CASC BULLETIN

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

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INDEX

MEETINGS

Date	Time	Speaker	Topic
08.06.2019 Saturday	09.00 am*	CA. Srinivasan	Recent Judicial Pronouncements Effecting Audit - GST
27.06.2019 Thursday	06.30 pm**	CA. Vikram Singhvi	New ITR Returns - An Insight

*Preceded with Breakfast half an hour before the scheduled time of meeting

** Preceded with High Tea half an hour before the scheduled time of meeting

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EDITORIAL

Election-mania comes to an End:

The world's fastest growing economy's biggest Pan India festival - General Elections 2019, the mammoth 45 days of democratic exercise has come to end. The long wait saw one of the resounding result for the Prime Minister and the present Ruling party. The overall polling was far better than what it was for the Professional Body namely ICAI Elections which was around 42% only as compared to this general election which is almost 3/4th of the valid voters. It is worth noting that the general population level of literacy is only around 71% as per Cencus of 2011 whereas voters of ICAI Elections is said to be 100%. The Chartered Accountants should learn something from the General Election and in the next election to ICAI Councils, it should at least be nearer to the Voting Percentage achieved in General Elections. It also heartening to note that the difference between the percentage voting between Male and Female is almost negligible. The Total number of voters in the form of Male, Female and Others are

State	Male	Female	Other	Total
Total	470919531	437763514	38933	908712040
As Percentage	51.82%	48.17%	0.00%	100.00%

The count of polling dates for certain states were spread over 7 days and it is worth to note that the percentage voting is less than the overall average which means more spread in dates will only decrease the polling though the same would have been done for security reasons and / or conduct fair elections. There in one exception, West Bengal which saw almost the maximum voting percentage. This state also saw most violence during the fiercely fought out election campaigns.

Voting Percentage Data					
State	Percentage – Male	Percentage - female	Average of Percentage - Others	Average of Total Percentage	Count of Polling Dates
Andaman & Nicobar Islands	64.81%	65.38%	22.22%	65.08%	1
Andhra Pradesh	79.93%	79.49%	17.49%	79.70%	1
Arunachal Pradesh	76.19%	80.70%	0.00%	78.47%	1
Assam	81.74%	81.30%	5.01%	81.52%	3
Bihar	55.27%	60.36%	3.00%	57.67%	7
Chandigarh	70.43%	70.83%	71.43%	70.62%	1
Chhattisgarh	71.61%	69.56%	24.90%	70.57%	3
Dadra & Nagar Haveli	78.18%	81.17%	0.00%	79.59%	1
Daman & Diu	68.21%	75.47%	0.00%	71.83%	1
Goa	73.68%	76.16%	0.00%	74.94%	1

Gujarat	67.08%	60.90%	25.25%	64.11%	1
Haryana	71.01%	69.58%	13.95%	70.34%	1
Himachal Pradesh	68.39%	72.08%	36.73%	70.22%	1
Jammu & Kashmir	30.29%	28.43%	1.04%	29.39%	5
Jharkhand	61.61%	64.51%	11.38%	62.99%	4
Karnataka	69.66%	67.60%	10.78%	68.64%	2
Kerala	76.47%	78.80%	35.63%	77.67%	1
Lakshadweep	83.47%	86.49%	0.00%	84.96%	1
Madhya Pradesh	73.59%	68.64%	34.03%	71.23%	4
Maharashtra	63.21%	59.42%	20.11%	61.39%	4
Manipur	81.24%	84.11%	37.26%	82.72%	2
Meghalaya	68.87%	73.94%	0.00%	71.43%	1
Mizoram	63.78%	62.49%	0.00%	63.12%	1
Nagaland	83.47%	82.71%	0.00%	83.09%	1
NCT OF Delhi	60.81%	60.15%	24.81%	60.51%	1
Odisha	72.12%	74.13%	9.60%	73.09%	4
Puducherry	80.86%	81.52%	73.96%	81.21%	1
Punjab	66.26%	65.63%	26.51%	65.96%	1
Rajasthan	66.45%	65.38%	39.07%	65.94%	2
Sikkim	79.11%	78.50%	0.00%	78.81%	1
Tamil Nadu	71.85%	72.20%	20.90%	72.02%	1
Telangana	62.85%	62.56%	15.43%	62.71%	1
Tripura	83.65%	82.74%	36.67%	83.20%	2
Uttar Pradesh	57.97%	58.40%	4.63%	58.17%	7
Uttarakhand	58.77%	64.45%	16.09%	61.48%	1
West Bengal	81.54%	82.38%	13.63%	81.95%	7
Grand Total	66.89%	66.79%	14.79%	66.84%	78

This election also created history when the Party which had implemented GST has won the election immediately implementing the same that to with resounding victory and decimating the opposition almost in the entire country. This is history as tweeted by one of our member "India writes History. BJP the only Party in the World to get second term post implementation of GST." Just not implementing GST, this Government had also taken a very brave decision of doing demonetization of almost 85% of the currency notes in circulation.

"With 23 May mandate, Modi also becomes the first prime minister to return to power winning a bigger vote share for the party enjoying full single-party majority in the Lok Sabha since Jawaharlal Nehru's victory in 1957 Lok Sabha election. Nehru's Congress improved its vote share by 2.79 percentage points over 1951-52 elections, *India Today* reports."

In 2014, the swearing in ceremony held on 26th May 2014, had something different like the ceremony was attended by heads of all SAARC countries and also it was held in the forecourts (Open Ground) of the Rashtrapati Bhavan in Delhi which has been used as the venue of swearing-in by only two previous Prime Ministers, Mr. Chandra Shekhar and Mr. Atal Bihari Vajpayee. "Extra trains were scheduled from Varanasi and Gujarat on the previous day for viewers to reach Delhi. The special "K9" squad of trained dogs belonging to the Indo-Tibetan Border Police was employed to secure the areas of the venue. The squad has previously been used at the time of 2010 Commonwealth Games and other Naxal-affected regions.[1] India's national broadcaster Doordarshan had various innovative ways planned. The ceremony's broadcast had an anchor in inset narrating the event in sign-language. This had previously been used in the Republic Day parade broadcast, but was the first time for a swearing-in. In another first, the 15 regional television channels of Doordarshan aired the ceremony in the respective regional languages. The event was also the first of its kind to ever be streamed live on YouTube" [Source: https://en.wikipedia.org/wiki/Swearing-in_ceremony_of_Narendra_Modi]

We have to wait for some more time to see what new will be carried out in the swearing in ceremony and which leaders will be invited for the same. One of Chartered Accountant had tweeted on 23rd May, 2019 - "What will be unique in this time's swearing in ceremony? Which global leaders would be invited?"

However, now the new Government has many herculean task in hand like reversing the slowdown in consumption, employment creation, simplify the GST at least the remove the implementation issues to compliance, simplify the Direct Taxes (Task for drafting the New Direct Tax Code gets two more months to submit the report), reduce the number of compliance and / or simplify the compliances required under various laws so that the businesses can concentrate more on business than only on compliances, etc. It is worth to read what Mr. Gurnani, MD & CEO of Tech Mahindra had said ***"Spearheading the world's largest democracy is no mean feat, so congratulations to the winning team. It is time for us to drive positive change by leveraging digital technologies and embolden India's collective dream of becoming a five trillion dollar economy. This also underscores the massive task that lies ahead of us – of shaping India's future. It's time for each one of us to step-up, collaborate and contribute towards the great India dream."***

Recent Developments

During January 2019 there was a Gazette notification wherein there was one more increase in compliance requirements namely filing of annual return under the Payment of Bonus Act, 1965. Through Gazette Notification [No. Z-20025/24/2018-LRC] dated 29th January, 2019, by Ministry of Labour and Employment, there is a replacement of Rule No.5 whereby the following is substituted:

*5. **Annual return.-** Every employer shall, on or before the 1st day of February in each year, upload unified annual return in Form D on the web portal of the Central Government in the Ministry of Labour and Employment giving information as to the particulars specified in respect of the preceding year:*

Provided that during inspection, the inspector may require the production of accounts, books, registers and other documents maintained in electronic form or otherwise.

Explanation.- For the purposes of this rule, the expression "electronic form" shall have the same meaning as assigned to it in clause (r) of section 2 of the Information Technology Act, 2000 (21 of 2000).'."

It is pertinent to note that the substitution is happening on 29th January, 2019 and it stipulates 1st February as the due date which was just 3 days away from the notification.

There was an office order passed by CBDT vide office order No. 111 of 2019 dated 13th May, 2019, wherein certain Principal Chief Commissioner of Income Tax were given additional charges. It is surprising to note that one of Principal Chief Commissioner of Income Tax has been ordered to hold additional charges for 9 jurisdictions including jurisdiction between different areas in the same state as well as in different states. Is it possible for a person to work in different locations simultaneously? Should not there be some criteria or policy in allocation of additional charges and in case they are in place whether the same has been followed while issuing this office order?

Our Member in limelight

It is heartening to note that one of our Life Member CA. T. N. Manoharan has been listed amongst 5 Famous Chartered Accountants in India to know about. He is listed along with CA. Kumar Mangalam Birla, CA. Naina Lal Kidwai, CA. Motilal Ostwal and CA. Rakesh Jhunjhunwala. Source: https://www.newsbytesapp.com/timeline/India/45700/206277/five-successful-chartered-accountants-cas-in-india

Appeal

Members are requested to attend the programs conducted by CASC and are also requested to send their suggestions and / or value additions to the services provided by CASC including this Bulletin. The same can be sent by hard copy to the office of the CASC or emailed to admin@casconline.org or any of the Members on the Management Committee.

For and on behalf of Editorial Board

CA. Uttamchand Jain

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RECENT JUDGMENTS IN VAT CST

CA. V.V. SAMPATHKUMAR

Excess collection:

The Tamil Nadu Taxation Special Tribunal refused to set aside the penalty imposed, in respect of excess collection of tax which was remitted to the department, under Section 22(2) of the TNGST Act, 1959. In the decision of the Hon'ble Division of this Court in the case of State of Tamil Nadu Vs. K.Mohammed Ibrahim Sahib reported in [(1991) Volume 83 Page 403], it has been held that no penalty can be levied, if the amount is collected and remitted to the Department. Similar is the view taken by the Hon'ble Division Bench in the case of State of Tamil Nadu Vs. Sakthi Sugars Ltd., reported in [(2004) Vol 137 Page 218]. Observing so, the court held that the Tribunal erred in dismissing the appeal filed by the petitioner/dealer and the interpretation given by the Tribunal, not to follow decision in the case of K.Mohammed Ibramim Sahib (cited supra) is incorrect. **Automotive Coaches and Components Limited, Vs. The Commercial Tax Officer, Adayar I Assessment Circle, Writ Petition No. 40029 of 2002 Dated : 28.03.2019**

Penalty:

Penalty levied u/s 12(3)(a) of the TNGST Act for the assessment year 1993-94 was set aside by the Appellate Tribunal, in T.A.No.70 of 2002 dated 23.06.2006. Though this order was referred to by the petitioner for the year 1994-95 before the Tribunal in an identical matter, the Tribunal did not distinguish the order rendered on finding that the petitioner is liable for penalty, as he has not wilfully disclosed as there has been a wilful nondisclosure. Stating so the Court held that, if the Tribunal had allowed the petitioner's case for the assessment year 1993-94 and the Revenue having not preferred any writ petition against said order in T.A.No.70 of 2002, judicial discipline demands that the Authorities are bound by such an order. Hence, the Tribunal could not have taken a different view for the assessment years 1994-95, 1995-96 & 1996-97 since, the facts are identical and set aside the penalty levied u/s 12(3)(a) of the Act .The order by the Assessing Officer was set aside and the order of the First Appellate Authority was confirmed. **Tvl.Gopu Stores**

& Chidambaram Builders, Vs. The Deputy Commercial Tax Officer, Velachery Assessment Circle, Writ Petition Nos. 4206, 4207 & 4208 of 2008 Dated : 28.03.2019

Purchase of HSD and issue C forms:

When difficulty is expressed in obtaining C forms under the provisions of the Central Sales Tax Act, 1956 in order to avail concessional benefit of tax for purchase of High Speed Diesel (HSD) from suppliers in other States, it was submitted that the issue is covered in favour of the assessee by a decision of this Court in M/s Ramco Cements Ltd. V. The Commissioner of Commercial Taxes (W.P.Nos.19460 of 2018) dated 26.10.2018 in a batch of over fifty (50) Writ Petitions. Learned Single Judge of this Hon"ble Court in considering the issue held categorically that the benefit of the concessional rate is available to dealers who purchase High Speed Diesel from neighbouring States by way of inter-State sales. Here it is relevant that the decision of the Punjab and Haryana High Court has been carried to the Supreme Court in special leave and has been confirmed in State Of Haryana & Others Vs. Caparo Power Ltd. & Others in Special Leave Petition (Civil No. 20572 of 2018). The issue has also been considered in Hindustan Zinc Limited & Several Others Vs. The State of Rajasthan & others (S.B.Civil Writ Petition No.5506/2018 dated 18.05.2018) and Shree Raipur Cement Plant (A unit of Shree Cement Limited) Vs. State of Chhattisgarh, Finance department (Tax Division) (W.P.(T) No.83 of 2018 dated 18.05.2018) and held in favour of the assessee. Stating the above this Court rules that till such time the order of this court in the case of M/s Ramco Cements Ltd (supra) is either stayed or reversed it is incumbent upon all Assessing Authorities within the State of Tamil Nadu to apply the rationale of the decision to all pending assessments since the decision of this Court as well as other High Courts, one of which has been confirmed by the Supreme Court, are decisions in rem, applicable to all dealers that seek benefit thereunder, of course, in accordance with law. **M/s.Southern Cotspinners Coimbatore Private Limited Vs The Principal Commissioner & Commissioner of Commercial Taxes, Chennai and The Assistant Commissioner (ST) Singanallur Assessment Circle, Coimbatore and others W.P.No.12520 of 2019 DATED: 26.04.2019**

Stay Order Modification:

Petitioner submits that the stay order condition imposed in regard to the furnishing of bank guarantee seriously

prejudices the interests of the petitioner and requests that the same be modified by directing the petitioner to furnish a personal bond instead of bank guarantees as directed by the first appellate authority. As identical requests made have been considered by this Court favourably and the conditional stay order is modified by permitting the petitioner to furnish a personal bond in the place of bank guarantee within a period of seven days from date of receipt of a copy of this order. It is made clear that impugned orders stand modified to this limited extent alone. **Tvl. Sri Sai Enterprises vs. Appellate Deputy Commissioner (ST) South, Chennai and The Assistant Commissioner (ST), Thirumullaivoyal Assessment Circle, Chennai Writ Petition Nos.12303 and 12305 of 2019 DATED: 25.04.2019**

Appeal:

The Appeal petition could not be filed in time as the order of assessment was misplaced and appeal filed with certified true copy was returned by the first appellate authority. In this back ground, the Court directed the first respondent to take the Appeal on file with the certified copy of the order as filed by the petitioner subject to the petitioner paying the entire balance tax which has been remitted by the petitioner. **M/s. Tamil Agencies vs. The Appellate Deputy Commissioner (CT), Cuddalore 607 001 and another Writ Petition No.7154 of 2019 DATED: 09.04.2019**

Natural Justice:

A notice has been issued on 15.12.2017 by the Assessing Officer. There is no justification for the Officer to have waited till 23.01.2019 to issue a notice for personal hearing, after a lapse of more than one year from the notice first issued. It is not justified for the AO to have denied the one opportunity sought for by the petitioner. Stating so, the assessments were set aside the impugned order solely on the ground of violation of principles of natural justice. The petitioner was directed to appear before the Assessing Officer on 29.04.2019 at 10.30 a.m. along with objections to the proposals in the notice and all documents in support of its claims. As the assessments relate to the periods 2010-11, 2011-12 and 2012-13, orders of assessment de novo shall be passed by the Assessing Officer within six (6) weeks from the date of conclusion of personal hearing, after affording full opportunity to the petitioner. **M/s.Hi-Tech Air Power Pvt., Ltd., vs. The Assistant Commissioner, (ST), Amaindakarai Assessment Circle, W.P. Nos.7484, 7488, 7493 of 2019 DATED: 03.04.2019**

Mismatch:

When there is mismatch of purchases reported by the Buyer and the sales reported by the Seller in the Web Portal, this Court in the case of J.K.M.Graphics Solutions Pvt. Ltd., Vs. C.T.O., Vepery Assessment Circle, Chennai [(2017) 99 VST 343] considered the veracity of notices/ assessments that had been framed solely on the basis of data obtained from the website of the Commercial Taxes Department. The Court has set aside the impugned notices/orders and remanded the matters to the respective Assessing Officers, to undertake assessment afresh after conducting thorough enquiry. A direction has also been given to the Commercial Tax Department to evolve a centralized mechanism to exclusively deal with cases of mismatch based on web data. The Court was informed that the mechanism is being formulated and about the issuance of Circular 3/2019 by the Commissioner directing the Assessing Officers when confronted with such issues, to issue notice to keep proceedings for assessment alive and thereafter keep the assessment in abeyance till the mechanism is formulated and implemented in full. In view of this there being no dispute that the issue on merits is covered by the order of this Court in J.K.M.Graphics Solutions Pvt. Ltd., Vs. C.T.O., Vepery Assessment Circle, Chennai (supra) and also the fact that the petitioner paid the entire tax as well as penalty and in the interests of justice, the impugned order is set aside and the Assessing authority is directed to take the proceedings denovo and in accordance with law, after affording an opportunity of hearing to the petitioner. **M/s.Usman Brother Agencies Vs The Deputy Commercial Tax Officer, Gingee Assessment Circle, W.P. Nos.5728 and 5732 of 2019 DATED: 29.03.2019**

Effective opportunity:

The Government advocate brought to the notice of this Court that the petitioner has filed letter dated 28.09.2018 acknowledging the receipt of revised notice issued by the assessing officer and putting forth its objections to the proposals contained therein. The petitioner has stated in conclusion that some documentary proof in regard to their claim as well as in response to the queries raised by the officer are enclosed with the written statement. This objection has not been filed for the year 2011-2012 but is on record in respect of other

assessment years. These replies and the annexures thereto have not been taken into account by the Assessing Officer in finalising the impugned assessments. Moreover, the revised notice dated 27.07.2018 itself merely calls upon the petitioner for a personal hearing along with available evidence on any working day within the aforesaid period. This can hardly be called reasonable opportunity in so far as, opportunity of hearing, to be effective, has to be afforded by fixing a specific date and time when petitioner can appear before the officer and make submissions. It is thus in fitness of things that the present impugned assessments are set aside with directions to the petitioner/ authorised representative to appear before the assessing officer on 12.04.2019 at 10.30 am or on any date proximate to the aforesaid date, which may be convenient to the officer and which may be intimated to the assessee and the process of assessment will be completed within a period of six (6) weeks from the conclusion of personal hearing. **Titanium Equipment and Anode Manufacturing Company Limited, Vs. The Assistant Commissioner (ST) (FAC), Thirukazhukundram Assessment Circle W.P. Nos.5999, of 2019 DATED: 27.03.2019**

Export Oriented Units:

When few issues are agitated, the Court ,relating to levy of on sales made to 100% Export Oriented Units observed that the appellate authority concludes that the sales are to be treated as exempt sales, no notice has been issued to the petitioner in this regard. Learned SGP states on instructions that the petitioner will be put to notice about the proposal to treat the sales as exempt sales and not zero rated sales and the matter will be decided thereafter. This portion of the impugned order is thus set aside. A proposal will be issued by the Deputy Commissioner to this effect within a period of two (2) weeks and the matter will be taken up for adjudication and decided after affording suitable opportunity to the petitioner, both personal as well as written, within a period of six(6) weeks from today. **M/s. Technova Imaging Systems Ltd., Vs The Assistant Commissioner (CT) Mylapore Assessment Circle, Chennai 28 W.P. Nos.7890 etc. of 2019 Dated: 27.03.2019**

(The author is a Chennai based Chartered Accountant. He can be reached at vvsampat@yahoo.com)

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CASE LAWS - SERVICE TAX / GST

1. GST – SCN INITIATED AFTER 16.9.2017 – NO SPECIFIC CONSTITUTIONAL INFIRMITY

In Sheen Golden Jewels (I) P. Ltd. V. State Tax Officer (IB), SGST Dept., Thiruvananthapuram, 2019(23) GSTL 4(Ker.) the petitioner is a dealer under the Kerala Value Added Tax Act (KVAT)and Central Sales Tax Act and had opted to pay the tax at compounded rates under Section 8 of the KVATAct.

The Assessing Authority issued notice for cancelling the "compounding permission" granted to the petitioner and for a best judgment assessment under Section 25, read with Section 42(3), of the KVAT Act for the AYs 2010-2011 and 2011-2012, which was replied by the petitioner as they contend that the SCN is not sustainable as it is a composite one wherein it proposes to cancel the compounding, besides undertaking a best judgment assessment— simultaneously. Hence, a writ petition was filed. The high court observed as under:

Time and again, Courts have held that tax imposition will encompass all the three elements: levy, assessment, and collection. A mere Legislation to tax

CA. VIJAY ANAND

cannot result in fructifying a tax imposition. Inother words, for a tax to be imposed, it requires a taxable event to trigger the levy and a taxable person to discharge it.

1. The appellants have argued as under:-

a. The Constitution Amendment Act is in itself an amending act as well as a repealing enactment. Of that Act, Section 19 is the transitional provision, as also the saving one. But Article 367 does not apply because repealing enactment itself specifically provides for transition and savings. Only in the absence of the repeal or saving, is the General Clauses attracted and in the instant case, the General Clauses Act does not apply;

b. Article 367 does not apply to constitutional amendments; the General Clauses Act is only for understanding and interpreting words not defined and specifically

available in the Constitution including Article 366 (12);

c. Specific repeal and saving under KSGST and also the application of the General Clauses Actas per S.174 (3) is self-contradicting. In any view, S.174 (2) and 174 (3) are by themselvesself-contradicting;

d. Section 24 of the General Clauses Act is the saving of subordinate legislation and applies when there are repeal and re-enactment. The present is not a case of repeal and re-enactment. So Section 24 is not attracted consequent to which there can be no tax without machinery provisions.

2. Section 6 of the General Clauses Act does not apply to sunset clauses or temporary statutes.Repeal and Omission are different. They are not. Shree Bhagwati Steel Rolling Mills v CCE (2016) 3 SCC 643 (S.C.) dispels this myth. Yet, even if we accept it to be so, still that does not alter the outcome in any way.

3. None of the provisions repealed through the Constitutional Amendment Act is a central legislation. Each one is state legislation and the General Clauses Act does not apply to the State Legislation.

4. Section 4 of the Kerala Interpretation and General Clauses Act could be roped in, if there is a need to be saved under a repealed enactment. However, neither act needs to be invoked.

Hence, the petition was dismissed.

2. <u>GST – APPELLATE AUTHORITY FOR ADVANCE RULING – DELAYED PAYMENT CHARGES OF ELECTRICITY BILL – COMPOSITE SUPPLY FOR PRINCIPAL SUPPLY OF ELECTRICITY WHICH IS EXEMPT – CHEQUE DISHONOUR FEE</u>

IN RE: T.P.Ajmer Distribution Limited, 2019(23) G.S.T.L. 60 (App.A.A.R.-GST), the applicant is a power company which has entered into a Distribution Franchisee Agreement ('DFA') with Ajmer Vidyut Vitran Nigam Limited ('AVVNL') to supply Electricity to the customers of AVVNL in Ajmer district, Rajasthan, for a period of 20 years for which charges are recovered in terms of the Rajasthan Electricity Regulatory Commission (Terms and Condition for Development of Tariff) Regulation, 2014 (hereinafter referred to as "RERC Tariff Regulations").

An application for advance ruling was filed as to whether the various non-tariff charges recovered by the appellants from its customers would be eligible for exemption under Sr.No.25 of Notification No.12/2017- Central Tax (Rate) for which the authority held as under:-

- In respect of the cheque dishonour fees, the said fee is a consideration for 'tolerating an act', which is supply in terms of Clause 5(e) of Schedule II to CGST Act, and hence leviable to GST.

- In respect of the Delayed payment charges, the said charges are includible in the value of 'supply' under Section 15(2)(d) and hence taxable under GST.

- In respect of other non-tariff charges, they are leviable to GST, relying on Circular No. 34/8/2018-GST dated 1.3.2018.

Aggrieved by the above ruling in respect of the 'Cheque Dishonour Fees' and 'Delayed payment charges', an appeal was preferred before the appellate authority which observed as under:

1. A perusal of sections 15(1) & 15(2) of the CGST Act makes it clear that the value of supply shall include interest or late fee or penalty for delayed payment of any consideration for any supply.

2. Now the question which arises is what the value of supply is in the instant case. The value of supply is the consideration charged by the appellants from the consumers of electricity on account of consumption of electricity by them.

3. W.r.t. the taxability of the supply of electricity, electrical energy has been classified under tariff item No. 2716 00 00 under Customs Tariff Act, 1975 and value of its supply has been exempted vide entry No.104 of the notification No. 02/2017- Central Tax (Rate) dated 28.06.2017.

4. As per Section 15(2) of the CGST Act, delayed payment charges should form part of the value of supply of electricity. When value of supply of electricity itself stands exempted by virtue of the above exemption notification dated 28.6.2017, incremental value (i.e. consideration for delayed payment of the electricity bills) would also remain exempted.

5. Thus the ruling given by the AAR that GST is applicable on the delayed payment charges received by the appellants cannot be sustained.

6. W.r.t. the taxability of cheque dishonour fee collected by the appellants, the same is collected from those consumers of electricity, whose cheque upon presenting to the bank is being dishonoured.

7. Clause 5 (e) of the Schedule -II of the CGST Act covers the act of any person who tolerates any act or a situation and recovers a certain amount for such tolerance under the ambit of supply of service.

8. In the instant case, the appellant is tolerating the situation of dishonor of cheques tendered by the consumers of electricity for payment of electricity bill, by charging certain amount from the consumers, hence, it is a supply of service in terms of the above clause 5(e).

9. Therefore, cheque dishonor charges, being a supply of service and not exempted anywhere, appropriate GST is chargeable on the value of its supply.

Hence the appellate authority ruled that the no GST is chargeable on the delayed payment charges collected from the consumers for delay in payment of consideration for supply of electricity whereas the same is chargeable on the cheque dishonor charges collected (by whatever name) from the consumers.

3. GST - ADVANCE RULING – CONSTRUCTION OF RESIDENTIAL COMPLEX – TWO SEPARATE AGREEMENTS FOR UDS AND CONSTRUCTION – SALEDEED EXECUTED AFTER RECEIPT OF 80% SALE CONSIDERATION VALUE OF LAND TO BE 1/3RD OF THE TOTAL VALUE CHARGED FOR CONSTRUCTION AND UDS

IN RE: KARA property Ventures LLP, 2019(23) G.S.T.L. 287 (A.AR.-GST), the facts are as under:-

i. The applicant has purchased the land from the land owner.

ii. After the land is transferred to the applicant, the construction activity is commenced on the said land to develop the project which includes obtaining requisite approvals, awarding contracts etc.

iii. The interested customer approached the applicant for buying unit in the project.

iv. Once the commercials are agreed between the customer and the applicant two agreements viz., land and construction agreements are entered with the customer and executed simultaneously. Thereafter, on receipt of 80% of total sale

consideration, deed of sale is executed and registered in favour of customer for transferring the ownership of undivided share in land to the customer.

v. The payment to be made by the customer is based on milestone linked to the stage of completion of the construction activity.

vi. The unit is handed to the customer only after deed of sale is executed and registered and the applicant obtains the completion certificate from the competent authority.

An application was filed seeking advance ruling as to what is the value of supply of services provided. The authority observed as under:-

1. The activity of the applicant is construction of apartment units on land owned by them and when a customer purchases the unit, they also purchase a portion of the land. In the instant case, the applicant is selling to the buyer a portion of undivided share of land which the buyer can never demand partition from the combined land owned by other buyers. The agreement of sale states that this sale is only because the buyer intends to purchase an apartment which the applicant is constructing on the combined land for which another agreement has been made. The Sale Deed itself would be executed and registered only after the construction of the apartment is completed and completion certificate is received.

2. Consequently, this transaction is not a sale of land as per Schedule III Schedule III of the CGST ACT (which provides for activities or transactions which shall neither be treated as supply of goods nor services).

3. The construction agreement entered into is for construction of a complex with 43 units and various other facilities such as Club House, Swimming Pool etc. where the consideration is to be paid on the basis of milestones of the construction achieved. Further, they are co-existent and coterminous and shall run concurrently; each agreement cannot be terminated without terminating the other. Breach of any one agreement is equivalent to breach of the other nor will either be made independently enforceable. Cancellation of the construction agreement is equivalent to cancellation of the agreement of sale of undivided share of land.

4. Arising out of the above, though there are two Agreements with separate consideration for this transaction, it is a single supply which is squarely covered under Sl.5 (b) of Schedule II

of the CGST Act making this transaction a supply of service as 'Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly' where consideration is being paid while construction. This position is not contested by the applicant.

5. A perusal of section 15 of the CGST Act read with Notification 11/2017-Central Tax (Rate) dated 28.06.2017 as amended indicates that for the supply of 'Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier', the value of the supply of service is the total amount charged for such supply less the value of land or undivided share of land, as the case may be.

6. The value of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply where the "total amount" means the sum total of consideration charged for construction service and amount charged for transfer of undivided share of land, as the case may be.

Hence, the authority ruled that the value of supply of services provided by the applicant in the project wherein the applicant has entered into two separate agreements, viz., one for 'Sale of undivided share of land' and the other for 'Construction' with the customers, the measure of levy of GST on the supply of service of 'Construction' shall be 2/3rd of the total value charged for construction service and amount charged for transfer of undivided share of land, as per entry No. 3(i) of Notification No. 11/2017-C.T.(Rate) dated 28.06.2017 as amended.

4. <u>GST - ADVANCE RULING – DISSEMINATION OF KNOWLEDGE IN FIELD OF NATURAL WASTE WATER PROVIDED BY AN NGO REGISTERED UNDER 12AA OF THE INCOME TAX ACT, 1961- EXEMPTED AS CHARITABLE ACTIVITIES</u>

IN RE: ECOSAN Services Foundation, 2019(23) G.S.T.L. 310 (A.A.R.-GST), the applicant is an entity registered under section 12 AA of the Income Tax Act, 1961 and is providing following services -

- Sanitation Capacity Building through training, piloting and demonstration, awareness raising, R&D and coaching new enterprises.

- Open dissemination of knowledge in sustainable sanitation and water management among individuals and institutions.

- Providing sustainable solutions at community level.

- Survey, research and analysis in the field of natural waste water treatment technologies.

An application was filed seeking advance ruling as to whether the services provided by the NGO having registration u/s 12AA of the Income Tax Act amounts to provisions of service and any grant/donations received towards performing specific services as specified in Notification No.12/2017 is liable for GST. The authority observed as under:-

1. The central point of the discussion in the ruling is the entry at Sr. No. 1 of the Notification No.12/2017-Central Tax (Rate) dated 28.6.2017 that exempt services provided by an entity registered under section 12AA of the Income Tax Act, 1961 by way of charitable activities from whole of the GST.

2. The notification benefit of 'Nil' rate is available to services by an entity registered under Sec.12AA of Income Tax Act, 1961 by way of charitable activities. Although the applicant is registered under Sec.12AA of Income Tax Act, 1961, the notification benefit would be available only if the applicant's activities fell within the scope of charitable activities as defined in the said Notification.

3. The notification defines 'charitable activities' under Para 2 (r) of the notification as activities relating to (i) public health by way of (A) care or counselling of (i) terminally ill persons…, (ii) persons affected with HIV, AIDS (iii) persons addicted to drugs or alcohol, (B) public awareness of preventive health, family planning and prevention of HIV infection …..(iv) Preservation of environment including watershed, forests and wildlife.

4. The dictionary meaning of 'preservation' is to keep up; to maintain; to keep safe from injury.

5. Thus preservation of environment would cover both protection of environment (keeping it safe from destruction) and conservation of environment (optimal use of natural resources and allowing them to

regenerate or sustainable consumption of natural resources i.e. meeting the needs of present generation without compromising the needs of the future generations (Brundtland Report)).

6. The applicant's activities are broadly categorized into sanitation capacity building, dissemination of knowledge in sustainable sanitation, providing sustainable solutions at community level and survey and research in the field of natural wastewater treatment technologies.

7. One specific activity is construction of suction toilets and waterless UDDTs (urine- diversion dehydration toilets) as an alternative to flush toilets which cause wastage of quantities of water. This activity contributes to conservation of water resources and in particular reduces depletion of ground water resources.

8. Another activity is waste management in which human excreta, instead of releasing it into the environment causing pollution, is recycled for extraction of micro and macro nutrients which are used in agriculture. The conservation of water and prevention of pollution are essentially activities relating to preservation of environment. It is a well known fact that flush toilets waste large quantities of water and that recycling of human excreta would reduce pollution of the environment.

9. Therefore, the applicant's activities are covered by the activity specified under Para 2(r)(iv) of the Notification relating to preservation of environment.

10. Apart from the above, it is also a well-recognised fact that one of the key areas for preventive healthcare is sanitation. The Indian government's Swachch Bharat abhiyan aims precisely at this cause. Hence the activity of construction of public toilets goes a long way in this direction by prevention of defecation in the open grounds which causes the spread of diseases like Hook worm, Polio, Typhoid and Diarrhea, Amoebiosis and Cholera to name a few. Infection of Hook worm disease is caused when faeces comes into contact with the feet when a person walks barefoot on defecated soil and infection of diseases like Polio, Typhoid, Diarrhea, Amoebiosis and Cholera is caused by swallowing of water contaminated with human faeces.

11. Therefore, the construction of public toilets creates awareness of preventive health among public in general and contributes to preventive healthcare of communities.

12. Likewise, repair of toilets would also contribute to the objective of sanitation without which the toilets would be left without doors and required privacy. The applicant is also engaged precisely in activities relating to creation of awareness of sanitation which is an essential ingredient of preventive healthcare. These activities are also covered by the activities specified under Para 2(r)(B) of the Notification.

Hence, the authority held that the services provided by the applicant to various entities inducing NGO amounts to provision of service. Further, grants/ Donations received towards provision of services would be considered as received towards activities relating to preservation of environment as specified in definition at 2(r) of Notification No.12/2017-Central Tax (Rate), dated 28.6.2017 and therefore such grants/donations are covered by exemption Notification entry at Sr.No.1 of the said Notification.

5. GST - ADVANCE RULING – TRANSPORTING DEFECTIVE AND DAMAGED TRANSPORTERS, DISMANTLING AND REMOVING BURNT OIL AND PARTS – REASSEMBLING AFTER REPLACEMENT/REPAIR AND DELIVERING BACK COMPLETE TRANSFORMER AFTER TESTING – COMPOSITE SUPPLY WITH PRINCIPAL SUPPLY OF SERVICES

IN RE: Alok Bhanuka, 2019(23) G.S.T.L. 375(A.A.R.-GST), the applicant is engaged in repairing and servicing of transformers owned by WBSEDCL. An application for advance ruling was filed as to whether such repair/servicing is job work as defined under section 2(68) of the GST Act, and whether it is composite or mixed supply. If it is composite supply, the applicant wants to know what should be the principal supply and the rate of tax thereon as also whether the repaired transformers can be delivered to WBSEDCL against challans without raising tax invoices.

The authority observed as under:

1. In course of repairing the defective transformers the applicant replaces the worn out or burnt materials. The process, involves transfer of property in goods and the applicant's contribution is not limited to labour and skill done with the help of his own tools, gadgets or machinery. The supply of goods constitutes major portion of the value of the supply. The process is not job work as defined under section 2(68) of the GST Act.

2. Para 6(a) of Schedule II of the GST Act refers to works contract as a composite supply. Although limited to immovable properties only, the activity of repairing is included in the

definition of works contract under section 2(119) of the GST Act. Repairing was treated as works contract under both Service Tax and Value Added Tax, and the treatment under the GST Act differs only so far as the movable properties are excluded from the domain of works contract.

3. Composite nature of the activity of repairing remains unaltered when applied to movable properties. It is a supply of goods and services in conjunction and as naturally bundled in the ordinary course of business. Unless the contract specifies that the goods and the services supplied are to be separately charged, the nature of the supply remains a composite supply. The principal supply depends upon the dominant element of the composite supply.

4. In this connection, attention may be drawn to the order dated 19/12/2018 of Maharashtra AAR in Cummins India Ltd. wherein it was held that the predominant intention in such AMC is to provide maintenance service for the proper upkeep of the machines belonging to the clients.

5. Arising out of the above, the supply of maintenance service is the dominant intention of the contracts and can be considered as the 'principal supply'.

6. Repairing and servicing of defective transformers signify working on something which is already in existence. It involves supply of goods, but not as chattels. The goods, namely the spare parts that have replaced the defective ones, are embedded or fixed to the transformer already in existence so that the defects get removed. The contract is not for the supply of the spare parts, but for the treatment or process for maintenance and removal of the defects from the transformers that belong to WBSEDCL.

7. The predominant element of the supply, therefore, is not transfer of title to the goods, but service in terms of para 3 of Schedule II to the GST Act, and supply of spare parts is ancillary to such supply. The service so supplied is classifiable under SAC 998719, being repair of transformers, and taxable under Sl. No. 25(ii) of the Rate Notification, as amended from time to time.

Hence, the authority held that repairing and servicing of transformers owned by another person is not job work as defined under section 2(68) of the GST Act but a composite supply unless the contract specifies that the goods and services are to be separately charged. The principal supply is the service of repair of transformers classifiable under SAC 998719 and taxable under Sl No. 25(ii) of

Notification No. 11/2017 – CT (Rate) dated 28/06/2017 as amended from time to time.

6. <u>GST - ADVANCE RULING – JOB WORK FOR BUS BODY BUILDING WHEREIN CHASSIS IS SUPPLIED BY THE CUSTOMER – COVERED UNDER SAC 9988 LEVIABLE TO TAX @ 18%</u>

IN RE: Kondody Autocraft (India) Pvt. Ltd. 2019(23) G.S.T.L. 488(A.A.R.-GST), applicant is engaged in bus body building on the chassis given by the customers on job work basis. The customers purchase chassis and handed over to the applicant's yard for fabricating the bus body. On receipt of chassis, a work order with the specifications of the bus body will be raised and on acceptance of the customer, the materials used for structural fabrication of buses will be procured and build bus body on the chassis. An application was filed seeking advance ruling as to the following:-

i. Whether the activity of Bus Body Building on job work basis, on the chassis supplied by the customer, is supply of goods or supply of service?

ii. If it is supply of Goods, what is the applicable rate of GST?

iii. If it is supply of Services, what is the applicable rate of GST?

The authority observed as under:

1. Chassis is a semi-finished goods and any treatment done by any other party on the chassis of principal is the activity of the job work. Ownership of the chassis is not transferred to the job worker.

2. The job worker can use his own goods for providing the service of job work. In this case, fabrication of body is a structure which is applied on the chassis supplied by the customer and, consequently, the activity of fabrication of body with material is also a service covered under SAC Code 9988 - Manufacturing services on physical inputs (goods) owned by others and thereby attract 18% GST.

Hence, the authority ruled that the activity of bus body building on job work basis, on the chassis supplied by the customer, is supply of service covered under SAC Code 9988 and thereby attracting 18% GST.

7. <u>TENANCY RIGHTS RECEIVED BY APPLICANT FROM AN UNREGISTERED PERSON VIDE AGREEMENT DATED 31.3.2017</u>

AND TRANSFER THEREOF IS THE SUPPLY OF SERVICES UNDER CLAUSE (b) OF SCHEDULE II – RCM U/S 9(4) APPLIES

IN RE: Famous Studios Ltd. 2019(23) G.S.T.L. 505 (A.A.R.-GST), the applicant is a registered taxable person under the GST Act carrying on the business of Studio services such as Production of advertisement films and Post Production services as Video Editing, Sound recording, Animation, VFX, etc. and also renting out some of the premises to his tenants. One of the tenants has surrendered his "Tenancy Rights" in favor of the applicant vide agreement dated 31.08.2017 for a consideration of Rs.54, 00,000/- (Rupees fifty four lakhs only). The applicant has discharged his liability of Registration Fees and Stamp Duty as per the relevant laws in Maharashtra.

In the present matter, we find that applicant has received the tenancy rights from an unregistered person. The agreement was made between the parties on 31.08.2017. The transaction amount is Rs. 54.00 lakhs. The Transfer of tenancy rights in goods or of undivided share in goods without the transfer of titles thereof is treated as supply of services under clause (b) of para 1 of schedule II of CGST Act 2017.

An application for advance ruling was filed in respect of the following:

i. Whether the exemption from payment of GST on reverse charge basis under section 9(4) of the CGST SGST Act for receipt of supply of goods and / or services by us from an unregistered person is applicable irrespective of any threshold limit right from 01-07-2017 vide Notification No.8/2017 dated 28.06.2017 read with Notification 38/2017 dated 13-10-2017?

ii. Whether any action for recovery of tax under section 9(4) of CGST Act or corresponding provision of SGST Act can be initiated if such tax is not paid for a period from 01-07-2017 to 12-10-2017 within the respective due dates?

iii. Whether interest on the delayed payment of COST / SGST under section 9 (4) of the Act is applicable, when such tax on the relevant transactions has been kept on hold till 30-09-2019 by virtue of Notification No.22/2018 - Central Tax (Rate) dated 06-08-2018?

iv. Whether the circular dated 2nd May 2018 will have any effect of taxation including interest on the transaction dated 31st August 2017?

The authority observed as under:

1. The Supreme Court in Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others, [1994] 4 SCC 602 has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows

i. A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should be strictly confined to its clearly defined limits.

ii. Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and appeal even though remedial is substantive in nature.

iii. Every litigant has a vested right in substantive law but no such right exists in procedural law.

iv. A procedural statute should not generally speaking be applied retrospectively where the result would be new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

v. A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

2. Applying the above analogy, there is nothing to show that the amendment notification No.38/2017 would have retrospective effect consequent to which the provisions of RCM u/s.9(4) of the CGST Act are applicable, irrespective of any threshold limit, right from 01.07.2017.

3. Therefore, the benefit of exemption from payment of tax on RCM as provided u/s. 9(4) of the GST Act is not applicable from 01.07.2017 as claimed by the applicant.

Hence, the authority ruled that RCM is applicable on the transactions effected from 1.7.2017 to 12.10.2017.

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INDIAN START-UPS - IMPORTANT SAGA IN THE INCUBATION STAGE

CA. V. VIVEK RAJAN

Introduction

Indian Start-ups have had an eventful journey from the in the last half a decade while travelling in the Indian Direct Taxation train, the journey which with due credits to all stakeholders could have been better given the context of the application of Section 56(2)(viib) of the Income-tax Act, 1961, the eventual tax demand and the final intervention of the Central Government that has put to rest to some extent, the tough scenarios the start-ups companies faced.

This article intends to discuss from the start to the present all the scenarios that got unfolded in the past two and half years and also a probable solution to the cases pending before the appellate authorities.

Novelty of Start-ups and the eventual taxing of novelty

Taxing of Securities Premium

It all started with the Finance Act, 2012 introducing the Section 56(2)(viib) in the Income-tax Act, 1961. The objective of introducing Section 56(2)(viib) by Finance Act, 2012 was to discourage the generation and use of unaccounted money done through subscription of shares of a closely held company, at a value which is higher than the Fair Market Value (FMV) of shares of such company.

In simple words, with the insertion of Section 56(2)(viib) , the securities premium that a private limited company would receive from resident investors (amounts received from non-resident investors gets excluded straight away) would be chargeable to tax subject to the following exemptions

a. By a venture capital undertaking from a venture capital company or a venture capital fund

b. By a company from a class or classes of persons as may be notified by the Central Government – This exemption clause that could have been resorted for seeking relief in a much increased manner.

Novelty of Start-ups

Each start-up is unique in its own way and the idea behind the start-up adds up to the novelty. That novelty enables it to receive more share premium. In most cases the start-ups are private limited companies and the shares they issue would be unquoted equity shares.

Stages that lead up to the taxation

Stage 1

The start-up, a private limited company would issue shares at a premium and the premium for example would be **Rs. 1 Crore.**

Stage 2

The fair market value of these unquoted equity shares would have been mostly computed using the Discounted Free Cash Flow Method at a price higher than the face value of the shares and under most scenarios the valuation would have been done by a Chartered Accountant who would be (again in most scenarios) the auditor under the Companies Act, 2013 or the erstwhile Companies Act, 1956. However, who qualifies to be an **"Accountant"** for this purpose warrants greater attention (Rule 11U and Rule 11UA).

Situation up to 25th May 2018

As per Rule 11U (a), **"Accountant"** means a fellow member of the ICAI and who is not appointed by the company as an auditor u/s 44AB of the Income-tax Act, 1961 or under 224 of the Companies Act, 1956.

Situation from 25th May 2018

With effect from 25th May 2018, the determination of the fair market value of the unquoted equity shares has to be determined by a merchant banker as per the Discounted Free Cash Flow method.

Stage 3- The Taxing of the Angel

In the context of valuation report not prepared by an **"Accountant"** as required under Rule 11UA, the Assessing Officers come to a conclusion that the market value of shares issued by the assessee company during the years under assessment is not supported with an authentic document.

Further, any start-up, as a matter of fact any organisation could have lower profits and eventual lower net worth in the early stages of the organisation.

Based on the above, the Assessing Officer's mostly come to the following conclusion

- Market Value of shares not supported with an authentic document.
- The net worth of the assessee is below par at the time of issue of fresh shares and thus market value of the share can in no way exceed the face value.

Further to the above conclusion, the Assessing Officers proceed with addition u/s 56(2)(viib) of the securities premium received from Indian residents. **The consequence of the addition would be either**

a. Reduction in brought forward loss

b. Tax at the rate of 30% (Rs. 30 Lakhs (our example of Rs. 1 Crore @ 30%))

The provisions of Section 56(2)(viib) being a **7 (seven)** year old provision has been put to use by the Assessing Officers while completing the scrutiny assessments for the periods FY 2013-14 to FY 2015-16.

Stage 4- Penalty and Demand

In addition to the above, penalty would be levied and if there is assessed tax liability, the assessee companies were mostly directed to pay the 20% of the disputed tax demand.

The dispute on this count at present is largely being heard either before the Commissioner of Income-tax (Appeals) or the ITAT, as this is a seven year provision and it would take at least one more year for the aggrieved companies to knock the doors of the High Court and eventually the Supreme Court.

The Role of the DIPP/DPIIT, CBDT and the road less followed

As mentioned earlier, the provisions of section 56(2)(viib) does not apply where consideration for issue of shares is received by a company from a class or classes of persons as may be notified by the Central Government.

Accordingly, the CBDT vide Notification No. 45/2016/F.No.173/103/2016, notified the persons to be the persons defined u/s 2(31), **being a resident,** who is making an investment at premium in case of a **"start-up" company.**

Further the notification explains that "Start-up" shall mean a company in which the public are not interested and fulfils the condition as specified in the DIPP Notification dated GSR 180(E) dated 17th February 2016.

From 17th February 2016 till 19th February 2019, there has been notifications of the DIPP that have either modified the notification dated 17th February 2016 or superseded the same by way of another notification. The summary of the same is given as under

Existing Notification of DIPP	Superseded Notification of DIPP/DPIIT
G.S.R 180 (E) dated 17th February 2016	G.S.R 501 (E) dated 23rd May 2017
G.S.R 501 (E) dated 23rd May 2017	G.S.R 364 (E) dated 11th April 2018
G.S.R 364 (E) dated 11th April 2018	G.S.R 127 (E) dated 19th February 2019

The DIPP Notification G.S.R 127(E) dated 19th February 2019 is the latest notification in this context and the companies are exempt from the clutches of the provisions of Section 56(2)(viib) if the following conditions are satisfied [Para 4 and Para 6 of the Notification]

1. The start-up shall be recognised by DPIIT or as per earlier notification on the subject

2. Aggregate amount of paid up share capital and share premium of the start-up after issue or proposed issue of share, if any, does not exceed Rs. 25 Crores. In computing this limit of Rs. 25 Crores, the shares issued to a non-resident shall not be included.

3. Para 6 of the notification **restricted the exemption scope by excluding the shares issued in respect of which an addition u/s 56(2)(viib) of the Act has been made in an assessment order made under the Act before the date of its notification, the date being 19th February 2019.**

4. Thus, **for the eligible companies for whom the assessment has been completed before 31st December 2018, the benefit of this notification is not available even though they are otherwise eligible for the benefit.**

5. Therefore, **the legislative intent is clear in giving relief to the eligible start-ups on a prospective note but the law makers did not want to intervene with the ongoing appellate proceedings.**

However this exemption came after a lot of hardships with the nation wide representation to prevent Angel taxation and the CBDT did its part to extend relief by

a. Issuing an administrative instruction (Instruction No. F.No.173/14/2018 dated 06.02.2016) directing that no coercive measure would be taken to recover the outstanding tax demand and administrative steps shall be taken for expeditious disposal of appeals, preferably by 31.03.2018

b. Issuing another timely instruction (Instruction No. F.No.173/14/2018 dated 24.12.2018) that no coercive measure to recover the outstanding demand should be taken till further instructions in this regard is given by the CBDT. This was a speed breaker given the context in which the tax demands was being enforced.

Probable Double Taxation and the Road Ahead

The provisions of Section 56(2)(viib) applies to the extent the inward investment is received from resident investors. In light of the resident investors, investing the same out of their income already been subjected to tax i.e. **it being an after tax income, the taxing of the same in the hands of the companies would amount to double taxation.**

The above exemption clause extended by Section 56(2)(viib) and the prevalent DIPP/DPIIT notifications as explained above, can be resorted to by considering as an ground of appeal at the respective appellate stage , so that there is a good probability of securing a favourable appeal. Further, if the aspect of double taxation is examined and if it can be demonstrated before the appellate authorities, the probability of securing a favourable verdict would increase.

If the above view is resorted to, the remedies can be extended at the appellate level itself. If the journey propels to the High Court or Supreme Court, there is a greater probability of securing a favourable verdict with a more detailed examination of the potential double taxation.

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EXCEL TIPS

Calculating retirement date (Using Edate, YearFrac, Today)

CA DUNGAR CHAND U JAIN

Given the birth date, if we need to find the retirement date and the balance years of service, the same can be done using Edate and Yearfrac functions in Excel.

EDate

It Returns the serial number that represents the date that is the indicated number of months before or after a specified date (the start date). Use EDATE to calculate maturity dates or due dates that fall on the same day of the month as the date of issue.

Syntax

EDATE(start_date, months)

The EDATE function syntax has the following arguments:

- **Start_date** A date that represents the start date. Dates also can be entered by using the DATE function, or as results of other formulas or functions. For example, use DATE(2019,9,20) for the 20th day of September, 2019. Problems can occur if dates are entered as text.
- **Months** The number of months before or after start_date. A positive value for months yields a future date; a negative value yields a past date.

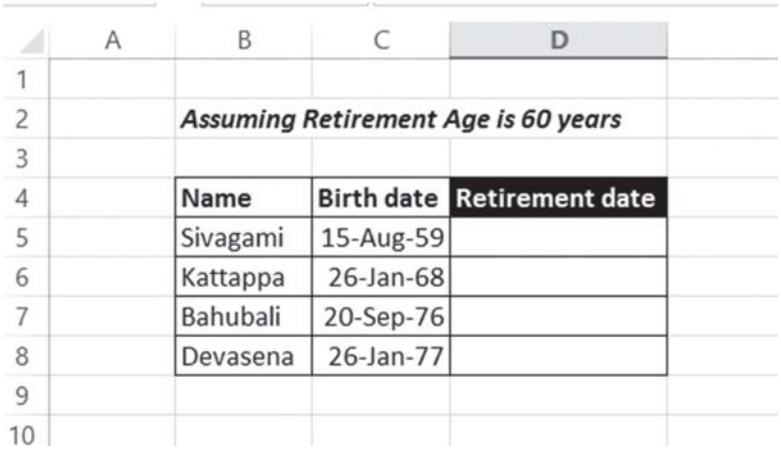
Remarks

- Microsoft Excel stores dates as sequential serial numbers so they can be used in calculations. By default, January 1, 1900 is serial number 1, and January 1, 2008 is serial number 39448 because it is 39,448 days after January 1, 1900.
- If start_date is not a valid date, EDATE returns the #VALUE! error value.
- If months is not an integer, it is truncated.

Example

	A	B	C
1	**Date**		
2	26-Jan-19		
3	**Result**	**Formula**	**Description**
4	26-Feb-19	=EDATE(A2,1)	The date, one month after the date above
5	26-Dec-18	=EDATE(A2,-1)	The date, one month before the date above
6	26-Mar-19	=EDATE(A2,2)	The date, two months after the date above
7			

So Assuming the retirement age is 60 and the birth date is given, retirement date is to be calculated.



	A	B	C	D
1				
2		*Assuming Retirement Age is 60 years*		
3				
4		**Name**	**Birth date**	**Retirement date**
5		Sivagami	15-Aug-59	
6		Kattappa	26-Jan-68	
7		Bahubali	20-Sep-76	
8		Devasena	26-Jan-77	
9				
10				

To find the retirement date, we need to use the Edate Function. The EDATE function is fully automatic, and will return a date xx months in the future or past, when given a date and the number of months to traverse.

In this case, we want a date 60 years in the future, starting with a birthdate, so we can write a formula as follows

Formula to be used is =EDATE(Birth date, months * no. of years)

=Edate(C5,12*60)

Since we probably don't know how many months are in 60 years, we can use 12*60 to get the retirement date.

	A	B	C	D	E
1					
2		*Assuming Retirement Age is 60 years*			
3					
4		**Name**	**Birth date**	**Retirement date**	**> Formula used**
5		Sivagami	15-Aug-59	15-Aug-19	=EDATE(C5,12*60)
6		Kattappa	26-Jan-68	26-Jan-28	=EDATE(C6,12*60)
7		Bahubali	20-Sep-76	20-Sep-36	=EDATE(C7,12*60)
8		Devasena	26-Jan-77	26-Jan-37	=EDATE(C8,12*60)
9					

YEARFRAC

It calculates the fraction of the year represented by the number of whole days between two dates (the start_date and the end_date). For instance, you can use YEARFRAC to identify the proportion of a whole year's benefits, or obligations to assign to a specific term.

Syntax

YEARFRAC(start_date, end_date, [basis])

The YEARFRAC function syntax has the following arguments:

Start_date Required. A date that represents the start date.

End_date Required. A date that represents the end date.

Basis **(**Optional) The type of day count basis to use.

Today() Function

Returns the serial number of the current date. The serial number is the date-time code used by Excel for date and time calculations. If the cell format was General before the function was entered, Excel changes the cell format to Date. If you want to view the serial number, you must change the cell format to General or Number.

To calculate the remaining years

The formula used to get remaining years is: **=YEARFRAC(TODAY(),D5)**

	A	B	C	D	E	F	G
1							
2		*Assuming Retirement Age is 60 years*					
3							
4		Name	Birth date	Retirement date	> Formula used	Remaining years	> Formula used
5		Sivagami	15-Aug-59	15-Aug-19	=EDATE(C5,12*60)	0.2	=YEARFRAC(TODAY(),D5)
6		Kattappa	26-Jan-68	26-Jan-28	=EDATE(C6,12*60)	8.7	=YEARFRAC(TODAY(),D6)
7		Bahubali	20-Sep-76	20-Sep-36	=EDATE(C7,12*60)	17.3	=YEARFRAC(TODAY(),D7)
8		Devasena	26-Jan-77	26-Jan-37	=EDATE(C8,12*60)	17.7	=YEARFRAC(TODAY(),D8)
9							

The same technique can be used to calculate Expiry date, Warranty expiry etc.

Generally, it is the end of month in which the employee attains retirement is reckoned as the retirement date.

The same can be done using EOMONTH function in Excel. We will cover the same in the forthcoming article.

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LEARNING SERIES ON MULTILATERAL INSTRUMENT UNDER TAX TREATIES
LS #4: - COVERED TAX AGREEMENT (CTA)

Objectives

A. Recap of Learning Series on MLI

B. Prelude

C. CTA- India Context

D. Debrief

E. Annexure

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Recap of Learning Series on Multilateral Instruments - MLI

Before we get into this edition of the learning series, we will revisit briefly on the distance we have covered so far in the learning series. LS #1(March 2019 edition) – Metamorphosis of MLI: We discussed the need & cause for MLI under tax treaties. In LS #2 (April 2019) - Decoding Basics of MLI: We discussed what is MLI and mechanics of the same from a tax treaty perspective and in the third series LS #3 (May 2019) - Implementation of MLI: We discussed how MLI can be implemented in the existing framework by Countries in order to make it workable.

Having discussed the foundational aspects, we will dwell into the substantive portions which are relevant from a practice perspective. Therefore, in this learning series, we will focus on what is a Covered Tax Agreement (CTA) and its relevance from India perspective, as CTA is a key aspect for the MLI to function.

B. Prelude – What is Covered Tax Agreement (CTA)

- In the context of MLI, CTA can be considered as the main organ of the MLI akin to a heart in human body. As evident from Article 1 of the MLI, The entire scope and starting point of the MLI revolves around CTA. [1] Article 2 of MLI defines a CTA as:

  'an agreement for avoidance of double taxation with respect to taxes on income that is in force between two or more parties and/or jurisdictions with respect to which each party has notified to the Depository as a listed agreement under the MLI'.[2]

[1]Article 1 of MLI http://www.oecd.org/tax/treaties/multilateral-convention-to-implement taxtreaty-related-measures-to-prevent-BEPS.pdf (accessed on 15 May 2019)

[2]Article 2 of MLI - http://www.oecd.org/tax/treaties/multilateral-convention-to-implement taxtreaty-related-measures-to-prevent-BEPS.pdf (accessed on 15 May 2019)

- It is extremely relevant therefore, that in order to make the MLI operational between two parties (or) jurisdictions/ states, it is important that each country must notify each other's bilateral tax treaty while becoming a signatory to the convention.
- Understanding how the MLI and CTAs interact is key in identifying the interpretational issues relating to the MLI. As a general proposition, the OECD in the "Explanatory Statement to the Multilateral Con-vention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (the "Explan-atory Statement") emphasizes that the MLI modifies tax treaties not by directly amending the text of the tax treaty, but by being applied together with the relevant CTA.[1]
- If the MLI applies to a treaty, it is then necessary to match the two countries' MLI positions to determine which MLI provisions will be applicable. As a general rule, a provision of the MLI will be applicable if both Contracting States have taken the same positions with respect to a provision.
- Further, wherever the countries have not notified a DTAA it has entered with another country as a CTA, it must ensure that the countries implement the minimum standards of the BEPS outcome in order to achieve the BEPS objective. [2] In this learning series our focus would to provide a practical framework of the MLI from an Indian perspective, more specifically on the first step to identify whether a DTAA is a CTA in order to invoke MLI provisions.

C. India Context - CTA Notifications

- Each country is to notify the DTAA with other jurisdiction under the MLI, upon which the said DTAA will be the CTA for the purposes of MLI operation. In this context, India has notified 93 jurisdictions under the MLI at the time of signing the MLI convention. It is imperative to note that as per the OECD's status document on the signatories and parties to MLI[3], only 87 countries have become signatories to the MLI convention, and another 6 countries have expressed their intent to be signatory to this convention.
- The list of countries notified by India under the MLI can be accessed on **www.oecd.org/tax/treaties/beps-mli-position-india.pdf.** We have provided below the table capturing the summary of tax treaties that may be regarded as CTA under the MLI context.

[3]Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting para. 13, Treaties IBFD

[4]The Minimum Standards are implementation of Action 5 - Harmful Tax Practices; Action 6-Prevention of Treaty Abuse; Action 13 - Country by Country Reporting for TP and Action 14-Effective Dispute Resolution Mechanism.

[5]As on 09 April 2019, available at http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed on 15 May 2019)

Summary of MLI Signatories – India's Context*	
Total Countries signatory to MLI	87
No of countries notified by India to MLI[6]	93
No of countries notified by India & MLI Signatory Country	54
No of countries **matched** as CTA with India	43
Notified Country without amending instrument	11
No of countries not a signatory to MLI	39

* Further in the ***annexure*** we have provided the basis for the summary table which shall enable as a guide to comprehend the '**new matching concept**', in the context of MLI, for an existing DTAA to be regarded as a CTA.

- In the post BEPS era, tax practitioners, Assessee's and administrators must apply the MLI (once India ratifies)[7] apart from the double tax agreements, in order to arrive at the exact tax position from a cross border taxation perspective. Therefore, we have hypothesised few scenarios in order to better appreciate the application of MLI from a practice perspective.

- Hypothesised illustrations for DTAA as CTA for MLI:

Situation A: India & Australia DTAA

Check 1 India and Australia already has a DTAA in existence.

Check 2 Both India and Australia are signatories to MLI.

Check 3 India has notified Australia, for the existing DTAA to be recognised as a CTA. Similarly, Australia has notified India for the existing DTAA to be a CTA.

Result Therefore, since both countries have notified each other, the DTAA will now be regarded as a CTA in the MLI context.

Impact Consequently, the **matching** MLI provisions from the relevant Articles shall apply on the CTA.

[6] India has notified all the treaty countries with which it has entered into a double tax treaty.

[7] India is a signatory to the MLI convention. It is worthy to note that India has deposited only the provisional notification on the MLI and is pending to be ratified according to the domestic law regulations in India. Therefore, the MLI notifications and reservations in India's context are only provisional unless ratified.

Situation B: India- USA DTAA

Check 1 India and USA already has a DTAA in existence.

Check 2 India is a signatory to MLI, whereas *USA is not a signatory to MLI.*

Check 3 Test of mutual notification in this case does not arise, as one of the parties is not a signatory to MLI convention

Result Therefore, the existing DTAA will not be regarded as a CTA in the MLI context. MLI convention does not apply to this case.

Impact Consequently, DTAA will continue to govern the taxing rights.

Situation C: India-Mauritius DTAA

Check 1 India and Mauritius already has a DTAA in existence.

Check 2 India and Mauritius are both signatories to MLI.

Check 3 India has notified Mauritius for the existing DTAA to be regarded as a CTA. However, the reciprocal notification by Mauritius is not available.

Result Therefore, the existing DTAA will not be regarded as a CTA in the MLI context.

Impact Consequently, DTAA will continue to govern the taxing rights. Recently, the India-Mauritius DTAA has been amended the tax treaty through protocol, wherein the BEPS actions have also been factored.

Situation D: India-UK DTAA

Check 1 India is a treaty nation with UK already and has a DTAA in place.

Check 2 India and UK are signatories to MLI.

Check 3 India has notified UK for the existing DTAA to be regarded as a CTA. Similarly, UK has notified India as a jurisdiction under the MLI convention, however, the amending instrument modifying the existing DTAA has not matched as per the notifications issued by India and UK. Hence, in such a case of mismatch, the reciprocal notification of the specific is not complete to call the existing DTAA as a CTA. (Refer Note below)

Result Therefore, the existing DTAA between India and UK will not be regarded as a CTA in the MLI context.

Impact Consequently, DTAA will continue to govern the taxing rights until the notification is complete.

Note: *In the matching the notified countries and recognise the CTA between the countries it is an essential aspect that each treaty partner is to exactly notify the same specific agreement which they seek to notify as CTA. Each country signatory to MLI has provided the position document. It may be interesting to note that under Article 2, the notification of the agreements has to be specific to the original treaty plus the amending instruments (in case a treaty is amended by protocol, referred to as*

an amending instrument in the MLI context, then this specific agreement that is listed by each state under the Article 2 notification). In case there is mismatch in notifying the same amending instrument by each of the states, then it may technically mean that there exists no match[8]*. Consequently, the DTAA between them may not be recognised as a CTA.*

- The above illustrations would aid in basic and preliminary understanding of the matching theory in applying MLI alongside the tax treaties. Once an existing tax treaty is recognised as a CTA in the MLI context, the tax treaty will take the characters and features of MLI. Matching of each countries' preferences towards taxation available under the MLI framework is essential. Unless the match is found on other treaty partner's MLI provisions, right from the notification of a tax treaty as discussed above, to each of the MLI provisions (articles) by way of notification of accepted positions, reservations and minimum standards in relevant articles of the MLI, the measures of anti-avoidance, double non-taxation and anti-treaty abuse measures contemplated may not be really workable.

- In our next edition of the learning series, we shall discuss the compatibility clauses which enable to understand the matching concept in the context of the substantive provisions of the MLI. "Compatibility clauses" are key in application of the MLI provisions on the CTA for the single instrument to be made application on approximately 3000 tax treaties which is sought to be modified.

D. Debrief

The way forward on ascertaining of tax implications, in the Indian context, with the introduction of MLI shall mean that, following documents are to be read side-by-side:

- The MLI document
- The specific tax treaty which India has with the treaty partner.
- MLI position document of India
- MLI position of the other treaty partner

The application of the above documents may be possible only in respect of the matched tax treaties, i.e., those tax treaties which qualify to be a CTA between India and any other country. This paves the first step in to the MLI application and thereafter apply the substantive provisions relevant treaty context. Once India ratifies its MLI agreement, one can certainly say that MLI remain at the top of the "tax box office" for a considerable period.

[8] Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, para 14.

Annexure

Table of CTAs - India's Context			
Countries (State B) notified by India	**MLI Signatory?**	**Whether State B notifies India**	**CTA?**
Albania	No	MLI NA	MLI NA
Armenia	Yes	Yes (to be confirmed)	Not a CTA. Notification mismatch.
Australia	Yes	Yes	□
Austria	Yes	Yes	□
Bangladesh	No	MLI NA	MLI NA
Belarus (Part of USSR)	No	MLI NA	MLI NA
Belgium	Yes	Yes (to be confirmed)	□(Amending instrument not in force)
Bhutan	No	MLI NA	MLI NA
Botswana	No	MLI NA	MLI NA
Brazil	No	MLI NA	MLI NA
Bulgaria	Yes	Yes (Provisional)	□
Canada	Yes	Yes (Provisional)	□
China	No	MLI NA	MLI NA
Colombia	Yes	Yes (Provisional)	□
Croatia	Yes	Yes (Provisional)	Not a CTA. Notification mismatch.
Cyprus	Yes	Yes (Provisional)	□
Czech Republic	Yes	Yes (Provisional)	□
Denmark	Yes	Yes (to be confirmed)	□
Egypt	Yes	Yes (Provisional)	□
Estonia	Yes	Yes (Provisional)	□
Ethiopia	No	MLI NA	MLI NA
Fiji	Yes	Yes (Provisional)	□
Finland	Yes	Yes	□
France	Yes	Yes	□
Georgia	Yes	Yes	□
Germany	Yes	Not notified	MLI NA
Greece	Yes	Yes (Provisional)	□
Hungary	Yes	Yes (Provisional)	□
Iceland	Yes	Yes (to be confirmed)	□
Ireland	Yes	Not notified	Not a CTA. Amending instrument not in force
Indonesia	Yes	Yes (Provisional)	□
Israel	Yes	Yes	□
Italy	Yes	Yes (Provisional)	□(Amending instrument not in force)
Japan	Yes	Yes	□
Jordan	No	MLI NA	MLI NA
Kazakhstan	No	MLI NA	MLI NA
Kenya	No	MLI NA	MLI NA

Kenya (new)	No	MLI NA	MLI NA
Korea	Yes	Yes (Provisional)	□
Kuwait	Yes	Yes (Provisional)	□(Amending instrument not in force)
Kyrgyz Republic	No	MLI NA	MLI NA
Latvia	Yes	Yes (Provisional)	□
Libya	No	MLI NA	MLI NA
Lithuania	Yes	Yes	□
Luxembourg	Yes	Yes	□
Macedonia	No	MLI NA	MLI NA
Malaysia	Yes	Yes (Provisional)	□
Malta	Yes	Yes	□
Mauritius	Yes	Not notified	MLI NA
Mexico	Yes	Yes (Provisional)	□
Mongolia	No	MLI NA	MLI NA
Montenegro	No	MLI NA	MLI NA
Morocco	No	MLI NA	MLI NA
Mozambique	No	MLI NA	MLI NA
Myanmar	No	MLI NA	MLI NA
Namibia	No	MLI NA	MLI NA
Nepal	No	MLI NA	MLI NA
Netherlands	Yes	Yes	□
New Zealand	Yes	Yes	□
Norway	Yes	Yes (Provisional)	□
Oman	No	MLI NA	MLI NA
Philippines	No	MLI NA	MLI NA
Poland	Yes	Yes	□
Portugal	Yes	Yes (Provisional)	Not a CTA. Notification mismatch.
Qatar	Yes	Yes (to be confirmed)	□
Romania	Yes	Yes (Provisional)	□
Russia	Yes	Yes (Provisional)	□
Saudi Arabia	Yes	Yes (Provisional)	□
Serbia	Yes	Yes	□
Singapore	Yes	Yes	□
Czechoslovakia (Slovakia)	No	MLI NA	MLI NA
Slovenia	Yes	Yes	□
South Africa	Yes	Yes (Provisional)	□
Spain	Yes	Yes (Provisional)	□(Amending instrument not in force)
Sri Lanka	No	MLI NA	MLI NA
Sudan	No	MLI NA	MLI NA

Sweden	Yes	Yes	
Swiss Confederation	No	MLI NA	MLI NA
Syria	No	MLI NA	MLI NA
Tajikistan	No	MLI NA	MLI NA
Tanzania	No	MLI NA	MLI NA
Thailand	No	MLI NA	MLI NA
Trinidad and Tobago	No	MLI NA	MLI NA
Turkey	Yes	Yes (Provisional)	Not a CTA. Notification mismatch.
Turkmenistan	No	MLI NA	MLI NA
Uganda	No	MLI NA	MLI NA
Ukraine	Yes	Yes (Provisional)	
United Arab Emirates	Yes	Yes (Provisional)	
United Kingdom	Yes	Yes (Provisional)	Not a CTA. Notification mismatch.
Uruguay	Yes	Yes (Provisional)	
USA	No	MLI NA	MLI NA
Uzbekistan	No	MLI NA	MLI NA
Vietnam	No	MLI NA	MLI NA
Zambia	No	MLI NA	MLI NA

Note:

The above list may be subject to changes based on the amendments and changes made to the beta tool in-line with the countries' notification/ amendments.

Source:

1. http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf
2. https://www.oecd.org/tax/treaties/mli-matching-database.htm
3. www.oecd.org/tax/treaties/beps-mli-position-india.pdf

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DATA SCIENCE - THE TREADING TERM FOR QUANTITATIVE AND QUALITATIVE DECISION MAKING

CA. S. DEEPHIKA

Growing business is an important part of success. However, success does not come without challenges. Data growth is one of the most significant challenges faced by organizations today. Let's consider an example of a manufacturing enterprise, data is captured at different levels (like purchase, shop floor, warehouse management, barcoding, packaging, logistics, e-commerce) by different applications and each try to communicate with each other to aide decision making.

Now when we talk about decision making all of us are familiar with Management information systems (MIS), but how effective is our existing MIS system? How much does it help the management in decision making? How fast we are able to get the report? How much past data we are able to compare? How much we can predict future or being future ready? How much external indicators we have factored into our MIS?

To relate all these measures and to create a strong Decision Support Systems the term Data Science was coined. Now let's see what Data science is. Data Science is a blend of various tools, algorithms, and machine learning principles with the goal to discover hidden patterns from the raw data. Now, how is this different from what statisticians have been doing for years? Data Scientist not only does the exploratory analysis to discover insights from it, but also uses various advanced machine learning algorithms to identify the occurrence of a particular event in the future. A Data Scientist will look at the data from many angles, sometimes angles not known earlier.

Without the expertise of professionals who turn cutting-edge technology into actionable insights, Data is of no value. Today, more and more organizations are opening up their doors to big data, and we are able to unlock its power. It has become a universal truth that modern businesses are awash with data now how and what sense we are going to make with

this data is the crux. Some of the tools used to create model to get insights from data are

- R, R has a complete set of modelling capabilities and provides a good environment for building interpretive models.

- SQL Analysis services can perform in-database analytics using common data mining functions and basic predictive models.

- SAS/ACCESS can be used to access data from unstructured databases and is used for creating repeatable and reusable model flow diagrams

How to analyse data?

The first process in any data analysis technique is data preparation. Preparing data for analysis can be further broken into 3 step process.

Data Preparation

Step 1: Data Validation

The purpose of data validation is to find out, as far as possible, whether the data collection was done as per the pre-set standards and without any bias. This includes review of procedure used to collect data and to ensure completeness of data

Step 2: Data Editing

Typically, large data sets include errors. For example, respondents may fill fields incorrectly or skip them accidentally. To make sure that there are no such errors, the data analyst should conduct basic data checks, check for outliers, and edit the raw data to identify and clear out any data points that may hamper the accuracy of the results.

Step 3: Data Normalisation

This is one of the most important steps in data preparation. It refers to grouping and assigning values to the data.

This is the process of reorganizing data in a database so that it meets two basic requirements: one, to ensure that there is no redundancy of data (all data is stored in only one place), and two, data dependencies are logical (all related data items are stored together). Normalization is important step in data preparation.

Quantitative data analysis methods

There are two type of quantitative analysis methods. There are Descriptive statistics and Inferential Statistics

Descriptive Statistics

Descriptive Statistics refers to a discipline that quantitatively describes the important characteristics of the dataset. For the purpose of describing properties, it uses measures of central tendency, i.e. mean, median, mode and the measures of dispersion i.e. range, standard deviation, quartile deviation and variance, etc.

The data is summarised by the analyst in a useful way, with the help of numerical and graphical tools such as charts, tables, and graphs, to represent data in an accurate way. Moreover, the text is presented in support of the diagrams, to explain what they represent.

Inferential Statistics

Inferential Statistics is all about generalising from the sample to the population, i.e. the results of analysis of the sample can be deduced to the larger population, from which the sample is taken. It is a convenient way to draw conclusions about the population when it is not possible to query each and every member of the universe. The sample chosen is a representative of the entire population; therefore, it should contain important features of the population.

Inferential Statistics is used to determine the probability of properties of the population on the basis of the properties of the sample, by employing probability theory. The major inferential statistics are based on the statistical models such as Analysis of Variance, chi-square test, testing of hypothesis, regression analysis, etc.

All you need to know is that descriptive statistics is all about illustrating your current dataset whereas inferential statistics focuses on making assumptions on the additional population that is beyond the dataset under study

Qualitative data analysis methods

Several methods are available to analyse data qualitatively. The most commonly used data analysis methods are:

Content analysis: This is one of the most common methods to analyse qualitative data. It is used to analyse documented

information in the form of texts, media, or even physical items. When to use this method depends on the objective of the analysis.

Narrative analysis: This method is used to analyse content from various sources, such as interviews of respondents, observations from the field, or surveys. It focuses on using the stories and experiences shared by people to answer the research questions.

Grounded theory: This refers to using qualitative data to explain why a certain phenomenon happened. It does this by studying a variety of similar cases in different settings and using the data to derive causal explanations. Data analyst may alter the explanations or create new ones as they study more cases until they arrive at an explanation that fits all cases.

Conclusion

Organisations that adapt customer needs much faster than their competitors rely on data analytics to enhance their business. Data analytics provides various advantages such as identifying new opportunities, understanding customer behaviour, becoming more agile and outperforming competition.

Traditional methods of data processing insights have to be changed in this current scenario while having new form of data coming from different sources such as internet, web, mobile or machine. Today organisations are implementing new technology platforms like multi-platform capabilities, open source, and visual tools on the on the cloud to adopt changes. On incorporating predictive analytics, the most significant branch of data analytics companies can approach risks and opportunities differently. They will be able to reduce cost save time, increase revenue and modernise their business

With an effective data management strategy, organizations would be able to offset the impact of data complexity. This will empower them and pave road to a data-driven analytical culture and make business decisions based on the same.

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CASE STUDIES - ANNUAL RESIDENTIAL CONFERENCE

These are the case studies which were discussed during the Annual Residential Conference held during January, 2019 at Sri Lanka. The author of the case studies has been kind enough to provide the key to the case studies. The key to the balance case studies will be carried in the subsequent bulletin.

CA. BANUSEKAR

QUERY 1

1) M owns a property admeasuring 14,398 Sq. Ft which was purchased on 08.04.1977. The cost of acquisition of the property was Rs.10 lakhs. A joint development agreement was entered into on 16.02.2017 and the approvals were obtained by M. Power of attorney was granted in December 2017 whereby possession was given to the builder. The developer has then demolished the existing building and construction is expected to be completed in May 2018. The constructed area is 21,600 Sq. Ft.

   M is allotted six flats admeasuring 6814 Sq. Ft. plus monetary consideration.

   The builder's share in the flats and corresponding undivided share in land was registered during the period February 2017 to March 2018. In these circumstances,

a) What is the year in which the capital gain will arise? Would there be any difference if the joint development agreement itself were registered in February 2017?

b) If the monetary part of the consideration is not yet received, would the year of taxability change?

c) What will be the sale consideration of the land that should be considered by M while computing capital gains?

d) Should M substitute the value as on 01.04.1981 or as on 01.04.2001 while computing capital gains? How can the Fair Market Value (FMV) as on 01.04.1981 / 01.04.2001 be computed?

e) Are there TDS obligations u/s 194-IA on the developer on the monetary part of the consideration? If the UDS value of each residential unit coming to the share of the developer is less than Rs.50,00,000/-, would the TDS obligations differ? What about the obligation on the value of the built up portion allotted to M?

f) Can M claim the cost of construction of the demolished building as a deduction while computing capital gains? If M had taken a mortgage on the property and the monetary consideration was directly paid by the developer to the mortgagor, can M claim the loan amount also as part of cost of the property while computing capital gains?

g) If, prior to handing over of the constructed flats, M sells the UDS of one residential unit, how would the capital gains be computed? Does M have to compute capital gains on the built up portion also? What would be the TDS obligations on the buyer?

h) Subsequent to the handing over of the constructed flats, if M sells one flat to his cousin, how would the income from the sale be taxed in M's hands? Are there TDS obligations on the cousin at the time of sale?

i) In the above issue, can M claim exemption u/s 54F in respect of the flats allotted to M's share? Or, since M has handed over both land and building to the developer, is M entitled to claim exemption u/s 54 in respect of the flats allotted to his share?

j) If yes, by what time should the construction be completed so that M's claim for exemption u/s 54 and 54F is not rejected?

k) For the purpose of claiming exemption, how can the cost of investment in new residential property be computed by M?

l) M's neighbour had entered into a similar joint development agreement a couple of years back and got into a tangle with the Income Tax authorities since the Assessing Officer held that the income from the joint development activity was in the nature of business income. M wants to know what is his risk exposure for similar treatment in his hands. He also wants to know whether he should from the outset declare the income as his business income. If he does so, what would be the other consequences in terms of time of accrual of income, computation of income, etc.

m) Can 50C be invoked in the circumstances in which M has been operating? How would it be applied in M's case and how can M establish that consideration received by him is not lower than the guideline value of the property transferred? If M wants to dispute the guideline value adopted by the Assessing Officer, what must he do?

REPLY

(a) Date of transfer:

Power of Attorney has been granted in December 2017 and possession has also been transferred to the builder. In *CIT v Balbir Singh Maini [2017] 398 ITR 531 (SC)* it was held that where the Joint Development Agreement (JDA) is not registered, the provisions of Section 2(47)(v) are not applicable due to the amendment in Section 17 of the Registration Act. This amendment has made registration compulsory for documents of transfer for the purpose of Section 53A. Therefore only if the JDA is registered can transfer be considered to be effected on the date of transfer of possession.

In the absence of registration of JDA there is no basis for treating the mere transfer of possession as transfer for the purpose of Section 45.

Where prior to the registration of JDA, the builder has sold his share in the flats, then transfer of the portions of the UDS comprised in the flats sold would be deemed to have been transferred on the date of sale by the builder. This is on the premise that the builder could not have sold his share without first having acquired the same. In this situation Section 2(47)(vi) can be referred to which states that transfer includes any transaction which has the effect of transferring or enabling the enjoyment of any immovable property.

(b) Monetary consideration not received

In *Potla Nageswara Rao v DCIT [2014] 365 ITR 249 (AP)* the Andhra Pradesh High Court held that capital gains are chargeable to tax even if no consideration is received by the assessee.

Section 45(5A) has been inserted with effect from Assessment year 2018-19 which states that in case of JDAs the capital gains on transfer are chargeable to tax in the year in which the completion certificate for the whole or part of the project has been received. In this case also, where the monetary consideration is received later, the taxability cannot be postponed.

(c) Sale consideration:

Section 45(5A) provides that the stamp duty value of the assessee's share on the date of issue of completion certificate, as increased by monetary consideration, if any, received , will be the full value of consideration.

Where Section 45(5A) is not applicable, i.e. where any of the conditions in the proviso thereto are existing (where the assessee transfers his share in the

project before issue of completion certificate), then the cost of construction of the built up area received by the assessee under the JDA will be the full value of consideration.

(d) Substitution of value

Where the capital gains are chargeable to tax prior to Assessment year 2018-19 then the FMV on 01.04.1981 can be substituted. By virtue of the amendment of Section 55 by the Finance Act 2017 with effect from Assessment year 2018-19, the FMV as on 01.04.2001 can be substituted where the capital gains are chargeable to tax in the Assessment year 2018-19.

For determining FMV, a valuer's certificate can be obtained in this regard.

(e) TDS obligations:

In case of JDAs Section 194-IC and not Section 194-IA is applicable to the developer where he makes payment of monetary consideration. The developer has to deduct tax at 10% at the time of credit of the sum to the account of the payee, or at the time of payment in cash or cheque or draft or any other mode, whichever is earlier.

The limit of Rs.50 lakhs is not applicable in this case and tax has to be deducted irrespective of the amount of the monetary consideration.

TDS obligations do not arise in case of built up area allotted to M by the developer.

(f) Cost of acquisition:

Whether the cost of construction of the building can be claimed as deduction depends on who demolished the building. M can include cost of construction of the demolished building while computing capital gains if he has transferred the entire property including land and building to the developer and the demolition of the building is done by the developer. If M demolishes the building and transfers only land to the developer then since the building is not subject matter of the transfer, the cost of construction of the building cannot be considered while computing capital gains.

Section 48 gives the mode of computing capital gains. The assessee can deduct from the full value of consideration the following amounts:

- Expenditure incurred wholly and exclusively in connection with the transfer;
- Cost of acquisition of the asset and cost of any improvement thereto

Amount of loan mortgage taken by M on the property is not an amount incurred in connection with transfer nor was it incurred by M towards acquiring or improving or bettering the title of the property. Therefore the loan amount cannot be claimed as deduction while computing capital gains.

On the other hand, if, while acquiring the property M, in order to better his title, had repaid a loan taken by the previous owner, the amount of such repayment can be included by M in cost of acquisition of the property. Reference can be had to the Supreme Court decision in the case of *V.S.M.R. Jagadishchandran v CIT [1997] 227 ITR 240 (SC); R.M.Arunachalam v CIT [1997] 227 ITR 222 (SC).*

In a recent decision of *P.Sukumar v ITO ITA 442 / Mds / 2013, decision rendered on 17.03.2017*, the Madras High Court decided on a similar matter. The assessee director had given his individual property as security for loan taken by the company from the bank. Subsequently when the company was unable to repay the loan, the bank sold the property and applied the sale consideration towards the loan. The assessee claimed this as diversion by overriding title and contended that capital gains was not taxable in his hands. The Madras High Court dismissed appeal relying on the Supreme Court decisions (supra) and held that the capital gains were chargeable to tax in the hands of the assessee director even though he had not received any part of the sale consideration. It was also held that the entire sale consideration should be taken in the hands of the assessee director without allowing any deduction for repayment of mortgage debt either as expenditure for improvement or as cost of acquisition.

(g) Computation when M sells prior to handing over of flats

Section 45(5A) provides that the capital gains arising in the case of JDAs is chargeable to tax in the year in which the whole or part of the project receives a completion certificate.

i. If M sells a residential unit after the date of completion certificate but before handing over of flats, the stamp duty value of his share in the project, comprising land and building, and as increased by any monetary consideration, will be deemed to be the full value of consideration received by him. This value apportioned to the unit sold will be the cost of acquisition for M while computing capital gains on the sale of the residential unit.

ii. Where M sells a unit before receipt of completion certificate, the provisions of Section 45(5A) will not be applicable.

a. If the JDA is not registered, then provisions of Section 2(47)(v) would not be applicable (in light of *Balbir Singh Maini case (supra)).* The transaction would be of sale of UDS by M to the buyer and execution of construction agreement between the buyer and the developer.

b. Where the JDA is registered, by virtue of Section 2(47)(v), the transfer by M of the developer's share of UDS would have taken place on the date of registration, with cost of construction of M's share of built up area forming the consideration for the transfer. Therefore at the time of the subsequent transfer of the residential unit to the buyer, capital gains would have to be computed separately for the UDS and for the built up area of that residential unit. The gains on sale of UDS would be Long Term Capital Gains in the hands of M, while gains on sale of the built up area would be Short Term Capital Gains.

TDS obligations u/s 194-IA would be applicable for the buyer where the consideration for the transfer is in excess of Rs.50 lakhs.

(h) Sale of flat after handing over of flats

The capital gains in this case would be on the same lines as under (g)(i) above. TDS obligations u/s 194-IA would be applicable for the buyer if the value of consideration exceeds Rs.50 lakhs.

(i) Exemption u/s 54 / 54F

M can claim exemption u/s 54 since he has transferred both land and building. If, however, he demolishes the building before entering into the JDA, he can claim exemption u/s 54F.

Post amendment of Section 54 / 54F with effect from 01.04.2015, it has been specified that exemption is available only in respect of "one" residential house. M can therefore claim exemption u/s 54 / 54F only in respect of the value of one residential house.

However, Section 54F lays down further restrictions on purchase or construction of additional houses other than the new house and provides that where assessee purchases within one year of transfer of original asset or constructs within three years of transfer of original asset any house other than the new house, the exemption u/s 54F will not be available.

In connection with the above, in *CIT v Shri Gumanmal Jain 2017 (3) TMI 394 – Madras High Court,* it was held that in

case of a JDA, though the land owner received more than one flat it would not disentitle him to claim exemption u/s 54F since all the flats received are in the same location / address, all the flats are part of one JDA for the same piece of land and the assessee after all gets proportionate undivided share in the same piece of land. It was therefore held that assessee does not buy more than one property in that sense of the matter.

Therefore, if M transfers land alone, M would be entitled to claim exemption u/s 54F even though he has invested in more than one residential house.

(j) Time for completion of construction

Both Sections 54 and 54F require that new residential house should be constructed within 3 years after the date of transfer. The Madras High Court in *Principal CIT v Smt. Charumathi Seshadri T.C. (A) No. 293 of 2018, decision rendered on 17.07.2018,* relied on the factual findings of the lower authorities that the assessee had invested in construction of the new residential house within the required time even though the construction had not been completed within that time. The High Court concluded that no substantial question of law arose in the case and dismissed the Revenue appeal.

In *Mrs.Seetha Subramanian v ACIT [1996] 59 ITD 94 and CIT v Sardamal Kothari [2008] 302 ITR 286,* the Madras High Court held that the assessee need not complete the construction of the house and occupy the same within three years from the date of sale of the original asset if the construction had commenced within the period of three years.

In M's case, the construction of his share of flats has already commenced. Therefore, irrespective of the date of completion, in all situations considered in his case (either u/s 45 or 45(5A)), this requirement of Section 54 / 54F is met. M can however claim exemption u/s 54 / 54F only in respect of one residential house.

(k) M has transferred his property in consideration for receiving built up flats. Depending on whether Section 45 or 45(5A) is applicable, the mode of computing value of sale consideration will differ. The value of consideration so computed will be apportioned to the number of flats received by M under the Joint Development Agreement. Proportionate value of the flat considered by M for investment will have to be worked out on this basis.

(l) Where it can be shown clearly that the property has been held as investment and that the assessee has not taken any

effort to improve the land and has merely held it for the purpose of future gains, then the action of the Assessing Officer would be held to be without justification. That is, the intention of the assessee is the deciding factor.

Where the intention of the assessee is to carry on business of development, then the property so far held as investment can be converted into stock-in-trade. In such circumstances, Section 45(2) provides that the income from sale of the property is chargeable to tax in the year in which such stock-in-trade is sold or transferred by the assessee. The difference between the fair market value of the property on the date of conversion and the cost of acquisition will be chargeable to tax as capital gains while the difference between the sale consideration and the fair market value on the date of conversion is chargeable to tax as Profits and gains from business. The income would accrue at the time of sale, i.e. at the time of transfer of significant risks and rewards to the buyer.

(m) Invoking of Section 50C

Yes, Section 50C can be invoked since there is a transfer of immovable property. Where Section 45(5A) is applicable, capital gains would be computed based on the procedure specified therein which already deems the guideline value as the full value of consideration. Where Section 45(5A) is not applicable and M takes the value of the built up area plus the monetary receipts as the full value of consideration, the provisions of Section 50C are applicable. For this purpose, the stamp duty value of the property would have to be ascertained and furnished. Where M considers that the value adopted by the Assessing Officer is incorrect, he can request the Assessing Officer to make a reference to the Valuation Officer.

QUERY 2

A search operation was conducted in the business premises of M/s.Kanya Oils Pvt Ltd, M/s.Kriya Seeds Pvt Ltd and in the residential premises of its Director Ms.Kayva on 24.06.2018. Several documents, loose sheets were found in the search and the search party has seized those documents, loose sheets and the tally backup for the accounts maintained by the company and the sole proprietary business of the director which included both accounted and unaccounted books of account.

The shareholders of M/s.Kanya Oils Pvt Ltd and M/s.Kriya Seeds Pvt Ltd are Ms.Kavya and her daughter Ms.Kripa holding 50% each.

Notice u/s.153A was issued for M/s.Kanya Oils Pvt Ltd and notice u/s.153C read with section 153A was issued on M/s.Kriya Seeds Pvt Ltd and Ms.Kavya. Both companies and the director Ms.Kavya had decided to approach the Settlement Commission by filing an application and offer undisclosed income to settle their issues once and for all.

1. In the case of Ms.Kavya and M/s.Kriya Seeds Pvt Ltd, the assessees were liable to pay a sum of Rs.53,45,000/- and Rs.1,25,32,110/- respectively as additional tax on the undisclosed income admitted before the Income Tax Settlement Commission. However in the case of M/s.Kanya Oils Pvt Ltd, the additional tax payable on the undisclosed income comes only to a sum of Rs.11,43,800/-. Under this circumstances whether the application filed by M/s.Kanya Oils Pvt Ltd can be admitted to be proceeded further u/s.245D(1). It may be noticed that the warrant u/s 132 was only on M/s Kanya Oils Pvt Ltd. and the premises of M/s Kriya Seeds Pvt Ltd. and Ms Kavya were also searched based on the same warrant.

2. In the application of M/s.Kriya Seeds Pvt Ltd, the tax liability was calculated at Rs.1,25,32,110/- and the interest on the same worked out to Rs.53,75,314/-. Hence M/s.Kriya Seeds Pvt Ltd had totally paid a sum of Rs.1,79,07,424/-. However when the case came up for hearing before the Settlement Commission it was noticed that there was a shortfall of Rs.23,254/- in the interest payment made by M/s.Kriya Seeds Pvt Ltd and hence the application came to be rejected. However the other two applications i.e. of Ms.Kavya and of M/s.Kanya Oils Pvt Ltd were allowed to be proceeded further u/s.245D(1). Under this circumstance whether M/s.Kriya Seeds Pvt Ltd can approach the Settlement Commission again by paying the shortfall in interest. Analyse the same in the light of the provisions of section 245K.

3. In the case of Ms.Kavya an assessment was completed and an addition of Rs.2,23,560/- was made in one of the assessment year which is now pending before the Settlement Commission. Ms.Kavya had neither filed an appeal against the said addition nor paid taxes on the same. However the said addition was also not brought to the notice of the Settlement Commission in the application filed by Ms.Kavya. Whether the application can be rejected for not providing such information in the application? It may be noted that Ms Kavya has made excess payment towards tax and interest in one of the years for which she was before the ITSC. The said excess payment is more than the tax

and interest payable on Rs.2,23,560/-. In this scenario, whether the assessee would face penal consequences for the said amount.

4. While passing the final order u/s.245D(4) the Settlement Commission had determined the income to be offered by the assessees at a sum higher than what was offered by the assessees and the Settlement Commission had allowed 20 days' time from the date of receipt of the said order by the assessees to pay the additional tax and interest on the offer enhanced by the Settlement Commission. Further the Settlement Commission had also granted immunity from penalty and prosecution. However in the case of M/s.Kriya Seeds Pvt Ltd the assessee was unable to pay the additional tax and interest within the stipulated period of 20 days. What will be the consequence of non-payment of additional tax and interest?

Further what would happen if prosecution proceedings were initiated in the case of Ms.Kavya before filing her application before the Income Tax Settlement Commission?

5. In the given facts if instead of search a survey has happened on 24.06.2018 and notice has been issued u/s.148 in the case of Ms.Kavya for assessment years 2015-16 and 2016-17 on 10.10.2018, whether she can approach the settlement commission for assessment years from 2012-13 to 2018-19 now?

6. If in the case of M/s.Kriya Seeds Pvt Ltd, additions are related to issues covered u/s 68, can the ITSC levy tax at the rate of 60% + surcharge in accordance with the provisions of Section 115BBE?

REPLY

1. It may be noted that notice u/s 153A has been issued to M/s Kanya Oils Pvt Ltd. while notice u/s 153C rws 153A has been issued to M/s Kriya Seeds Pvt Ltd. and Ms. Kavya.

   Section 245C (1) provides that an assessee may at any stage of a case relating to him make an application to the Income Tax Settlement Commission (ITSC). Proviso to the section states in clause (i) that no application can be made unless additional income tax payable on income disclosed in the application exceeds Rs.50 lakhs.

   In the case of both M/s.Kriya Seeds Pvt Ltd and Kavya, the additional income tax payable on undisclosed income comes to Rs.53,45,000 and 1,25,32,110/-, both exceeding the prescribed limit. In these cases notice u/s 153C has been issued. Therefore

both M/s.Kriya Seeds Pvt Ltd and Kavya can make application u/s 245C(1)

However, in the case of M/s.Kanya Oils Pvt Ltd, the additional income tax payable is Rs.11,43,800/- which does not fulfil the requirement of clause (i) of the proviso to Section 245C(1). Therefore M/s.Kanya Oils Pvt Ltd cannot make an application u/s 245C(1) read with clause (i) of the proviso thereto.

However clause (ia) of the proviso to Section 245C(1) states that in the following instance an application can be made where the additional income tax on undisclosed income exceeds Rs.10 lakhs:

- the person is "related to" the specified person who has made an application in terms of clause (i) of the proviso to Section 245C(1), and
- the person has proceedings u/s 153A or 153C initiated on him

Explanation to Section 245C gives the meaning of "applicant in relation to the specified person" and in clause (vi)A thereof provides that where the specified person is an individual who carries on business or profession, any person in whose business or profession such individual has a substantial interest shall come within the prescribed meaning. Substantial interest has been set at 20% of voting power.

Ms.Kavya has made an application in terms of clause (i) of the proviso to Section 245C(1), and she has 50% of the voting power in M/s.Kanya Oils Pvt Ltd. Therefore M/s.Kanya Oils Pvt Ltd is "related" to the specified person. Hence the first condition in clause (ia) is satisfied.

M/s.Kanya Oils Pvt Ltd is a person on whom action u/s 153A has been initiated. Hence the second condition in clause (ia) is also satisfied.

M/s.Kanya Oils Pvt Ltd is therefore permitted to make an application u/s 245C by virtue of clause (ia) of the proviso to Section 245C(1). The required additional income tax payable on disclosed income before ITSC would be Rs.10 lakhs, which condition is met by M/s.Kanya Oils Pvt Ltd. Therefore application by M/s.Kanya Oils Pvt Ltd can be proceeded with.

2. Section 245K bars a further application before the ITSC by any person in the following circumstances:

a. Where the person has already made an application before ITSC, and

i. The order of settlement provides for imposition of penalty on the ground of concealment, or

ii. Subsequent to order of settlement such person is convicted of any offence under Chapter XXII in relation to that case, or

iii. The case of the person was sent back to the Assessing Officer by the ITSC on or before 01.06.2002.

b. A person whose application before ITSC has been allowed to be proceeded with

c. A person related to person in (b) above. Related person includes a company in which the person in (b) above held more than 50% of the shares / voting power at any time before the date of application before ITSC by such person. –[clause (i) of Explanation to Section 245K(2)]

In the instant case, M/s.Kriya Seeds Pvt Ltd case does not fall under (a) or (b) above. In respect of (c), Ms.Kavya holds only 50% voting power in M/s Kriya Seeds Pvt Ltd. whereas the clause specifies "**more than** 50%. Therefore this bar also does not apply to M/s.Kriya Seeds Pvt Ltd. Consequently M/s.Kriya Seeds Pvt Ltd can approach the Settlement Commission once again.

M/s.Kriya Seeds Pvt Ltd can also explore the possibility of paying the shortfall of the interest and requesting the ITSC to take up its application.

3. Where full disclosure has not been made by the applicant, the ITSC can declare the application to be invalid u/s 245D(2C) and it will not be allowed to be proceeded with. However this will not be done without providing an opportunity to the applicant to defend his case. Ms.Kavya can therefore request for the excess payment made by her in another year to be adjusted against the tax and interest payable on Rs.2,23,560/-.

Under Section 245H the ITSC has the power to grant immunity from the imposition of penalty under the Income Tax Act.

4. Where the assessee has not paid the tax and interest as directed by the ITSC within the stipulated time, he can make an application for extended time for making payment. If payment is not made even within such extended time, Section 245H(1A) provides that all immunities granted by the ITSC shall be withdrawn and the provisions of the Income Tax Act would apply as if such immunity had not been granted.

No immunity can be granted by the ITSC in cases where prosecution proceedings have been instituted before the date of receipt of application. (First proviso to Section 245H(1)). Therefore Ms.Kavya would have to face such prosecution proceedings.

5. Section 245C provides that an application before the ITSC can be made at any stage of a "case" relating to him. "Case" has been defined in Section 245A(b) as

(b) "case" means any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application under sub-section (1) of section 245C is made.

Explanation. – For the purposes of this clause –

(i) a proceeding for assessment or reassessment or recomputation under section 147 shall be deemed to have commenced –

(a) from the date on which a notice under section 148 is issued for any assessment year;

(b) from the date of issuance of the notice referred to in sub-clause (a), for any other assessment year or assessment years ***for which a notice under section 148 has not been issued, but such notice could have been issued on <u>such date</u>****, if the return of income for the other assessment year or assessment years has been furnished under section 139 or in response to a notice under section 142;*

Notice u/s 148 for Assessment years 2015-16 and 2016-17 was issued on 10.10.2018. On that date, i.e. 10.10.2018, notice u/s 148 could have been issued for Assessment years 2012-13 to 2014-15 since that date is within the specified limit of six years. For Assessment years 2017-18 and 2018-19 time for completion of assessment u/s 143 itself is available. Therefore all these years would come within the meaning of "case" and Ms.Kavya can approach the ITSC for these years.

6. In an application before the ITSC, the applicant has to make full and true disclosure not only of his income but also the manner of earning such income. Having disclosed the manner of earning the income, if the explanation has been accepted, such income can no longer be held to be income covered by the provisions of Section 68. Therefore provisions of Section 115BBE would also not be applicable and regular tax rates would apply.

CHANGES IN COMPANIES ACT, 2013

Highlights of amendments notified in May, 2019 (till 23.05.2019)

CA. CS. DHANAPAL

Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2019 w.e.f 16th May, 2019

A new Rule 12B has been introduced after the existing Rule 12A which provides as below:

- Where a company governed by Rule 25A of the Companies (Incorporation) Rules, 2014, fails to file the e-form ACTIVE within the period specified therein, the Director Identification Number (DIN) allotted to all its existing directors, shall be marked as **"Director of ACTIVE non-compliant company"**.

- Where the DIN of a director has been marked as "Director of ACTIVE non-compliant company", such director shall take all necessary steps to ensure that all companies governed by rule 25A of the Companies (Incorporation) Rules, 2014, where such director has been appointed as director, file e-form ACTIVE.

- After all the companies referred to in sub-rule (2) file the e-form ACTIVE, the DIN of such director shall be marked as "Director of ACTIVE compliant company.

General Circular No. 06/2019 dated 13.05.2019

- In all cases where form GNL-2 was filed by Companies in the year 2014 relating to Auditor appointment, there was an issue while filing form INC 22A (ACTIVE).

- The Ministry has now clarified that companies which had filed form ADT-1 through GNL-2 as an attachment (by selecting 'others') during the period from 01.04.2014 to 20.10.2014 may file now eform no.ADT 1 for appointment of Auditor for the period upto 31.03.2019 without fee, till 15.06.2019 (since fee had been paid for filing GNL-2 for the same purpose) and thereafter fee and additional fee shall be applicable as per Companies (Registration of Office and Fees) Rules, 2014.

Companies (Incorporation) Fifth Amendment Rules, 2019 w.e.f 10th May, 2019

Rule 8 of the Companies (Incorporation) Rules, 2014 has been substituted with new Rule 8. The major changes made in Rule 8 are as below:

- Rule 8 has been bifurcated as below:
  - Rule 8 - Names which resemble too nearly with name of existing company
  - Rule 8A - Undesirable Names
  - Rule 8B - Word or expression which can be used only after obtaining previous approval of Central Government
- A number of illustrations have been provided in Rule 8 to explain the instances under which a name will be treated as resembling the name of an existing company and under Rule 8A to explain instances of undesirable names.
- Certain new provisions has been added which shall be considered while checking whether a name is desirable or not.

Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2019 w.e.f 10th May, 2019

- Filing fees for form STK 2 has been increased from Rs. 5000/- to Rs. 10,000/-
- Form No. STK-2 can be filed by a company only after it has filed overdue returns in Form No. AOC-4 (Financial Statement) or AOC-4 XBRL, as the case may be, and Form No. MGT-7 (Annual Return), up to the end of the financial year in which the company ceased to carry its business operations
- In cases where action Company intends to file form STK – 2 after action under sub-section (1) of section 248 has been initiated by the Registrar, it will have to file all pending overdue returns in Form No. AOC-4 (Financial Statement) or AOC-4 XBRL, as the case may be, and Form No. MGT-7 (Annual Return) before filing Form No. STK-2
- Once notice in Form No. STK-7 has been issued by the Registrar pursuant to the action initiated under sub-section (1) of section 248, a company shall not be allowed to file an application in Form No. STK-2

- Format of Statement of Accounts to be filed alongwith Form No. STK-2 has been prescribed in Form STK 8.

National Company Law Tribunal (Second Amendment) Rules, 2019 w.e.f 08th May, 2019

- The requisite number of members / depositors who may file application for class action has been notified as below (Amendment of Rule 84):

- In case of a company having a share capital, the requisite number of member or members to file an application under sub-section (1) of section 245 shall be –

(i) (a) at least 5% of the total number of members of the company; or

(b) 100 members of the company,

whichever is less; or

(ii) (a) member or members holding not less than 5%of the issued share capital of the company, in case of an unlisted company;

b) member or members holding not less than 2% of the issued share capital of the

- The requisite number of depositor or depositors to file an application under sub-section (1) of section 245 shall be –

(i) (a) at least 5% of the total number of depositors of the company; or

(b) 100 depositors of the company, whichever is less; or;

(ii) depositor or depositors to whom the company owes 5% of total deposits of the company.

- The entry relating to fee for compounding of offences has been omitted from Schedule of fees.

(The author is a Chennai based practicing Company Secretary. He can be reached at csdhanapal@gmail.com)

SUMMARY OF RECENT CASE LAWS IN SERVICE TAX, CENTRAL EXCISE AND CUSTOMS

1. Applicability of service tax on expats salary deputed from parent company to Indian subsidiary

CA. DEBASIS NAYAK

Brief Facts of the case

In case of *Commissioner of Central Excise and Service Tax Vs. Nissin Brake India Pvt. Ltd (2018-TIOL-1976-CESTAT-DEL)*, the respondent is engaged in the business of manufacture of automobile parts and had entered into dispatch agreement with its parent company Nissin Kogyo Company Ltd. for payment of salary and other perquisites of the employees deputed from the parent company.

Revenue contention

The revenue contended that the services provided by the parent company in Japan to the respondent should be classifiable under the taxable category of 'manpower recruitment or supply agency service' and thus the assessee was liable to discharge service tax on revere charge basis. Accordingly, demand of INR 1.77 crore along with interest and penalty was raised.

CESTAT Order

The Hon'ble CESTAT after perusal of the agreement and other relevant documents observed that the employees deployed by the parent company were working under the control, direction and supervision of the appellant.

It was also observed that no direct consideration was paid by the appellant to its parent company towards deployment of employees and therefore concluded that there is no agency and client relationship between the parent company and the appellant. Further, the appellant was also deducting TDS on payments being made to such employees. The CESTAT in its order observed that the relationship between the appellant and the parent company is of employer/employee and hence cannot be considered as a taxable service.

Being aggrieved by the order of the CESTAT, the Revenue preferred an appeal before the Supreme Court.

Supreme Court Order

The Hon'ble Supreme Court dismissed the appeal filed by the Revenue and upheld the Tribunal's order. While determining the nature of service, it made the following key observations:

1. The deputed person works under the control, direction and supervision of the assessee,
2. The assessee did not pay any direct or indirect compensation to its parent company for the deployment of employees, apart from the reimbursement of salary at cost.
3. As per the agreement, the relationship between the assessee and the deputed employee is that of employer-employee.
4. Method of salary disbursement [through a group company] will not result in provision of service.

2. No National Calamity Contingent Cess (NCCD), Education Cess (EC) and Secondary & Higher Education Cess (SHEC) on units availing area based excise exemption

In case of *Bajaj Auto Ltd Vs Union of India & ORS (2019-TIOL-127-SC-CX)*, question raised before the apex court was:

a) Whether a manufacturing entity, which is exempted from payment of Central Excise duty, is liable to pay NCCD, EC & SHEC.

Brief Facts of the case

The appellant, a limited company, is engaged in manufacturing two wheeler vehicles since 2007. The appellant availed the area-based exemption Notification No.50/2003-Central Excise, dated June 10, 2003. The said notification exempts the goods from whole of the duty of excise or additional duty of excise, as the case may be. The appellant was apparently paying an automobile cess, but the NCCD, EC and SHEC were not being paid. In the meantime, audit was conducted by the department and an audit objection report was prepared on account of the failure to pay the aforementioned three cesses. Pursuant to that, a show cause notice (SCN) was issued.

Being aggrieved by the said SCN, the appellant filed a writ petition before the High Court assailing the SCN. However, the writ petition was dismissed by the learned Single Judge. The appeal preferred before the Division Bench also met the same fate.

Supreme Court Order

With respect to EC & SHEC

- The issue stands settled in favor of the appellant by the Apex Court's judgment in *SRD Nutrients Pvt. Ltd. v. Commissioner of Central Excise, Guwahati*, where it had been held that EC was a surcharge levied @ 2% on Excise duty payable and if no Excise duty was found to be payable, being exempted, then no liability of EC would arise as well, considering that the EC is to be calculated on the aggregate of Excise duty.

With respect to NCCD

- The Apex Court in SRD Nutrients Pvt. Ltd. (Supra) also referred to the judgment of the Rajasthan High Court in Banswara Syntex Ltd. v. Union of India wherein it was held that surcharge partakes the character of the parent levy, regardless of the objective behind the surcharge. NCCD is the same as an Excise duty & where it takes the character of the Excise duty levied on the product, the NCCD would also be subject to the Excise duty provisions relating to manner of collection of product & obligations of the taxpayer. Hence if Excise duty is exempted, then NCCD being levied as an Excise duty would be entitled to benefit under exemption notification, which states that exemption is from the "...whole of the duty of excise or additional duty of excise...".
- On a proper appreciation of the judicial pronouncement in SRD Nutrients Pvt. Ltd. (supra), the court are not inclined to take a different view from the one taken for EC and SHEC, even while considering the issue of NCCD.

Thus, the orders of the High Court are quashed & the demand for payment of EC, SHEC & NCCD is set aside.

3. Obtaining registration of premises is not a pre-requisite for claiming refund of service tax under Rule 5 of Cenvat Credit Rules 2004

In case of Commissioner of GST and CCE Chennai South Vs Pfizer Accelerated Solution Centre (2019-TIOL-1255-CESTAT-Mad) question before the Tribunal was:

a) Whether the taxes paid prior to obtaining registration of premises is eligible for claiming refund of service tax under Rule 5 of CCR 2004

Brief Facts of the case

- The respondents is a service provider under the categories of Business Auxiliary Service (BAS), Business Support Service (BSS) and Information Technology Software Service and had taken registration on 03.10.2008.The respondent has availed some services prior to registration under cover of invoices and accordingly respondent had availed cenvat credit of same. However, credit of service tax so availed remained unutilized since respondent had exported the services.
- Accordingly, the respondents filed refund claim under Rule 5 of Cenvat Credit Rules, 2004 (herein after refereed as CCR Rules)
- Original adjudicating authority rejected the refund claim on the ground that the claim pertained to the period before taking registration and hence respondents are not eligible to claim refund of such unutilized cenvat credit.

- In appeal, Commissioner (Appeals) relying upon the case law of Tribunal decision in *Textech International (P) Ltd. vide Final Order No.1184/2010 dt.04.11.2010* set aside the order of the original authority and allowed the appeal.
- Aggrieved by this order, department has filed appeal before CESTAT.

CESTAT Order

The Hon'ble Tribunal held that issue in dispute is no longer res integra and has been laid down to rest by a number of decisions and in particular the judgement of the Hon'ble High Court in *BNP Paribas Sundaram Global Securities Operations Pvt. Ltd. - 2018-TIOL-1126-HC-MAD-ST*, wherein it has been held that registration of assessee's premises is not a pre-requisite for claiming credit of refund under Rule 5 of CCR, 2004.

In this light, the Tribunal has found no merit in the appeal of the department, and accordingly dismissed the appeal.

4. No sufficient reason to invoke the provisions of Section 80 of the Finance Act, 1994 and penalty u/s 78 is upheld, since the tax amount was collected but not deposited with the Government

Brief Facts of the case

In case of M/s Banu Engineering Contractor Vs Commissioner of GST and Central Excise Coimbatore (2019-TIOL-1174-CESTAT-Mad), the appellant is registered for providing Manpower Recruitment & Supply Agency service. During the relevant period, the appellant collected services charges along with service tax from the service recipients, but the same was not deposited with the Government within the prescribed time limit and also did not file ST-3 returns. Pursuant to that, SCN was issued proposing duty demand for service tax short-paid, along with interest & equivalent penalty. Upon adjudication demand were confirmed. Further, the appellant filed appeal before Comm (A) and the Commr (A) sustained such demands.

Appellant Contention

The appellant submitted that the appellant is not contesting the appeal on merits and is confining the contest only to the penalties imposed. In this regard, appellant put forward that the appellant was under financial constraints due to which the appellant were unable to discharge their service tax liability. Further, the accountant who was only a part-time worker left the assignment without giving any proper guidance or information with regard to the service tax.

Further, TDS deduction by vendor was hampering the financial position. In such a scenario, they were unable to set apart any amount for service tax. There was no intention to avoid payment of service tax.

The appellant further submitted that apart from a bald allegation that the appellant has suppressed facts, the Department has not adduced any evidence to show that the appellant has committed any positive act of suppression with intention to evade payment of service tax.

Revenue contention

The revenue argued that this is a case wherein the appellant has collected the tax and has not paid the same to the Government. This is a clear case of suppression of facts. The appellant would not have paid up the amount but for the interference of the Department. Further, revenue argued that failure to pay the service tax due to financial constraints is not a reasonable cause.

CESTAT Order

The Hon'ble Tribunal found that there is no positive act of suppression alleged in the SCN and established by the Department. Various courts have held that the word "suppression" is qualified by the word "willful" and therefore, there should be some positive act of suppression with an intention to evade payment of service tax. Mere collection and delay to remit to the Government cannot be considered as an act of suppression. The Hon'ble Tribunal relied on the Judgment of jurisdictional High Court in the case of C.S.T., Chennai Vs. M/s. Lawson Travel and Tours (I) Pvt. Ltd. - 2015 (38) S.T.R. 227 (Mad.).

Accordingly, the tribunal set aside the penalty imposed u/s 78 of the Finance Act, 1994.

5. Once input invoice is received, buyer is entitled to assume that excise duty has been/ will be paid by the supplier

Brief Facts of the Case

In case of M/s Ellen Industries Vs Commissioner of Central Excise and Service Tax (2019-TIOL-1354-CESTAT-Mad), the appellant is the manufacturers of 'Mono Block Pumps' and have a foundry unit functioning in their premises for casting requirements. The appellant were availing Cenvat credit on inputs purchased from Central Excise registered dealers. Pursuant to visit of the departmental officers to the factory premises of appellant and further follow up investigations, it was alleged that the appellant received only non-duty

paid scrap without any valid cenvat documents. Further, it was appeared that vendor had not sold cenvat credit availed goods to the appellant. Accordingly, SCN was issued to appellant and many others interalia, proposing recovery of illegally, wrongly and fraudulently taken cenvat credit with interest thereon and imposition of penalty. The adjudicating authority had confirmed the said demand. Accordingly, the appellant preferred appeal before Comm (Appeals) and the Comm (Appeals) upheld the order of the original authority.

Appellant Contention

The Appellant submitted that

- No evidences have been adduced against the appellant other than the statements to prove vendor had issued cenvatable invoices of duty paid material or had only supplied non-duty paid MS scrape, etc.

- Similar allegation and disputes has been decided in case of M/s. Ferro Cast Industries.

Revenue Contention

The revenue submitted that investigations have sufficiently established the modus operandi being followed by the appellants. In all the statements recorded from the dealers concerned they have uniformly admitted that they had supplied only non-duty paid scrap but that they had issued invoices of duty paid scrap to only to enable wrong availment of cenvat credit thereon. Further, even the Managing Director had admitted to the modus operandi.

CESTAT Order

The Hon'ble Tribunal relied on the judgement in case of M/s. Ferro Cast Industries wherein similar issue have been dealt with.

Further, the view which the Tribunal has taken (Supra) is consistent with the judgment of the Jharkhand High Court in Commissioner of C. Ex., East Singhbhum v. Tata Motors Ltd. - 2013 (294) E.L.T. 394 (Jhar.). The findings recorded by said judgement is as follows:

- Once a buyer of inputs receives invoices of excisable items, unless factually it is established to the contrary, it will be presumed that when payments have been made in respect of those inputs on the basis of invoices, the buyer is entitled to assume that the excise duty has been/will be paid by the supplier on the excisable inputs.

- The buyer will be therefore entitled to claim Modvat credit on the said assumption.
- It would be most unreasonable and unrealistic to expect the buyer of such inputs to go and verify the accounts of the supplier or to find out from the department of Central Excise whether actually duty has been paid on the inputs by the supplier.
- No business can be carried out like this, and the law does not expect the impossible."

In view of the above judgements, the tribunal set aside the order passed by the Comm (Appeals) with all consequential relief to the appellant.

6. Once statutory Rules exist & mandate sequential implementation, the adjudicating authority is bound to proceed as per those rules & in that manner

In case of Anil Kumar Anand Vs Commissioner of Customs (Preventive) (2019-TIOL-179-SC-CUS) question raised before the apex court was:

- Whether the appellant, knowingly, did not declare the brand of imported goods, and undervalued the same with the intent of evading customs duty;
- Whether appellant had imported the branded goods from its related party, and had undervalued the same to evade customs duty.

Brief Facts of the case

The appellant is a regular importer of electric decorative lightings, and in the process of such imports, filed a bill of entry on 21.1.2015 for clearance of electric decorative lightings. These import consignments were of brand names 'Diyas' and 'Mantra', and the enquiry proceeded to ascertain whether the goods had been correctly valued for the purposes of customs duty. On completion of the enquiry, proceedings were initiated for revaluing the current import consignment, as well as past consignments. Pursuant to that, a SCN was issued under Section 28 of the Customs Act, providing for recovery of duties.

The proceedings resulted in an adverse order against the appellant, resulting in the imposition of differential duty. A perusal of the order shows that the valuation of the goods had been made under Rule 7 and Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (hereinafter referred to as the 'said Rules').

Appellant Contention

- The appellant submitted that method of valuation is not correct on a reasoning that the scheme of the Rules has not been correctly understood and implemented by the competent authority.

- Further, the appellant explained the factual matrix of the case that for some consignments where the import is from other than related party, transactional value should be adopted.

- Non-declaration of the brand pertaining to the consignments in question was that the brands were not so well known as to make a difference to the value.

Revenue Contention

The revenue relied on judgment in *Collector of Customs, Bombay v. Swastic Woollens (P) Ltd. & Others 1988 Suppl. SCC 796* to support the arguments.

Supreme Court Order

The Apex court held that

a) Electrical decorative lightings, normally, are not highly branded products, exceptions apart. It does appear that even though the imports were under the brand names, they were not trademarks of such nature as would make them an exclusive product.

b) There was really no occasion to straightaway proceed to determine the transactional value by relying on Rules 7 to 9. Sequential application would apply as especially in view of sub-Rule (4) of Rule 3, which provides that there have to be a sequential implementation of the Rules.

c) Once the statutory Rules exist and provide for sequential implementation, the assessing authority has no option but to proceed in accordance with those Rules, in that manner.

Accordingly, order of the Principal Commissioner of Customs (Preventive) as well as the order of the CESTAT are liable to be set aside, and the matter remitted back to the Principal Commissioner of Customs (Preventive) to proceed afresh with the matter in accordance with our observations.

7. Adjudicating authority have to mandatorily held a pre-notice consultation before issuance of SCN

In case of M/s. Amadeus India Private Limited vs. Principal Commissioner of Central Excise and Service Tax (W.P.(C) 914/2019, the following question was raised before the court:

- Whether prior to issuing the SCN, the adjudicating authority have to mandatorily held a pre-notice consultation with the Petitioner in terms of para 5.0 of Master Circular dated 10th March, 2017 issued by the Central Board of Excise and Customs ("CBEC").

Brief Facts of the case

The Petitioner is engaged in providing computer data processing software, which is used by travel agents and ticket booking entities in the Airline industry. On 20th August 2016, Anti Evasion unit of Service Tax Commissionerate had conducted a search of the unregistered premise of the petitioner. During the course of the search, statements of the representative of the petitioner were recorded. After 2 years on 10th August 2018, a fresh summon were issued seeking the documents. Thereafter on 4th September 2018, a SCN was issued alleging non payment of tax amounting to Rs. 99.45/- crores.

On 3rd October 2018, the petitioner draw the attention of the respondent to the Master Circular dated 10th March 2017 in terms of which pre-show cause consultation in cases involving duty demand above 50 lakhs is mandatory. When no response received in relation to this from the respondent, the petitioner filed the writ petition.

Respondent Contention

In the present case, since the SCN was preceded by a search that was conducted in the business premises of the Petitioner, and the Petitioner also rendered itself liable for penal action "for suppression of facts and contravention of various statutory provisions with intent to evade payment of due service tax" and other incidental levies, the SCN partakes of the character of an "offence related SCN and therefore falls within the exceptions carved out under para 5.0 of the Master Circular.

High Court Order

a) Pursuant to reading the Master Circular dated 10th March 2017, the court noted that there are two exceptions carved out for the respondent to engage in a pre-SCN consultation. The first is preventive and second is offence in terms of Finance Act, 1994.

b) The mere possibility that at the end of the adjudication process, the Petitioner may have to face consequences for having committed an "offence" under Finance Act, 1994 need not per se render the SCN itself as an "offence related" SCN. The exception would then become the rule and not vice versa, and the need for any pre-notice consultation being rendered redundant.

c) Further, without the conclusion of the adjudication on the SCN, the Respondent would not be in a position to decide whether an offence is made out.

In present case, the officers of the Respondent do not appear to have taken any conscious decision in regard to the requirement of the Master Circular. This fact is also confirmed by the learned counsel appearing on behalf of the respondent that there was no noting in the file to that effect. Therefore, the court held that respondent had completely ignored the Master Circular. Accordingly, the court directed the respondent to grant a pre consultation to the petitioner.

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THE CHARTERED ACCOUNTANTS STUDY CIRCLE (Regd.)

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10.00 a.m to 11.00 a.m	Keynote Address	**Padma Shri Ms. Sucheta Dalal** Eminent Journalist
11.00 a.m to 11.15 a.m.		**Tea Break**
11.15 a.m to 12 Noon	Introduction to IBC & Practical Issues	**Mr. Anant Merathia** Advocate
12 Noon to 1.00 p.m.	Capacity Building to IBC-Challenges	**Ms. Sripriya Kumar,** C.A & I.P
LUNCH 1.00 P.M TO 2.00 P.M.		
2.00 p.m. to 2.30 p.m.	Special Address to IBC-Challenges	**Mr. Prakash Kumar** NCLT Member (Confirmation Awaited)
2.30 p.m. to 3.30 p.m.	IBC-Bankers Perspective	Speaker to be Fixed
3.30 p.m. to 5.00 p.m.	Panel Discussion	**Mr. P.H Arvind Pandian** Sr. Counsel **Mr. Dinakar Subramaniam** CA & IP **Mr. V. Mahesh,** CA & IP Moderator : **Mr.Anant Merathia,** Advocate

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