemption notification wherein the benefit of ambiguitymust be strictly interpreted in favour of theRevenue/State. There is abundant jurisprudential justification for this.In the governance of rule of law by a writtenConstitution, there is no implied power of taxation. Thetax power must be specifically conferred and it shouldbe strictly in accordance with the power so endowed bythe Constitution itself. It is for this reason that theCourts insist upon strict compliance before a Statedemands and extracts money from its citizens towardsvarious taxes. Any ambiguity in a taxation provision,therefore, is interpreted in favour of thesubject/assessee. The statement of law that ambiguityin a taxation statute should be interpreted strictly andin the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing differentsituations. For instance, if there is ambiguity in thesubject of tax, that is to say, who are the persons orthings liable to pay tax, and whether the revenue hasestablished conditions before raising and justifying ademand. Similar is the case in roping all persons withinthe tax net, in which event the State is to prove theliability of the persons, as may arise within the strictlanguage of the law. There cannot be any impliedconcept either in identifying the subject of the tax orperson liable to pay tax. That is why it is often said thatsubject is not to be taxed, unless the words of thestatute unambiguously impose a tax on him, that onehas to look merely at the words clearly stated and thatthere is no room for any intendment nor presumption asto tax. It is only the letter of the law and not the spiritof the law to guide the interpreter to decide the liabilityto tax ignoring any amount of hardship and eschewing equity in taxation. *Thus, we may emphatically reiteratethat if in the event of ambiguity in a taxation liabilitystatute, the benefit should go to the subject/assessee.But, in a situation where the tax exemption has to beinterpreted, the benefit of doubt should go in favour ofthe revenue, the aforesaid conclusions are expoundedonly as a prelude to better understand jurisprudentialbasis for our conclusion. We may now consider thedecisions which support our view."*

If aforesaid observations are tested against facts of this case in hand in our view same should go to benefit the tax payer as there is not only ambiguity in law in applicability of section 68/115BBE but also principle of strictest interpretation would support case set up by assessee as held in aforesaid order in following instructive words "In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. *The penal statute which tends to*

*deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims ofdiscretionary decision making.*Insofar as taxation statutes are concerned, Article 265 of the Constitution3 prohibits the State from extracting tax from the citizenswithout authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizenswithout authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, itcannot be expanded/interpreted to include those, which were not intended by the Legislature." , these observations in our respectful view are clincher to present issue.

IN THE HIGH COURT OF DELHI AT NEW DELHI in ITA 613/2010
COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms Suruchi Aggarwal
versus
KAILASH JEWELLERY HOUSE ..... Respondent
Through: None
O R D E R 09.04.2010

HELD

The revenue is in appeal against the order passed by the Income-tax Appellate Tribunal dated 08.07.2009 passed in the revenue?s appeal being ITA No.3597/ Del/2008 pertaining to the assessment year 2006-07. Before the Tribunal, the revenue had taken the ground that the Commissioner of Income-tax (Appeals) had erred in deleting the addition of an amount of Rs 24,58,400/- in respect of cash received in the bank account on the ground that the assessee had not established the nexus of such deposit to any source of income.

2. On examination of the orders passed by the Assessing Officer, the Commissioner of Income-tax (Appeals) and the impugned order passed by the Tribunal, we find that both the appellate authorities below have disagreed with the Assessing Officer and have deleted the said addition on the ground that the cash sales were duly recorded in the books and that they had found place in the profit and loss account.

3. The Commissioner of Income-tax (Appeals) had returned a finding that the stock and cash found at the time of search had been examined by the Assessing Officer and was compared with the stock and cash position as per books. The stock and cash position as per the books had been arrived at after the effect of the aforesaid cash sales. The stock position as well as the cash position as per the said books had been accepted by the Assessing Officer. The Commissioner of Income-tax (Appeals) also noted that the appellant had furnished the complete set of books of accounts and the cash books and no discrepancy had been pointed out. The Assessing Officer had doubted the aforesaid sales as bogus and had made the aforesaid addition. However, the Commissioner of Income- tax (Appeals) as well as the Income-tax Appellate Tribunal returned findings of fact to the contrary.

4. *The Tribunal also noted that the departmental representative could not challenge the factual finding recorded by the Commissioner of Income-tax (Appeals). Nor could he advance any substantive argument in support of his appeal. The Tribunal also observed that it is not in dispute that the sum of Rs 24,58,400/- was credited in the sale account and had been duly included in the profit disclosed by the assessee in its return. It is in these circumstances that the Tribunal observed that the cash sales could not be treated as undisclosed income and no addition could be made once again in respect of the same.*

5. The findings of the Commissioner of Income-tax (Appeals) and the Tribunal, which are purely in the nature of the factual findings, do not require any interference and, in any event, no substantial question of law arises for our consideration. The appeal is dismissed.

Case law Proposition

M/s Singhal Exim Pvt.LtdITA No.6520/Del/ 2018Assessment Year : 2014-15THE INCOME TAX APPELLATE TRIBUNALDELHI BENCH 'G' In the first paragraph above, the Assessing Officer mentioned"the amount of Rs.59,11,29,517/- is hereby disallowed u/s 68 of the Actand added back to the total income of the assessee company". Itseems that the Assessing Officer has probably not understood the scope of Section 68. Section 68 is not for the purpose of allowability or disallowability of any deduction and moreover, the question ofdisallowance may arise in respect of any expenditure or allowance claimed by the assessee. In respect of a sale consideration, there

cannot be any question of any disallowance. In the second paragraph above, the Assessing Officer has alternatively applied Section 69C.Section 69C is also for unexplained expenditure. Admittedly, there is no question of any unexplained expenditure in the case under appeal before us and therefore, Section 69C is also not applicable.In view of the above, we hold that the Assessing Officer was not right in concluding that the high sea sales are not genuine. *Moreover, Section 68 would also not be applicable in respect of recovery of sales consideration. Once the assessee sold the goods, the buyer of thegoods becomes the debtor of the assessee and any receipt of money from him is the realisation of such debt and therefore, we are of the opinion that in respect of recovery of sale consideration, Section 68 cannot be applied. In view of the above, we find no justification forupholding the addition of '59,51,29,517/-. The same is deleted.*

IN THE INCOME TAX APPELLATE TRIBUNALDELHI BENCH 'D', NEW DELHIITA No. 1220/Del/2011 : Asstt. Year : 2006-07Kishore Jeram Bhai KhaniyaDate of Pronouncement : 13.5.2014

There is another dimension to this issue. The Assessing Officer madeaddition of Rs. 22.06 lacs u/s 68 of the Act, which contemplates the makingof addition where any sum found credited in the books of the assessee is notproved to the satisfaction of the A.O. It is only when such a sum is notproved that the Assessing Officer proceeds to make addition u/s 68 of theAct. We are dealing with a situation in which the assessee has himself offeredthe amount of cash sales as his income by duly including it in his total sales.Once a particular amount is already offered for taxation, the same cannot beagain considered u/s 68 of the Act. In fact, such addition has resulted intodouble addition.

CIT vs Goverdhan India (P) Ltd.,177 Taxman 29 ,18 August 2008 AY 2001-02. The assessee had recorded sale of goods to Ambrose International Corporation worth Rs.50.36 lakhs. On summons from AO, AIC sent a copy of account showing purchase of Rs.28.19 lakhs only. The difference of Rs.22.17 was added as unexplained cash credit. The assessee's accounts were audited. The copies of the sale bills to AIC were countersigned by AIC. The sales to AIC stood proved . The sales were made to identified person. No addition under s.68 could be merely on copy of account filed by AIC. Further, assessee's request to cross examine AIC was not allowed. The tribunal rightly deleted the addition to income. S.68 of the Income Tax Act 196

Racmann Springs (P) Ltd vs DCIT,55 ITD 159ITAT (Delhi) - *Thereare contradictory findings in the assessment order dated 8-10-1984 and 13-1-1992. In the assessment order dated 8-10-1984, that Assessing Officer (Mr. O. S. Bajpai) at page 18 stated that these deposits are the realisation of the sale proceeds against the sales not disclosed in the past years in the books of account". However, in the assessment order dated 13-1-1992 at page 5 the Assessing Officer (Mrs. Gunjan Misra) stated that "drafts deposited in the Bank of Tokyo as per List-I ..... are actually undisclosed sales of the assessee." and "the sales were not being accounted for in the books of the assessee and the same were being directly deposited in various bank accounts". Thus, the successive Assessing Officers are not sure of the stand taken by them. Added to this, no evidence was brought on record by the Assessing Officer to substantiate the allegation that the impugned amount of Rs. 15,59,845 represented undisclosed sales. In the circumstances, benefit of doubt should have been given to the assessee as contended by the assessee's counsel reproduced earlier. The taxation authorities cannot go on changing their mind from time to time and cannot be allowed to create uncertainty in the realm of taxation (6 ELT 756 Guj. (sic)). Departure from earlier conclusion without explanation is vitiated. When the taxing authorities themselves were not sure about the correct factual position, any addition made is not sustainable under the law. It is settled law that benefit of doubt is the right of the assessee. (29 STC 695 (sic)).* -The assessee has filed reconciliation statement of sundry debtors from 1-7-1979 to 30-6-1980 (page 135 of paper book No. 1). In the said statement Rs. 18,00,763 was shown as realisation from the debtors during the year ended 30-6-1980. The Assessing Officer after comparing the figures of realisation from the debtors in the assessment years 1982-83, 1983-84 and 1984-85 concluded that it was unlikely that for the assessment year 1981-82 the assessee suddenly had realisation from sundry debtors of about Rs. 18 lakhs. This is only a suspicion of the Assessing Officer. *Suspicion, however, grave, cannot take the place of proof.* The assessee's plea of realisation of Rs. 18,00,763 from the sundry debtors in the year ended 30-6-1980 cannot be rejected on the ground that

realisations in the later assessment years were less. Please see the case of New Ambadi Estates Pvt. Ltd.'s case (supra).- *The Assessing officer held in the assessment order dated 13-1-1992 that the drafts deposited in the Bank of Tokyo as per List-I are actually undisclosed sales and treated the same as income of the assessee under section 68 of the Income-tax Act, 1961. This was really strange. Only unsubstantiated cashcredits could be added under section 68 of the Income-tax Act, 1961. The said section does not permit the Assessing Officers to add undisclosed sales under that section. Further, the realisations from the sundry debtors cannot be treated as cashcredits. Cashcredits always appear as a liability in the balance sheet of the assessee. Realisation from the sundry debtors would reduce the sundry debtors appearing on the "assets" side of the balance sheet.*

IN THE INCOME TAX APPELLATE TRIBUNAL"D" BENCH, AHMEDABADITA.No.1652/Ahd/2011 Shri Pavankumar Bhagatram Sharma

Date of Pronouncement: 11/04/2016 Since the books of accounts of the appellant are incorrect, andunreliable, the proper course to be adopted by the AO was to rejectthe books and estimate the income of the appellant on a reasonablebasis. It is obvious that the deposits in the bank account are saleproceeds of the appellant. The mere fact that the books of accountswere not correct would not empower the AO to make an addition ofthe entire deposits in the bank account as unaccounted income of theappellant u/s 68 of the IT Act.-If this finding is weighed in the light of the finding recorded by the ld.AO, then scale would tilt in favour of this finding. The AO has not made detailed analysis of the account as well as other details submitted by the assessee. According to the ld.CIT(A) aggregate cash deposits in the said bank account is only of Rs.21,23,800/-. The AO, on the other hand, observed that the cash deposits was of Rs.50,48,055/-. Theld.CIT(A) thereafter made reference to other materials produced before the AO to point out that this bank account was used for the purpose of business and sale proceeds were deposited in this bank account. On theother hand, the ld.AO did not make any such investigation. He simply treated the deposits made in the bank account as unexplained cashcredits. Contrary to this, the Revenue has not brought any evidence on record to demonstrate the fact that opinion formed by the ld.CIT(A) contrary to the details available on record. In words, it has not brought to our notice that inference drawn by the ld.CIT(A) are factually incorrect. The ld.CIT(A) has right observed that total amount appearing as a deposit in the account was not cash credits, rather sale proceeds of the assessee. Turnover of the assessee is to be computed on the basis of all these details and at the most, an estimated net profit can be computed as an income of the assessee. Accordingly, the ld.CIT(A) has confirmed an addition of Rs.3,50,208/-. We do not find any error in the detailed reasoning of the ld.CIT(A), and accordingly, the appeal of the Revenueis dismissed. For dismissal of this appeal, we do not require the presence of the assessee.

IN THE INCOME TAX APPELLATE TRIBUNALHYDERABAD BENCH "A", HYDERABADITA No. 264/Hyd/2011Assessment Year : 2006-07

S.B. Steel Industries,Date of pronouncement : 13 -11-2013 - It is an established fact that only cash credits can only beconsidered u/s 68, but, not trade receipts. The coordinate bench ofITAT in the case of ITO Vas. Rajendra Kumar Taparia, 106 TTJ 712(Jodh.) has held that "*cash credits standing in the names tradecreditors, all income-tax Assessees, could not be treated as nongenuinewhen they have confirmed the transactions by filing affidavitsand deposing before the AO, and the addition could not be made inrespect of cash credits or interest paid thereon*". In the present case,the amounts received by Assessee are not cash credits but the samewere recovery of the debtors, which are available in the books ofaccount. Since Assessee furnished details of debtors and also theentries made in the books of account, we are of the opinion that boththe AO and the CIT(A) have erred in considering recoveries fromdeposits as cash credits. the corresponding sales in earlier yearshave been accepted, as there is no dispute with reference to theentries in the books of account in any of the earlier years. Therefore,we are of the view that the principles laid down for invokingprovisions of section 68 cannot be applied to the trade recoveriesmade by Assessee during the year.

Gujarat high court approving ITAT order in case of VISHAL EXPORTS OVERSEAS LIMITED Date : 03/07/2012TAX APPEAL No.2471 of 2009

The Tribunal however, upheld the deletion of Rs.70 lakhs under section 68 of the Act observing that when the assessee had already offered sales realisation and

such income is accepted by the Assessing Officer to be the income of the assessee, addition of the same amount once again under section 68 of the Act would tantamount to double taxation of the same income.

In view of aforesaid legal position it is not fathomable as to on what basis deeming fiction of section 68 is applied to sales offered to taxation by assessee in its return of income and that to creating egregious tax demands under section 115BBE where till end it is no bodys case that assessee is owner of stated sum of money and same is possessed by assessee in form of hidden/unaccounted investments. Whether any real income in form of said alleged unexplained cash credits is there is something which remains shrouded in mystery.

Now if we turn to other cases where books are maintained and same are not doubted u/s 145 of the Act and stated cash deposits are duly accounted for in books of accounts and are explained to be from justified source (say cash sales), *then without showing it is not possible to compute assessee's income from given books for which burden lies on revenue,* no valid exception can be made to audited defect free books of accounts. *Evidentiary value of books of accounts maintained in regular course can be traced to section 34 of Indian evidence law.* Even in cases where it is observed that books are rejected u/s 145, appropriate satisfaction on part of assessing officer as required and stipulated in section 145 is lacking as it is not shown that books are incorrect and incomplete etc. So where cash deposits are validly supported by regular & audited books of accounts then same carry huge relevance and cant be brushed aside lightly. Analyzing from different angle at worst if books are treated to be not validly maintained in such cases, can proportionate punishment principle which is ingrained in Indian jurisprudence, allow revenue to tax entire cash sale deposits/gross receipts or it would be just proper to estimate enhanced business profits of assessee on basis of material on record. *Latter idea (to estimate profits as per law) seems to be better/ worthy option in reaching to fair tax assessment.*

Now for cases where assessee has filed valid cash flow statement to justify cash deposits say same are sourced from cash withdrawals , can revenue interdict to check as to why assessee withdrew cash and prudence for the same and if same in opinion of revenue is found to be not explained satisfactorily, can additions be made in deeming provisions of section 68/section 69A etc. ?To this it may be worthwhile to quote from a recent Lucknow bench ITAT verdict in case of Smt. Veena Awasthi order dated 30.11.2018 Held :

"We have perused the case record and heard the rival contentions. We *find that addition has been made by the Assessing Officer, as is evident from his order, on the ground that he has come to the conclusion that cash deposits were from some other source of income which is not disclosed to the Revenue. Assessing Officer nowhere in his order has brought out any material on record to show that assessee is having any additional source of income other than thatdisclosed in the return nor Assessing Officer could spell out in his orderthat cash deposits made by the assessee was from some undisclosedsource. All throughout Assessing Officer has raised suspicion on thebehavioral pattern of frequent withdrawal and deposits by the assessee.There is no law in the country which prevents citizens to frequentlywithdraw and deposit his own money.* Documentary evidences furnished before the Revenue clearly clarifies that on each occasion at the time of deposit in her bank account, assessee had sufficient availability of cash which is also not disputed by the Revenue. Entire transaction of withdrawals and deposits are duly reflected in the bank account of the assessee and are verifiable from relevant records. Assessing Officer himself admitted that assessee had sufficient cashbalance on each occasion at the time of deposit in her bank account ondifferent dates during the assessment year under consideration. Wehave also examined the order of ld. CIT(A) and we find that his decisionis based on facts on record and is supported by adequate reasoningand, therefore, we do not want to interfere with the order of ld. CIT(A)and accordingly we uphold the findings of the ld. CIT(A) sustaining reliefgranted to the assessee."

Even Delhi bench of ITAT in recent case of Neeta Breja, ITA No. 524/Del/2017 Date of pronouncement 25/11/2019 has held as under:

"We have carefully considered the rival contention and perused the orders ofthe lower authorities. In the present case it is not disputed that the amountof cash was explained as available with the assessee in the hands todeposit in the bank. Assessee has substantiated the availability of the cashby producing the cash flow statement, day-to-day cash book,

Ledgeraccount of the Bank with narration and the complete bank statement Same were disbelieved by the learned assessing officer for the only reasonthat there is an inordinate delay in deposit of the cash in the bank account.

Identical issue arose before the honourable Delhi High Court in case of CIT vs Kulwant rai in 291 ITR 36 wherein the honourable Delhi High Court hasheld as under:-

This cash flow statement furnished by the assessee was rejected bythe AO which is on the basis of suspicion that the assessee must havespent the amount for some other purposes. The orders of AO as well asCIT(A) are completely silent as to for what purpose the earlierwithdrawals would have been spent. As per the cash book maintained bythe assessee, a sum of Rs. 10,000 was being spent for householdexpenses every month and the assessee has withdrawn from bank a sumof Rs. 2 lacs on 4th Dec., 2000 and there was no material with theDepartment that this money was not available with the assessee. It hasbeen held by the Tribunal that in the instant case the withdrawals shownby the assessee are far in excess of the cash found during the course ofsearch proceedings. No material has been relied upon by the AO or CIT(A)to support their view that the entire cash withdrawals must have beenspent by the assessee and accordingly, the Tribunal rightly held that the assessment of Rs. 2.5 lacs is legally not sustainable under s. 158BC of theAct and the same was rightly ordered to be deleted.""

In the present case also the learned assessing officer or the learned CIT Adid not show that above cash was not available in the hands of the assesseeor have been spent on any other purposes. Further the coordinate bench inACIT vs Baldev Raj Charla 121 TTJ 366 (Delhi) also held that merelybecause there was a time gap between withdrawal of cash and cash depositsexplanation of the assessee could not be rejected and addition on account ofcash deposit could not be made particularly when there was no findingrecorded by the assessing officer or the Commissioner that apart fromdepositing this cash into bank as explained by the assessee, there was anyother purposes it is used by the assessee of these amounts. In view ofabove facts, the ground number 1 of the appeal of the assessee is allowedand orders of lower authorities are reversed"

The Hon'ble Punjab & Haryana High Court in the case of Shiv Charan Dass Vs CIT 126 ITR 263 considered the facts wherein the amounts kept with the wife of theassessee from 1951 upto her death in 1956 – later deposited in bank in the names of two unmarried daughters of the assessee after they became major – explanation of the assessee was not accepted and amount deposits were considered from undisclosedsources. Hon'ble High Court held that , "There was nothing on record to show that amount was utilized by the assessee or the HUF in any other manner than theone which was represented by the assessee, the onus lay on the department to show that explanation offered by the assessee should not be accepted".

Same ratio in: Ahmedabad bench of the Tribunal in the case of Anand Autoride Ltd. V/s. JCIT (99TTJ 1250); Kerala High Court in the case of CIT V/s. K.J.Sridharan (201 ITR 1010);

2.3 *When we now turn to section 115BBE , it remains a matter of constitutional debate as to whether doubling of tax rate from 30 to 60 % (penalty and interest separate) can be held to be reasonable and within legislative competence , in authors personal opinion, applying Apex court ruling in case of Nikesh Tarachand Shah vs Union Of India on 23 November, 2017 in context of constitutional validity of Section 45 of the Prevention of Money Laundering Act, 2002 has observed as under:*

In so far as "manifest arbitrariness" is concerned, it is important to advert to the majority judgment of this Court in Shayara Bano v. Union of India and others, (2017) 9 SCC 1. The majority, in an exhaustive review of case law under Article 14, which dealt with legislation being struck down on the ground that it is manifestly arbitrary, has observed:"87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied

to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641: 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14." This view of the law by two learned Judges of this Court was concurred with by Kurian, J. in paragraph 5 of his judgment." So on ground of manifest arbitrariness one may attack amendment in section 115BBE in adopting standard rate of 60% when in provisions like section 115BB dealing with immoral income of gambling etc still tax rate prescribed is 30% & for simply unexplained income u/s 68 etc which is nebulous, it is fixed at 60% which seemingly does not satisfy reasonable classification test in article 14 of Indian constitution. Even one may refer to Delhi high court recent decision in case of Sahara reported at 399 ITR 81 where constitutional validity of section 142(2A) in income tax act - amendment was adjudicated:

"Before dealing with the constitutionality of the aforesaid amendment, it would be fitting to recollect the basic principles that must be kept in mind by the Courts while dealing with the challenge to the constitutionality of a legislative enactment. These principles were succinctly stated by the Supreme Court in Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar, AIR 1958 SC 538:

- *"The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish -*
  - *(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;*
  - *(b) That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;*
  - *(c) That it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;*
  - *(d) That the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;*
  - *(e) That in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and*
  - *(f) That while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.*

- *The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."*
- *The above principles have been consistently followed by the courts in India and the law in relation to challenge on the constitutionality of an enactment on the touchstone of Article 14 was reiterated by the Supreme Court in Subramaniam Swamy v. CBI, (2014) 8 SCC 682 in the following terms:*

"Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders-if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

Even on merits of invocation of section 115BBE one may refer to :

HIGH COURT OF KERALA AT ERNAKULAM
M/S. VIJAYA HOSPITALITY AND RESPORTS LTD THE 07TH DAY OF MARCH 2019ITA.No.20 OF 2019HELD:

"As theprovisions of law which stood applicable for the relevant year ofassessment, there is a specific bar with respect to allowing anydeductions from such income, by virtue of Section 115BBE, as itstood unamended. The amendment declining set off wasintroduced only with effect from 1.4.2017. Therefore, questionwhether set off permissible under Section 72(2) read with

Section 32(2) of the Act would apply with respect to the said income, assumes importance. There again, the crucial aspectrelevant for consideration is the nature of the said income. In oneof the oldest cases decided by the Honourable Supreme Court,Govindarajulu Mudaliar v. Commissioner of Income Tax[(1958) 34 ITR 307] it is held that, "there is ample authority forthe position that where an assessee fails to prove satisfactorilythe source and nature of certain amounts of cash receivedduring the accounting year, the Income Tax Officer is entitled todraw an inference that the receipts are of an assessable nature".Following the said observations in Lakhmi Chand Baijnath(*supra*) the Honourable Supreme Court observes that, "when anamount is credited in the business books, it is not anunreasonable inference to draw that it is a receipt frombusiness". Even though Standing Counsel contended that thesaid observations of the apex court cannot be treated as aprecedent of binding nature, mainly because it is made withrespect to the provisions contained in the erstwhile Income Tax Act of 1922, we are not persuaded to accept the same. It isbasically on an identical circumstance that the apex court had found that the income credited in the business book with respectto which the assessee fails to prove satisfactorily the source andthe nature of receipt of the amount, it shall be deemed to be ofreceipt from business.The decisions of the High Court ofMadras in Chensing Ventures (*supra*) as well as the decision ofthe High Court of Gujarat in Shilpa Dyeing & Printing Mills(supra) are to the effect that income of such nature fromundisclosed source need to be treated as income from othersources. Therefore, we are of the opinion that the undisclosedincome assessed under Section 68 need not be treated as anincome falling totally outside the ambit of the classificationscontained in Section 14 of the Act."

IN THE INCOME TAX APPELLATE TRIBUNAL JODHPUR BENCH (SMC), JODHPUR
ITA No. 143/Jodh/2018 (ASSESSMENT YEAR-2014-15
Shri Lovish Singhal
Date of Pronouncement 25/05/2018

"I have heard the rival contentions and record perused. I have alsocarefully gone through the orders of the authorities below. I have alsodeliberated on the judicial pronouncements referred by the lower authoritiesin their respective orders as well as cited by the ld AR during the course ofhearing before the ITAT in the context of factual matrix of the case. From the record, I find that during the course of survey, income was surrendred bythe assessee on account of stock, excess cash found out of sale of stock andalso in respect of incriminating documents. As per judicial pronouncementscited by the ld. AR and also the decision of Hon'ble Rajasthan high court inthe case of Bajrang Traders in Income Tax Appeal No. 258/2017 dated.12/09/2017 I observe that the Hon'ble High Court in respect of excess stockfound during the course of survey and surrender made thereof was found tobe taxable under the head 'business and profession'. Similarly in respect ofexcess cash found out of sale of goods in which the assessee was dealingwas also found to be taxable as business income. Applying the proposition oflaw laid down in the judicial pronouncements as discussed above, I hold thatthe lower authorities were not justified in taxing the surrender made onaccount of excess stock and excess cash found U/s 69 of the Act. Thus, thereis no justification for taxing such income U/s 115BBE of the Act." While so holding ITAT took into consideration following (which is apposite in present facts also):

Lakhmichand Baijnath v. CIT [1959] 35 ITR 416, the SupremeCourt has observed that when an amount is credited in thebusiness books, it is not an unreasonable inference to draw thatit is a receipt from business. It was also observed that as thecredits were found in the business accounts of the assessee andthe explanation as to how the amounts came to be receivedwas rejected by the Income-tax authorities, the Income-taxauthorities were entitled to treat the credits as business receiptschargeable to tax.

Nalinikant Ambalal Mody v S.A.L. Narayan Row, CIT [1966] 61ITR 428, the Supreme Court has held that whether an incomefalls under one head or another has to be decided according tothe common notions of practical man because the Act does not provide any guidance in the matter.

On basis of above, no legal warrant and authorization remains to justify as done in some cases to support straight invocation of draconian and lethal provision of section 115BBE in I.T.N.S sheet computing demand without any whisper in assessment order what to speak of specific show cause notice to assessee in that regard which exposes perfunctory manner of creating stated abnormal and extraordinary tax demand .

When in context of interest levy u/s 234A/B/C etc such has been the position that same must be founded in assessment order can exorbitant demand raised in sec.115BBE be held to be justified when there is no whisper in assessment order what to speak of discernible satisfaction for the same on part of assessing officer and same is raised in demand computation sheet straightway. It is noteworthy that in some cases revenue has applied section 68 to cash deposits and in some cases section 69A is applied to cash deposits accounted in books so there is no uniformity in revenue's action . Even section 69A cant be applied to cash deposits which are explained from available /accounted source of *cash sales* without bringing something more on record for which burden lies on revenue,which has not been discharged ex-facie.

2.3 Now an attempt is made to deal with penal aspect of additions of cash deposits made u/s 68 or section 69A etc. It is really surprising that for addition made u/s 68 etc penalties in both provisions of section 270A and section 271AAC are initiated where correct legal position in authors opinion is for addition made in section 68 etc specific provision of penalty specified is section 271AAC and section 270A being general provision can't be recourse to. If one refer to section 271AAC(2) it clearly states that " (2) No penalty under the provisions of section 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (1)." So parallel and simultaneous initiation of penalty in section 270A and section 271AAC in assessment order, in authors opinion vitiates the charge of penalty beyond repair as it is held in series of decisions that application of mind is required in initiation of penalty and charge leveled (refer Delhi high court in Pr. CIT vs. M/s. Sahara India Life Insurance Company Ltd., 2019 (8) TMI 409 (Del.) vide Judgment Dated 02.08.2019). Even otherwise if penalty is to be levied in section 271AAC then again discretion given to assessing officer by use of phrase MAY in the provision has to be judiciously appreciated specially when underlying additions made are in deeming provisions of section 68 to section 69D of the Act for which reference may be made to : In the case of Durga Kamal Rice Mills 265 ITR 25, the Hon'ble High Court of Calcutta has held as under: "When two views are possible and when no clear and definite inference can be drawn, in a penalty proceeding,

penalty cannot be imposed....in quantum proceedings, a particular provision might be attracted for addition to the income of the assessee. *But when it comes to the question of imposition of penalty, then independent of the finding arrived at in the quantum proceedings the authority has to find conclusively that eh assessee owns the concealed amount."* (Same is Gujarat High court in National Textile case 249 ITR 125: theory of equal hypothesis that is facts not proved versus facts disproved) . Apropos cases where only penalty initiated is under section 270A and addition is made u/s 68 , then same would be required to be dropped as per section 271AAC(2) of the Act.

2.4 Last aspect of stay of demand u/s 220(6) of the Act is concerned , tabulation of various notable decisions is made below to highlight as to how discretion on part of assessing officer and CIT-A is to be exercised pending disposal of first appeal:

THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 07.03.2019
W.P.(MD).No.5328 of 2019
M/s.TVS Charities,

Discussion:

It is an admitted case that the said tenants were thetenants of the petitioner right from the year 1973, when thepetitioner's Trust was approved under Section 12A(a) of the IncomeTax Act for exemption. It is only for the first time, during theassessment year 2016-2017, the Income Tax Department has raisedan issue with the petitioner that they have to pay the tax as per themarket rent payable by their tenants who are their associatecompanies. The petitioner has already deposited Rs.5,00,000/ before the Assessing Officer, even at the time of filing the appealbefore the second respondent as against the assessment order dated14.12.2018. If 20 % of the tax amount is calculated, as per the firstrespondent's internal circular in Instruction No.1914 dated31.07.2017, the amount will come to Rs.16,50,000/-. Therefore, thesum of Rs.5,00,000/- deposited by the petitioner with the assessingofficer for obtaining stay will work out to 30% of Rs.16,50,000/-which is the amount to be deposited as per the internal circular.11. The Commissioner of Income Tax (Appeals) has gotinherent powers to grant stay of recovery as per the assessmentorder pending disposal of the appeal. This Court has alreadyconsidered the said issue and held in the decision reported in(2018) 409 ITR 33 (Mad) referred to supra by the learned counselfor the petitioner that when a prima facie case has been made out,the Commissioner of Income Tax (Appeals) is not bound by theinternal circular involving high pitched tax assessment. In the instantcase also, it is an high pitched tax assessment as seen from theassessment order, which is subject matter of challenge before theCommissioner of Income Tax (Appeals). 12. This Court is of the considered view that prima facie casehas been made out by the petitioner since the Associate Companieswho are their tenants from the date when the petitioner obtainedexemption from payment of income tax under Section 12A(a) of theIncome Tax Act right from the year 1973 onwards. In the instantcase, the Income Tax Department has raised the issue only for theAssessment Year 2016-17 even though income tax returns were filedby the petitioner disclosing the tenancy, right from the date whenthey got exemption from payment of Income tax under Section12A(a) of the Income Tax Act. The Assessing Officer ought to haveconsidered all these aspects and should have granted stay of theimpugned order.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 13.02.2019
W.P.No.3849 of 2019
Mrs.Kannammal ....Petitioner

"The Circulars and Instructions as extracted above are in the nature ofguidelines issued to assist the assessing authorities in the matter of grant of stayand cannot substitute or override the basic tenets to be followed in theconsideration and disposal of stay petitions. The existence of a prima facie casefor which some illustrations have been provided in the Circulars http://www.judis.nic.in themselves, the financial stringency faced by an assessee and the balance of convenience in thematter constitute the 'trinity', so to say, and are indispensable in considerationof a stay petition by the authority. The Board has, while stating generally thatthe assessee shall be called upon to remit 20% of the disputed demand, grantedample discretion to the authority to either increase or decrease the quantumdemanded based on the three vital factors to be taken into consideration.

- In the present case, the assessing officer has merely rejected thepetition by way of a non-speaking order reading as follows:

'Kindly refer to the above. This is to inform you that mere filing ofappeal against the said order is not a ground for stay of the demand.Hence your request for stay of demand is rejected and you are requestedto pay the demand immediately. Notice u/s.221(1) of the Income Tax Act,1961 is enclosed herewith.'

- The disposal of the request for stay by the petitioner leaves much to be desired. I am of the categoric view that the Assessing Officer ought to have taken note of the conditions precedent for the grant of stay as well as the Circulars issued by the CBDT and passed a speaking order. Of course the petition seeking stay filed by the petitioner is itself cryptic. However, as noted by the Supreme Court in the case of *Commissioner of Income tax vs Mahindra Mills*, ((2008) 296 ITR 85 (Mad)) in the context of grant of depreciation, the Circular of the Central Board of Revenue (No. 14 (SL- 35) of 1955 dated April 11, 1955) requires the officers of the department *'to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs. .... Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other'.* Thus, notwithstanding that the assessee may not have specifically invoked the three parameters for thegrant of stay, it is incumbent upon the assessing officer to examine the existenceof a prima facie case as well as call upon the assessee to demonstrate financialstringency, if any and arrive at the balance of convenience in the matter."

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED :16.07.2018
W.P.No.7410 of 2018
Kalaignar TV Private Limited

- So far as the contention of the Revenue that Instruction No.96 dated 21.08.1969 has superseded Instruction No.1914 is concerned, the stand is incorrectin the light of the decision of this Court in the case of *N.Jegatheesan Vs. Deputy Commissioner of Income-Tax,* cited supra. Identical plea was raised by theRevenue in the said case and the Court after taking into consideration severaldecisions, held that Instruction No.96 dated 21.08.1969 issued with the consent of the Informal Consultative Committee continues to hold the field. The relevant portion of the order reads as follows:

It is the contention of the learned counsel for the petitionerthat pending the appeal, the petitioner is entitled for stay of recoveryof the demand amount, as his case falls within the ambit of Sections220(3) & 220(6) of the IT Act. In view of the pendency of the appeal,the respondent ought to have passed an order treating him as notbeing in default in respect of the amount in dispute in the appeal, byplacing reliance on CBDT Instruction No.95 dated 21.08.1969. But,according to the respondent, the said CBDT Instruction No.95 wassuperseded and as such, the respondent has exercised his powerunder subsequent Instruction No.1914 dated 02.12.1993. But, thelearned counsel for the petitioner, by relying upon number of judgments submitted that CBDT Instruction No.95 is still in force.

Therefore, it would be appropriate to refer some of thedecisions in this regard. In the case of Taneja Developers &Infrastracture Ltd., Vs. Assistant Commissioner of Income Tax, Delhi &ors in W.P.(C).No.6956 of 2009, dated 24.02.2009, the Division Benchof Delhi High Court has held as follows:-

'Relying upon the said Instruction No.1914 of 1993, Mr.Jollysubmitted that all previous instructions stood supersededwhich included the supersession of said Instruction No.96. Hefurther submitted that paragraph No.2(C), which deals with guidelines for staying demand, specifically requires that ademand be stayed only if there are valid reasons for doing soand that a mere filing of an appeal against the assessment order will not be a sufficient reason for staying recovery of ademand.

Having considered the arguments advanced by the learnedcounsel for the parties, we are of the view that althoughInstruction No.1914 of 1993 specifically states that it is insupersession of all earlier instructions, the position obtainingafter the decision of this Court in

Valvoline Cummins Ltd.,(Supra) is not altered at all. This is so because paragraphNo.2(A) which speaks of responsibility specifically indicatesthat it shall be the responsibility of the Assessing Officer andthe TRO to collect every demand that has been raised ?exceptthe following', which includes ?(d) demand stayed inaccordance with the paras B and C below?. Para B relates tostay petitions. As extracted above, Sub-clause (iii) of para Bclearly indicates that a higher/superior authority could interferewith the decision of the Assessing Officer/TRO only inexceptional circumstances. The exceptional circumstances have been indicated as - where the assessment order appearsto be unreasonably high pitched or where genuine hardship islikely to be caused to the assessee.?. The very question as towhat would constitute the assessment order as beingreasonably high pitched in consideration under the saidInstruction No.96 and, there, it has been noted by way ofillustration that assessment at twice the amount of thereturned income would amount to being substantially higher orhigh pitched. In the case before this Court in ValvolineCummins Ltd., (supra) that assessee's income was about eight(8) times the returned income. This Court was of the view thatwas high pitched. In the present case, the assessed income isapproximately 74 times the returned income and obviously, this would fall within the expression unreasonably highpitched?. (Emphasis supplied).'

A reading of the above dictum would show that if assessment order is unreasonably high pitched or genuine hardship is likely to becaused to the assessee, then the assessee is entitled to be treated asnot being in default in respect of the amount in dispute in the appeal.

In the case reported in (1997) 223 ITR 192 (Raj) [MaharanaShri Bhagwat Singhji of Mewar Vs. Income-Tax Appellate Tribunal,Jaipur Bench, and others), the Rajasthan High Court has held asfollows:-

"accordingly, on the facts, that the factors which are relevantfor deciding the stay applications primarily are a prima faciecase, balance of convenience, financial status of thepetitioner, hardship and also the interest Revenue. In theinstant case there was an order of the court restraining the accountable person from alienating/disposing of theproperties of the estate. The value of the estate which wasdetermined by the authority was much more than twice thereturned value. Hence, the Instruction No.96 of August 21,1969, was applicable. It was also established that theaccountable person had no cash belonging to the estate. Aperusal of the order of the Tribunal indicated that thecontention raised by the petitioner before the Tribunal forstaying the total recovery was not contraverted and norelevant and convincing material regarding the financialstatus of the petitioner was placed before the Tribunal toestablish that the petitioner was in a position to deposit 25percent of the disputed duty. The recovery of the entire duty had to be stayed till the disposed of the appeal.

In the case in Kec International Ltd Vs. B.R.Balakrishnan and ors, reported in [2001] 251 ITR 158/1'19 Taxman 974, the Bombay High Court has held as follows:-

'Hence, we intend to lay down certain parameters which arerequired to be followed by the authorities in cases where a stayapplication is made by an assessee pending appeal to the firstappellate authority.

(a) While considering the stay application, the authority concerned willat least briefly set out the case of the assessee.

(b) In cases where the assessed income under the impugned order farexceeds returned income, the authority will consider whether theassessee has made out a case for unconditional stay. If not, whetherlooking to the questions involved in appeal, a part of the amountshould be ordered to be deposited for which purpose, some shortprima facie reasons could be given by the authority in its order.

(c) In cases where the assessee relies upon financial difficulties, theauthority concerned can briefly indicate whether the assessee isfinancially sound and viable to deposit the amount if the authoritywants the assessee to so deposit.

(d) The authority concerned will also examine whether the time toprefer an appeal has expired. Generally, coercive measures may notbe adopted during the period provided by the statute to go in appeal.However, if the authority concerned comes to the conclusion that theassessee is likely to defeat the demand, it may take recourse tocoercive action for which brief reasons may be indicated in the order.

(e) *We clarify that if the authority concerned complies with the aboveparameters while passing orders on the stay application, then theauthorities on the administrative side of the Department likerespondent No.2 herein need not once again give reasoned order.*

In the judgment reported in 346 ITR 375 (M/s.Maheswari Agro Industries Vs. Union of India and others), it has been held by the Rajasthan High Court as follows:-

" The mandate of Parliament in sub-section (6)seems to be that the lower Assessing Officer should abide by andbeing bound by the decision of the appellate authority, shouldnormally wait for the fate of such appeal filed by the assessee.

Therefore, his discretion of not treating the assessee in default,conferred under sub-section (6) should ordinarily be exercised infavour of assessee, unless the overriding and overwhelming reasonsare there to reject the application of the assessee under Section220(6) of the Act. The application under Section 220(6) of the Actcannot normally be rejected merely describing it to be against theinterest of Revenue if recovery is not made, if tax demanded is twiceor more of the declared tax liability. The very purpose of filing ofappeal, which provides an effective remedy to the assessee is likely tobe frustrated, if such a discretion was always to be exercised in favourof revenue rather than assessee.

The tendency of making high pitched assessments by theAssessing Officers is not unknown and it may result in seriousprejudice to the assessee and miscarriage of justice & sometimes mayeven result into insolvency or closure of the business if such powerwas to be exercised only in a pro revenue manner. It may be likeexecution of death sentence, whereas the accused may get evenacquittal from higher appellate forums or courts. Therefore, this Curtis of the opinion that such powers under sub-section (6) of Section220 of the Act also have to be exercised in accordance with the letterand spirit of Instruction No.95 dated 21.08.1969, which even nowholds the field and its spirit survives in all subsequent CBDT Circulars quoted above, and undoubtedly the same is binding on all theassessing authorities created under the Act."

From the reading of the above cited judgments, it is clear that it isincorrect to state that DBDT Instruction No.1914, dated 02.12.1993supersedes all previous instructions. Although instruction No.1914specifically states that it is in supersession of earlier instructions, theposition obtaining after the decision of the case in Volvoline CumminsLimited Vs. DCIT (2008) 307 ITR 103 (Del) is not altered at all. This isso, the DBDT Instruction No.95, dated 21.08.1969 was issued with theconsent of the informal consultative committee held on 13th May,1969 formed under the business rules of the Parliament, which evennow holds the field.

Hence, I am of the opinion that the tendency of makinghigh pitched assessments by the Assessing Officer is not unknown andit may result in serious prejudice to the assessee and miscarriage ofjustice & sometimes may even result into insolvency or closure of thebusiness if such power was to be exercised only in a pro-revenuemanner. Hence, I am of the opinion that the powers under Sections

220(3) & 220(6) of IT Act have to be exercised in accordance with theletter and spirit of CBDT Instruction No.95 dated 21.08.1969, which isbinding on all the assessing authorities created under the Act.

Therefore, the impugned order passed by the respondentwithout considering CBDT Instruction No.95, dated 21.08.1969 isagainst the principles laid down in the judgments stated supra."

In the light of the above decision, which has been rendered following the decisions of the other High Courts, it has to be held that Instruction No.1914 does not specifically supersede Instruction No.96 and it binds the Assessing Officers."

HIGH COURT OF CHHATTISGARH, BILASPUR
Writ Petition (T) No.59 of 2018
M/s Aarti Sponge & Power Ltd

"Thus, in the considered opinion of this Court, the assessing officerhas to consider the case of the particular assessee on merits and ifhe comes to the conclusion that the assessee has a case for grantof stay, then subject to deposit of 20% of the disputed demand, the outstanding demand may be stayed and in certain cases where theassessee's case is covered by the decision of the Supreme Courtand the deposit of 20% of the disputed demand may be reduced asper the discretion of the assessing officer, but the deposit of 20% ofthe disputed demand cannot be made condition precedent forhearing the application for stay. The condition of pre-deposit of20% of the disputed demand is neither contemplated by the saidmemorandum nor there is legislative sanction mandating suchdeposit for hearing of an application for stay. Therefore, such acondition of pre-deposit cannot be

imposed for hearing anapplication for stay of the disputed demand.

The High Court of Gujarat in the matter of Jagdish GandabhaiShah v. Principal Commissioner of Income Tax and otherswhile dealing with the similar issue of pre-deposit of disputeddemand qua the said memorandum while considering the application for stay by the said authority, held as under: -

"Therefore, the interpretation by the AssessingOfficer that at the time of submitting stay applicationand/or before stay application is taken up forconsideration on merits, the assessee is required todeposit 15% of the disputed demand as pre-deposit isabsolutely based on misinterpretation and/or misreading of the modified Instructions dated 29th February 2016.What Clause-4 provides is that the Assessing Officermay/shall grant stay of demand till disposal of first appealon payment of 15% of the disputed demand, unless thecase falls in the category mentioned in para 4 [B] of themodified instructions dated 29th February 2016. Underthe circumstances, the impugned decision of therespondent No. 2 in rejecting the stay application andconsequently directing the petitioner to deposit 100% ofthe disputed demand on the ground that the petitionerhas not deposited 15% of the disputed demand as a predepositbefore his application for stay is considered on merits cannot be sustained and the same deserves to bequashed and set-aside. The matter is required to beremanded to the Assessing Officer to consider the stayapplication in accordance with law and on merits, in lightof the modified instructions dated 29th February 2016 andobservations made by us in the present order.

Under the circumstances, for the reasons statedabove, the impugned decision of the respondent No.2-Assessing Officer rejecting the stay application cannot besustained and the same deserves to be quashed andset-aside. So far as the decision of the respondent No. 1is concerned, it appears that after the decision renderedby the respondent No. 2, the assessee filed stayapplication before the respondent No. 1 and therespondent No. 1 has passed the impugned order mainlyconsidering the order of the Assessing Officer. Therefore,first, the Assessing Officer is required to take appropriatedecision on the stay application, as per the modifiedinstruction dated 29th February 2016 and unless the casefalls within Clause 4 [B](a) & (b), he is required to passappropriate order on the stay application, granting stayon payment of 15% of the disputed demand. In case, theAssessing Officer is of the opinion that the case fallswithin Clause 4 [B](a) or (b), in that case, he is requiredto follow the procedure as observed hereinabove; moreparticularly, Clause 4 [B] where the Assessing Officer isrequired to refer the matter to the administrative PrincipalCIT/CIT and thereafter, the Principal CIT/CIT to takeappropriate decision."

I am in respectful agreement with the view expressed by theGujarat High Court in the above-stated judgment which squarelyapplies to the facts of the present case.

In my opinion, the said question is no longer res integra and it hasbeen well settled by a decision of the Bombay High Court in thematter of KEC International Ltd. v. B.R. Balakrishnan andothers4 in which S.H. Kapadia, J, as then His Lordship wasspeaking for the Bombay High Court, while considering the similar issue has laid down the following guidelines: -

"This is the consequence of an order being passedwithout giving any reasons. Hence, we intend to laydown certain parameters which are required to befollowed by the authorities in cases where a stayapplication is made by an assesee pending appeal to thefirst appellate authority.

Parameters:

(a) While considering the stay application, the authorityconcerned will at least briefly set out the case of theassessee.

(b) In cases where the assessed income under theimpugned order far exceeds returned income, theauthority will consider whether the assessee has madeout a case for unconditional stay. If not, whetherlooking to the questions involved in appeal, a part ofthe amount should be ordered to be deposited forwhich purpose, some short prima facie reasons couldbe given by the authority in its order.

(c) In cases where the assessee relies upon financialdifficulties, the authority concerned can briefly indicatewhether the assessee is financially sound and viableto deposit the amount if the authority wants theassessee to so deposit.

(d) The authority concerned will also examine whetherthe time to prefer an appeal has expired. Generally,coercive measures may not be adopted during the period provided by the statute to go in appeal.However, if the authority concerned comes to theconclusion that the assessee is likely to defeat thedemand, it may take recourse to coercive action forwhich brief reasons may be indicated in the order.

(e) We clarify that if the authority concerned complieswith the above parameters while passing

orders on thestay application, then the authorities on theadministrative side of the Department like respondentNo.2 herein need not once again give reasoned order."

The aforesaid guidelines have been followed later-on again by theBombay High Court in the matter of UTI Mutual Fund v. IncomeTax Officer 19(3)(2) and others5 in which Dr. D.Y. Chandrachud,J (as then His Lordship was) while following the decision rendered in KEC International Ltd. (supra) again held some moreguidelines as under: -

"These are, we may say so with respect, sageobservations which must be borne in mind by theassessing authorities. Consistent with the parameterswhich were laid down by the Division Bench in KECInternational and the observations in the judgment inCoca Cola, we direct that the following guidelines should

be borne in mind for effecting recovery :

1. No recovery of tax should be made pending
   (a) Expiry of the time limit for filing an appeal;
   (b) Disposal of a stay application, if any, moved by theassessee and for a reasonable period thereafter toenable the assessee to move a higher forum, if soadvised. Coercive steps may, however, be adoptedwhere the authority has reason to believe that theassessee may defeat the demand, in which case briefreasons may be indicated.
2. The stay application, if any, moved by the assesseeshould be disposed of after hearing the assessee andbearing in mind the guidelines in KEC International;
3. If the Assessing Officer has taken a view contrary towhat has been held in the preceding previous yearswithout there being a material change in facts or law, that is a relevant consideration in deciding the application forstay;
4. When a bank account has been attached, beforewithdrawing the amount, reasonable prior notice shouldbe furnished to the assessee to enable the assessee tomake a representation or seek recourse to a remedy inlaw;
5. In exercising the powers of stay, the Income TaxOfficer should not act as a mere tax gatherer but as aquasi judicial authority vested with the public duty ofprotecting the interest of the Revenue while at the sametime balancing the need to mitigate hardship to theassessee. Though the AO has made an assessment, hemust objectively decide the application for stayconsidering that an appeal lies against his order: thematter must be considered from all its facets, balancingthe interest of the assessee with the protection of theRevenue."

After having noticed the manner of disposing the appeal ashighlighted by the Bombay High Court in the two judgments noticedherein-above and agreeing with the same, it would appear that thecompetent authority, in the instant case, while considering theapplication simply held that the appeal proceedings are separateand distinct from recovery proceedings and further proceeded tohold that 20% of the disputed demand has not been deposited inaccordance with the guidelines dated 31-7-2017 and passed theorder dated 7-3-2018. Thus, it is quite vivid that the application forstay of demand has not been considered in the manner it wasrequired to be considered and dealt with. Deposit of 20% of thedisputed demand has been made condition precedent for hearingthe application for stay which is not contemplated either under theAct of 1961 or the CBDT guidelines dated 29-2-2016 modified bythe office memorandum dated 31-7-2017. It is only when the competent authority is of the opinion that the assessee has madeout a case for grant of interim relief, stay can be granted subject todeposit of 20% of the disputed demand. Likewise, there is a furtherclause in the circular for reduction of 20% deposit if the petitionermakes out a case, it has also not been considered. In straightway,direction of deposit of 20% of the disputed demand has been madewhich is not the correct way of deciding the application for stay ofthe disputed demand"

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 25.09.2019
Tax Case Appeal No.648 of 2019
Intimate Fashions (India) Private Limited,

Three relevant aspects should be always taken into consideration by all the Tribunals or civil Courts, while considering the stay applications, which are

(I) existence of *prima facie* case
(II) Irreparable injury aspect and
(III) Balance of convenience.

These are well settled and statutorily required parameters to be considered by dealing with stay applications.

The learned Tribunals or Civil Courts are bound to givetheir findings and reasons, even though tentative, with respect to theabove three aspects of the matter while dealing with any stayapplications before them.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2271 OF 2019

General Insurance Corporation of India
Petitioner

" So far as Issue No.1 above is concerned, the Petitionersubmits that same stands concluded in its favour by virtue of thedecision dated 11 October 2017of the Mumbai Bench of theTribunal in DCIT Circle 3(1)(2) vs. ECGC IT No.7657/Mum/2014 and the Kolkata Bench of the Tribunal in the case of DCIT v/s. Mutual Insurance Co. Ltd. 2016 (72) Taxmann.Com116 in favour of the Petitioner. However, the impugned order stilldirected a deposit of 10% of disputed demand on this Court in viewof the decision of Chennai Bench of the Tribunal in the case ofUnited India Insurance v/s. JCIT (2018) 97 Taxmann.com 466. Wenote that the Chennai Bench decision of the Tribunal has ignoredthe co-ordinate bench decision of Mumbai and Kolkata benches ofthe Tribunal. Therefore, prima facie per incurium. In any case theCBDT Circular No. 530 dated 6 March 1989 states that stay ofdemand be granted where there are conflicting decisions of the HighCourt. This principle can be extended to the conflicting decisions ofthe different benches of the Tribunal. Thus, in the above facts thecomplete stay of the demand on the above head i.e. Item No.1 of theabove chart was warranted in the Petitioner's favour."

On basis of above there should remain no iota of doubt that in high pitched assessments creating sky touching tax demands on basis of mechanical application of section 115BBE same needs to be stayed u/s 220(6) in favor of assessee as lot of judicial decisions are there which favors assessee case on merits from various high courts and ITAT benches.

Conclusion

It may be apt to close by reminding observations of Supreme court in case of Ms Era vs Govt of NCT of delhi where income tax act suddenly came up for *feedback from their lordships of Supreme court:*

- *The Indian Income Tax Act, 1960 has also been the subject matter of judicial criticism. Often, amendment follows upon amendment making the numbering and the meaning of its sections and sub-sections both bizarre and unintelligible. One such criticism by Hegde, J. in Commissioner of Income Tax v. Distributor (Baroda) (P) Ltd., (1972) 4 SCC 353, reads as follows:*

  "We have now to see what exactly in the meaning of the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" in the main Section 23-A and the expression "in the case of a company whose business consist wholly or mainly in the dealing in or holding of investments" in clause (i) of Explanation 2 to Section 23-A. The Act contains many mind-twisting formulas but Section 23-A along with some other sections takes the place of pride amongst them. Section 109 of the 1961 Income Tax Act which has taken the place of old Section 23-A of the Act is more understandable and less abstruse. But in these appeals we are left with Section 23-A of the Act." (Para 15)

- *All this reminds one of the old British ditty:*

  "I'm the Parliament's draftsman, I compose the country's laws, and of half the litigation I'm undoubtedly the cause!"

NOTES