CASC BULLETIN

The Chartered Accountants Study Circle

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MEETINGS

Date	Time	Speaker	Topic
10.11.2016 Thursday	06.30 p.m.	**Mr. K. Vaitheeswaran** Advocate	Real Estate Regulation Act - An Insight
24.11.2016 Thursday	06.30 p.m.	**Mr. R. Subramanian** Chartered Accountatnt	TNVAT Audit-Recent Issues

Preceeded with High Tea Half an hour before the scheduled time of meeting.

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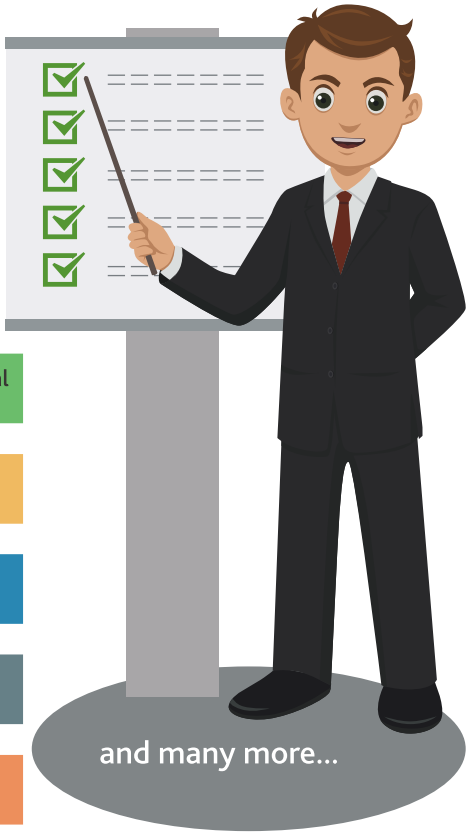

Statutory Audit	Depreciation	Borrowings	Key Managerial Personnel
Statutory Compliance	CSR	Audit Plan	Verification
Due Diligence	Related Party Transaction	Audit Plan	Verification
Tax Audit	Form 3 CA	Form 3 CB	Form 3 CD
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EDITORIAL

IDS – Last Minute Approach – Never Heard about before?

There was almost a different facet of the Department to be seen in the last few months particularly September, 2016, the ultimate month to finish of the race to reach the so called "No Target" set goal for the Country as a whole but "Target" for the Assessing Officer's. The Department officials were put before with a challenge to see the success of the Scheme and the world was turned upside down by the Assessing Officer's approach for many of the assessees. The last 24 hours were hectic but had brought a huge sense of relief for tax officials. The methodology adopted included from persuasion to threat and for the same the Assessing Officer used / misused the machinery as well as provisions of the Act. In some cases the Assessing Officer are struggling to find the way out in the provisions of the Act, to close the act carried out by them. For example the Assessing Officer has conducted a survey in a business premises which comes under his / her jurisdiction but the assessee is assessed by a different officer.

The Finance Ministry had initially claimed in the press release dated 1st October, 2016, as under

"In order to facilitate the taxpayers and to spread awareness about the Scheme, the CBDT issued a number of FAQs to address various queries received. Major issues clarified included manner of declaration of fictitious liability, allowance of cost indexation and holding period benefit for registered immovable property, sanctity of valuation report etc. Difficulties with respect to payment of taxes in a short span were removed by permitting payment of tax in 3 instalments, the last being in September 2017. **Absolute confidentiality of the declarations made was promised under the scheme to reassure the declarants**." [Emphasis Supplied]

The modus operandi of the Department was exactly in the opposite direction as the Assessing Officer are aware of the declaration, though many times not on record, as the said declarations were obtained based on the enquiry or survey conducted by them. Be that as it may the Scheme is claimed to be successful by total declaration of over Rs. 65000 crores as against the Rs. 33000 Crores in the 1997 VDIS Scheme.

In one of news items on the website this is what was stated "The disclosures lasted four months starting June 1, 2016. The government knows this is not a clean-up exercise. All those who have black money aren't going to jump forward and come clean. Nation is by no yardstick going to be free of black money. But yes many are

going to declare part of their stash," a top finance ministry official." Source: ndtv.com

The need of the hour is that the Assessing Officers as well as the assessee and or their authorised representative have to learn – "Be a Sceptic, not being a Cynic".

"A cynic distrusts most information they see, particularly when it challenges their own belief system. Thus, they often become intolerant of other people's ideas. It's not difficult to find cynics everywhere in our society, from live debate on TV to our own family dinner tables. People who are driven by inflexible beliefs rarely think like Galileo or Jobs.

Scepticism, on the other hand, is a key part of critical thinking – a meaning "to inquire" or "look around." A Sceptic requires additional evidence before accepting someone's claims as true. They are willing to challenge the status quo with open-minded, deep questioning of authority. In today's complex world, sceptics and cynics are often hard to differentiate.

And herein lays the dilemma of our modern day quest for certainty. When we can no longer be objective "inquirers" because we have already decided the truth, then we create a culture of cynicism instead of scepticism.

Be Scepticism but Be Positive. **This applies for quality audit as well as** ***Quality audit is a relative term, difficult to quantify. Moreover it may vary from person to person, case to case. Similarly how and how much sceptical should be auditor in particular scenario, very difficult to summarize. However there always exist a scope for process, reprocess, re-engineering, and innovation to improve and make auditing relevant with changing time."***

An interesting article on the topic – "How sceptical is sceptical enough for a quality audit?" is carried somewhere else in this bulletin which is worth reading

Judgements – The After Effects?

The Honourable Madras High Court had in one of its Judgement held by stating that "we are of the view that this aspect would brook no delay till the government develops some thought process for plans and brings into force Section 22A of Registration (Tamil Nadu Amendment) Act 2008". Accordingly the bench had directed that no registering authority shall register any sale deed in respect of any building constructed on plots in unauthorised layouts. The judges said, "We are concerned with the absence of any provision for the Act/Rules/Regulations at present describing any wetland lying for more than three years to be converted into residential or other use applied for. This was noticed in our order dated March 24, 2016 while simultaneously noticing that only 5 per cent of land area was under statutory planning process and for the remaining 95 per cent plans are yet to be developed. "We thus hereby direct that no

registering authority shall register any sale deed in respect of any building constructed on such plots or unauthorised layouts. This order becomes necessary in order to prevent unauthorised and haphazard development/sale of agricultural areas for agricultural use, and giving government time to come forthwith with a broad policy document to save ecology and prevent flooding", the judges said. This had its own impact and the registering authority without understanding the context under which such a direction was issued, had started rejected any building from being registered unless it is on an approved plot. The process of approval has got modified over a period of time. Panchayats are no more authorised to approve any layout. In other words though the order was some categories of registration but it was taken as a blanket ban by the registering authority. Now what happens to the public who have already acquired and got it registered in their names? This is irrespective of the time frame when it was acquired. Literally there seems to be no escape for buyers as their property has turned into a 'zero-return' asset with the passage of the order by the High Court.

An interesting fact to note is that the said section 22A of the Registration (Tamilnadu Amendment) Act, 2008, though amended way back but the same has not been notified till date. Though according to a news report the same is now notified on 20th October, 2016.

Accomplishments

One of our life Member, an eminent tax counsel, a leading and highly respected advocate, has been elevated to the prestigious post of a Judge of High Court of Madras. She is none other than Dr. Anita Sumanth, daughter of highly respected Senior advocate Late Mr. V. Ramachandran. She has represented and argued in many landmark judgements in illustrious career as an advocate. We wish her all the best in her new responsibility.

Annual Residential Refresher Seminar

The next Residential seminar will be conducted in the month of January, 2017. The entire details about the same is carried somewhere in this bulletin. We humbly request you to register at the earliest to enable the committee in charge to carry out seamless arrangement for the same.

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

Editor

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2. Earlier issues of the bulletin is also available on the website in the "News" column.

The soft copy of this bulletin will be hosted on the website shortly.

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RECENT DECISIONS - SERVICE TAX

CA. VIJAY ANAND

1. Exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion not one of compulsion. Income from writing articles in magazines, anchoring TV shows brand endorsements & from playing cricket in IPL – not covered under business auxiliary services / business support services – income – rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion :

In **Sourav Ganguly v. UOI 2016 (43) STR 482 (Cal.)**, the petitioner is a cricketer and is a former captain of the Indian Cricket Team who has participated in the IPL Cricket tournament held in India as a member of the Kolkata Knight Rider Team and was acting as a brand ambassador for various products. He also acted as anchor in television shows and was also engaged in writing articles for Sports Magazines. CBEC, vide instruction/circular dated 26 July, 2010, viewed as under:-

a. Sponsorship received by a player or a Team would be independent of sport event and hence taxable as sponsorship of IPL is not sponsorship of any sports event, since IPL in itself is not a sports event but an entity of franchisee teams and therefore it is taxable and the activity of the franchisee sub serves the business of BCCI IPL and would fall within the scope of 'Business Support Services' which is a taxable service under the service tax law.

b. The players provide taxable service when they wear apparel provided by the franchisee that are embossed with commercial endorsements or when they participated in endorsement event and the service provided by the players for promoting or marketing of the logos/brands/marks of the franchisee/sponsors would fall under the 'Business Support Services' and chargeable to service tax.

c. Fee charged for playing the matches will fall outside the purview of taxable service.

d. In case the players are paid composite fee for playing the matches and for participating in promotional activities the component of promotional activities should be segregated for

charging service tax and if it cannot be done then service tax should be leviable on the total composite amount.

e. The Commissionerate having jurisdiction on the address of the players should issue show cause notice to the players for rendering service to the franchisee.

f. In case, the address of the players is out of India, the liability to pay service tax would fall on the franchisee under the reverse charge mechanism."

Thereafter, the office of the Additional Director General, Directorate General of Central Excise Intelligence, Calcutta Zonal (respondent no. 4) initiated investigation against the petitioner. Thereafter the Commissioner confirmed the demand of the following:-

a. Writing articles in magazines, anchoring TV shows and Brand Endorsement.

b. On receipt of fee from KKR for playing cricket in IPL under business support service.

Thereafter, the assessee filed a writ petition before the High Court for quashing of the SCN, Order and Instruction/Circular dated 26.07.2010 which observed as under:-

1. It is a rule of self-imposed restraint that the courts have developed in the interest of judicial discipline that writ jurisdiction does not intervene when an efficacious alternative remedy is available to the aggrieved person. However, where the vires of a statute or a statutory rule is challenged or breach of a fundamental right is complained of or an order or action of an authority is challenged on the ground of lack of jurisdiction or on the ground of violation of the principles of natural justice, the Writ Courts have interfered in spite of an alternative remedy being available to the writ petitioner. The discretion should be left to the court to be exercised in accordance with sound principles of law and judicial conscience in a given factual matrix. The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion.

2. If it is finally decided that the extended period of limitation was wrongly invoked by the authority in issuing the impugned show cause notice, the logical conclusion that would follow is that the show cause notice was issued without jurisdiction. In that event, the court would be justified in interfering with the show cause notice and the order in which it culminated in the exercise of jurisdiction under Art. 226 of the Constitution of India.

An authority cannot clothe itself with jurisdiction by erroneously deciding a point of fact or law. An authority cannot confer on itself jurisdiction to do a particular thing by wrongly assuming the existence of a factual matrix, existence whereof is a pre-condition for exercise of jurisdiction by such authority.

3. The question is whether the Department was justified in invoking the extended period of limitation for the purpose of issuing the impugned show cause notice. A mere ipse dixit that fraud has been committed or something has been done or permitted to be done with fraudulent motive cannot be taken note of and cannot form the basis of any action on the part of the authorities. Even if, such particulars are not included in the notice, the Department should be in a position to justify and/or substantiate its allegation of suppression of material facts on the part of the noticee. The Department initiated the enquiry by issuing the letter dated 5 November, 2009. The petitioner duly responded to the said letter by his letter dated 24 November, 2009 wherein he categorically stated that he was not rendering any business auxiliary services and had earned income by playing cricket for the country. Thereafter, under cover of letters dated 14 December, 2009 and 15 March, 2010, the petitioner supplied all documents called for by the office of the respondent no. 4 including copies of agreements entered into with various companies and corporate entities and, in compliance of summon dated 12 January, 2011, the petitioner through his authorised representative, appeared before the respondent no. 4 for making statements and producing documents. Furthermore, by letter dated 20 August, 2011, the petitioner supplied the information sought for by the Department by its letter dated 4 August, 2011.

4. From the aforesaid it would appear that the petitioner was prompt and diligent in responding to all the notices issued by the Department and in his replies, the petitioner clearly explained the nature and scope of his activities. Subsequently, copies of contracts entered into by the petitioner with the corporate entities were also made available to the Department. There was full and sufficient disclosure of the nature of the petitioner's activities to the Department and it cannot be said that the petitioner suppressed material facts to deceive the Department with intent to evade payment of service tax.

5. In the following cases, the Hon'ble Supreme Court held that a mere failure to disclose a transaction or activity and pay tax thereon or a mere

misstatement or mere contravention of the Central Excise Act or the Finance Act, 1994 as amended, or of any Rules framed thereunder, is not sufficient for invocation of the extended period of limitation.

i. **CCE, Chandigarh v. Punjab Laminates Pvt. Ltd., 2006 (202) ELT 578 (S.C.)**

ii. **CCE, Chennai v. Chennai Petroleum Corporation Ltd., 2007 (211) ELT 193 (S.C.)**

iii. **CCE, Hyderabad v. Chemphar Drugs and Liniments, Hyderabad, (1989) 2 SCC 127 = 1989 (40) ELT 276 (S.C.)**

iv. **Anand Nishikawa Co. Ltd. V. CCE, Meerut (2005) 188 ELT 149 (S.C.)**

v. **CCE, Aurangabad v. Bajaj Auto Ltd. 2010 (260) ELT 17 (S.C.).**

6. There has to be a positive, conscious and deliberate action on the part of the assessee intended to evade tax, for example, a deliberate misstatement or suppression pursuant to a query, in order to evade tax. A clear fraudulent motive or an element of men's rea on the part of the assessee has to be established before the Department can take recourse to the extended period of limitation.

7. Consequently, there was no ground or justification whatsoever for issuing the SCN by invoking the extended period when no precondition for invoking the extended period existed.

8. With respect to the taxability of writing of articles in magazines, the same cannot, by any stretch of imagination, be said to be amounting to rendering business auxiliary service within the meaning of Sec. 65(19) or business support service under Sec. 65(104c) of the Finance Act, 1994. Writing article for publication in a media is for the benefit of the readers who have interest in the concerned topic. The petitioner wrote articles for media, primarily for the sports lovers and it would be preposterous to suggest that in writing such articles the object of the petitioner was to advance any business or commercial venture. The articles were meant for information and even entertainment of the general public interested in sports. An article written by a celebrity in an issue of a magazine may to some extent boost the sale of that issue but cannot be said that the object of the author in writing the article or permitting publication thereof was to promote circulation of the concerned magazine which might be an incidental effect but the same cannot foist service tax liability on the author of the article. Hence, such remuneration received for writing articles would not attract service tax.

9. With respect to the taxability of the remuneration received by the petitioner for anchoring TV shows, such shows are meant for entertainment of the viewers. In contemporary world watching television is a primary form of recreation. It would be absurd to say that anchoring TV shows amounts to rendering business auxiliary service or business support service. By anchoring a TV show, a celebrity or for that matter any other person does not render service with the object of enhancing any business or commercial interest. No reasonable authority with proper application of mind could classify anchoring of TV show as business auxiliary service or business support service. Hence, such remuneration received by the petitioner for anchoring TV shows does not attract service tax.

10. As regards the claim on brand endorsement, under the heading 'Business Auxiliary Service', by amendment of the Finance, Act, 1994, a new taxable service category of 'Brand Promotion' was introduced with effect from 1 July, 2010, the logical corollary and inevitable inference is that such category of service was not taxable prior to 1 July, 2010. Reliance was sought on the decision in the case of **CST, Delhi-vs.-Shriya Saran 2014 (36) STR 641 (Tri.-Del.)** and in the case of **Indian National Shipowners' Association-vs.-UOI 2009 (14) STR 289 (Bom.).** Business auxiliary service and brand promotion are distinct service heads as admitted by the Department in the show cause notice under challenge. Since brand endorsement was not a taxable service during the period of time for which the tax demand has been raised, such demand cannot be sustained. Such service rendered by the petitioner could not be taxed under the head of business auxiliary service as has been sought to be done.

11. As regards the remuneration received by the petitioner for playing IPL cricket, in my opinion, the service tax demand raised on such amount under the head of 'Business Support Service', is not legally tenable. As per the facts, the terms of the contract that the petitioner entered into with M/s. Knight Riders Sports Pvt. Ltd. would reveal that the petitioner's obligation was not limited to displaying his cricket skills in a cricket match and he also lent himself to business promotional activities. Thus he provided taxable service when he wore apparel provided by the franchisee that was embossed with commercial endorsements or when he participated in endorsement event. The Department admits that the fee charged for playing the matches will

fall outside the purview of taxable service. However, the Department contends that the petitioner has been paid composite fee for playing matches and for participating in promotional activities but the component of promotional activities could not be segregated for charging service tax. Accordingly, service tax is chargeable on the composite amount. For this contention, the Department relied on the letter dated 26 July, 2010 issued by the Central Board of Excise and Customs which is also under challenge in this writ petition.

12. The adjudicating authority held that such fees/remuneration have been paid to the petitioner by the franchisee in addition to his playing skills and thus the services rendered by the petitioner are classifiable under the taxable service head of 'Business Support Services' as per the provisions of Sec. 65(104c) read with Sec. 65(105)(zzzzq) of the Finance Act, 1994. There appears to be inherent inconsistency in such as Sec. 65(105) (zzzzq) pertains to Brand Promotion whereas Sec. 65(104c) pertains to Business Auxillary Services. They are two distinct and separate categories. The taxable head of Brand Promotion was not in existence prior to 1 July, 2010, hence, reliance on that head for levying tax on the amount received by the petitioner from the IPL franchisee is misplaced and misconceived. This is sufficient to vitiate the order.

13. The petitioner was under full control of the franchisee and had to act in the manner instructed by the franchisee. The apparel that he had to wear was team clothing and the same could not exhibit any badge, logo, mark, trade name etc. The petitioner was not providing any service as an independent individual worker. His status was that of an employee rather than an independent worker or contractor or consultant. It cannot be said that the petitioner was rendering any service which could be classified as business support service as he was simply a purchased member of a team serving and performing under KKR and was not providing any service to KKR as an individual.

14. Insofar the letter/instruction dated 26 July, 2010 issued by the CBEC is concerned, the petitioner is aggrieved by the instruction in the said letter to the effect that in case the players (in IPL) are paid composite fee for playing matches and for participating in promotional activities, the component of promotional activities should be segregated for charging service tax and if it cannot be done then service tax should be leviable on the total composite amount. CBEC in its administrative capacity is not entitled

to impose its views on its various subordinate authorities exercising quasi-judicial functions to interpret a particular provision of a statute in a particular manner. A circular/ instruction/letter cannot create tax liability. The statutory provisions relating to service tax do not provide that the fee received by an IPL player would attract service tax. This is admitted by the Department even in the said circular which states, inter alia, that charges for playing matches will fall outside the purview of taxable service. If the statute does not provide for levying service tax on fee received for playing matches, such a liability cannot be created by issuing a letter/ instruction/circular. A circular cannot travel beyond the statute. The statute does not provide that if a player receives a composite amount for playing matches and promotional activities and the segregation of the two elements is not possible, then the composite entire amount may be taxed. Such an act on the part of the Department will be de hors the statute and without jurisdiction or authority of law. It will also be in contravention of Art. 265 of the Constitution of India. CBEC cannot seek to legislate by issuing circulars/instructions. If such circulars/instructions/clarifications are contrary to or inconsistent with the statutory provision in question or seek to create a liability which the statute does not contemplate, such circular/ instruction is liable to be struck down. A misconceived and legally untenable interpretation of a statutory provision and/or an erroneous understanding thereof, which if applied by the quasi-judicial authorities will unduly prejudice the citizens of the country, cannot be allowed to stand. Hence such circular/instruction dated 26 July, 2010 was quashed to the extent it states that if composite fee received for playing matches and for participating in promotional activities cannot be segregated, then service tax should be levied on the total composite amount. Hence, the remuneration received by the petitioner from the IPL franchisee could not be taxed under business support service.

Hence, the court set aside the SCN, the consequential order and instruction/ circular dated 26.07.2010.

2. <u>Repair of roads and airports – exclusion under commercial or industrial construction does not mean that it could form part of other taxable services - retrospective exemption to the activity of management, maintenance and repair cannot be extended to runways on which aircrafts takes off and land -:</u>

In **D.P. Jain & Co. v. UOI, [2016] 43 STR 5072 (Mum.),** the appellant was engaged in:-

(i) Construction of roads for NHAI (National Highway Authority of India), CPWD (Central Public Works Department) and NMC (Nagpur Municipal Corporation).

(ii) Construction of runways for Airport Authority of India Ltd.

(iii) Strengthening renewal of roads.

(iv) Improving and surfacing of runways.

(v) Site preparation, excavation for further construction of roads either on its own behalf or for the clients having contracts for construction of roads.

The adjudicating authority, after due investigations, confirmed the demands on the services of (i) repair and maintenance of roads; (ii) repair and maintenance of airport runways; (iii) site formation activity undertaken at roads. On de novo appeal (after remand by the High Court), the Tribunal set aside the demand on repair and maintenance of roads, but upheld the other demands, against which the appellant preferred an appeal before the High Court which observed as under:-

1. Merely because repair of road and airports is specifically excluded from the definition of commercial or industrial construction does not mean that it cannot form part of other taxable service. If one carefully analyses section 65(25b) of the Finance Act, 1994, it would be apparent that it defines the words or expression' 'Commercial or Industrial Construction' which means, repair, alteration, renovation, restoration of or similar services in relation to building or civil structure, pipe line or conduit, but that ought to be used or to be used primarily for or occupied or to be occupied primarily with or engaged or to be engaged primarily in commerce or industry, or work intended for commerce or industry. From that service, the legislature excluded services provided in respect of roads, airports, transport terminals etc. The reason is obvious because the section contains a definition. The service provided could be for maintenance of utilities. Such maintenance may also include repairs. Therefore, the legislature thought it fit to bring it within maintenance or repair service under section 65(64) and while doing so, it firstly defined "management, maintenance or repair service" to mean any service provided by any person under a contract or an agreement for a manufacturer or any person authorised by him in relation to management of properties, whether immovable or not, maintenance or repair of properties, whether immovable or not or maintenance or repair including reconditioning on restoration, or servicing of any goods, excluding a motor vehicle and also substituted it by the Finance Act, 2006

with effect from 1-5-2006. It also substituted the Explanation below section 65(64) with effect from 15-5-2008 to state that for the purpose of section 65(64) "goods" includes computer software and "properties" includes information technology software.

2. However, when the Legislature brought in the concept of 'Taxable Service' by section 65(105) and defined it to mean any service provided or to be provided to person by any person in relation to management, maintenance or repair, its aim was specific and clear. The definitions contained in section 65 and by prior clauses would act as and provide a guideline.

3. Merely because repairs of roads and airports is specifically excluded from the definition of ' Commercial or Industrial Construction' it could still be brought in under the category of 'management, maintenance or repair service'. Ultimately, management, maintenance or repair is defined to mean any service provided by any person under a contract or an agreement for a manufacturer or any person authorised by him in relation to management of properties, whether immovable or not, maintenance or repair of properties, whether immovable or not or maintenance or repair including reconditioning on restoration, or servicing of any goods, excluding a motor vehicle. It is not urged that roads and airports are not properties. It is the management of properties as also their maintenance or repairs, irrespective of whether they are immovable or not, which is a management, maintenance or repair service. Once it is taxable, then, whether it is in relation to road or airport is hardly relevant and material.

4. Commercial or industrial construction service is defined in section 65(25b) and in its wisdom, the Legislature thought the services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dam would not be necessarily commercial or industrial construction and in any event repair, alteration, renovation, restoration of such utility should be excluded from the purview of the definition of the term ' Commercial or Industrial Construction Service'. By this, there is no prohibition for bringing it in another category. The definitions as carved out do not make any provision of the Act redundant. Once management, maintenance or repair is a service and, in it, provision of such service in relation to any property immovable or otherwise could be brought, then, Court cannot uphold the argument of assessee that exclusion from one service would imply exclusion from service tax itself.

5. In matter of taxation, when the language of the section or provision is clear and unambiguous, then, the court must give effect to it. There is no question of then interpreting the provision and by finding out the supposed intention of the Legislature. It is only when the language is not clear but ambiguous or obscure, then, there is scope for interpretation. In the present case, principles of interpretation cannot be pressed into service more so when there is no redundancy nor absurdity. Eventually, in inserting and incorporating definitions so as to understand taxable service if management, maintenance or repair is taken to be a distinct service and that aspect is excluded from the definition of the term ' Commercial or Industrial Construction Service', then, it is not a case of redundancy or rendering any provision nugatory, but being specific and clear.

6. The principle that 'When there is a law generally dealing with a subject and another dealing with one of the topics comprised therein, then, General law is to be construed as yielding to the special in respect of matters comprised therein' cannot be applied in this present case. Here, we have two definitions which are to be found to understand the whole gamut of services brought to tax. To encompass almost all the services for bringing them in the tax net, their definitions are worded accordingly, one cannot ignore the plain words by applying the above principle.

7. What could be brought to tax alone can be exempted from it or the levy. If that was not taxable at all or from inception, then, there is no question of grant of any exemption therefrom.

8. There is a difference even in commercial parlance between two words and terms viz. 'roads' and 'runways' as when these terms being not defined in the Finance Act, 1994, they must take their color from their common parlance meaning and be understood and interpreted as known to the commercial world. 'Runway' is a specially prepared surface along which an aircraft takes off and land. Thus, it is a path for aircraft to take off from. Whereas, 'road' may be a path or way with a specially prepared surface, but it is used by vehicles/ pedestrians etc. Ordinarily road is understood as a passageway, track suitable for wheeled vehicles. That is not how runway is construed and understood. Runway is made or specifically prepared along which an aircraft takes off and lands. Eventually, it is not how it is made and surfaced, but what it is utilized for which is relevant. Therefore, the premise or

foundation that road is a genus of which runway is species is not correct and proper. It cannot be agreed that road is a wide term and included in it is a runway. Mere fact that on some portions adjacent to a runway, motor vehicles ply or to tow or bring back stranded aircraft specialized recovery vehicles are brought on runway does not mean that runways are roads.

9. With respect to the submission pertaining to section 98 of the Finance Act, 1994, which grants retrospective exemption to repair/maintenance services provided to non-commercial Government buildings and assessee has argued that airports are non-commercial Government buildings and maintenance/repair thereof is exempt u/s 98, the exclusion is clear as section 98 refers to building services relating to management etc. of non-commercial Government buildings.

Consequent to the above, the High Court did not find any merit in the appeal and dismissed the same.

3. <u>Export of software to SEZ – refund of accumulated credit under rule 5 of the CENVAT Credit Rules, 2004 – not to be denied - CENVAT Credit on Goods transport agent's services upto the port which is the place of removal – not to be denied – when value of SEZ turnover is included in the value of total turnover, the same should be included in the value of export turnover.</u>

In **Cognizant Technology Solutions v. CCE & ST (LTU)**, Chennai [2016] 43 STR 576, the appellants were rendering software services and the services are exported and also to the domestic clients and obtained centralized registration for service tax with the Commissioner of LTU, Chennai and also registered with STPI/ SEZ as well. The Appellant claimed refund of CENVAT credit on the credit relating to input services used in the output services exported outside India under Rule 5 of CCR read with Notification No. 05/2006 dated 14 March 2006 as amended. The original adjudicating authorities as well as the Commissioner (Appeals) rejected/ restricted the refund claims of the Appellant on the following grounds:-

a. Services related to development of information technology software and maintenance of such software were specifically included as taxable service only from 16.05.2008.

b. Appellant was engaged in provision of software maintenance service which was not covered under the ambit of Management, maintenance, and repair service (MMRS) upto 16.05.2008) and hence the same was not taxable up to 16.05.2008.

c. The appellants are not eligible for refund of CENVAT credit of input services availed on the software maintenance service.

d. The export turnover portion in the formula prescribed under Rule 5 of CCR, does not include the value of exports made from SEZ.

e. In the numerator the total export turnover the adjudicating authority taken only STPI turnover and excluded the SEZ exports and while taking the total turnover (denominator) the adjudicating authority has computed including SEZ exports and accordingly rejected the refund.

f. The adjudicating authority also excluded the quantum of amount from the refund claim which are otherwise ineligible for which separate show because notices were issued under CCRs.

Aggrieved by these orders, the appellants and the departments preferred appeals before the Tribunal which observed as under:-

1. The short issue involved in this case relates to rejection of refund on input service credit utilized in the export of services and refund claimed under Rule 5 of CCR. The adjudicating authority and the lower appellate authority in the appellant assessees appeals rejected or restricted the refund on the ground as under:-

a. The software maintenance service under the category of Management Maintenance and Repair Service (MMRS) is not taxable/exempted.

b. Restricted their refund claim by adopting different value for computation in respect of total turnover vis-'-vis export turnover provided in the formula prescribed under Notification No. 5/2006-CE(NT) dated 14.03.2006.

2. With respect to the first issue, the appellant is a software firm engaged in the business of software development and obtained centralized service tax registration under LTU Commissionerate and discharging service tax on the software services rendered to local customers and also exported software services. There is no dispute on the payment of service tax by the appellant on the MMRS during the period 2007-2008. The appellant has furnished the details of the taxable service i.e., MMRS and it has been clearly mentioned that the appellant has paid the service tax both by cash as well as by debit in their CENVAT credit and the appellant has claimed refund of service tax paid on input service which was used in

output service. Revenue cannot adopt two standards, when the appellant paid service tax under MMRS the same was accepted by the Revenue whereas while claiming the refund under Rule 5 of CCR, they choose to argue differently, stating that the said services are exempted. The issue of granting refund of unutilized input credit/input service tax credit used in the export of services under Rule 5 of CCR has been settled by various Honble High Courts and Tribunal. The decision of the Tribunal at Mumbai Bench in the case of **KPIT Cummins Info systems Ltd. Vs. CCE, Pune-I - 2013 (32) STR 356 (Tri.-Mum.)** has dealt the identical issue on the software consultancy service exported during the relevant period and allowed the appeal by following the decision in mPortal **India Wireless Solutions Pvt. Ltd. Vs. CST, Bangalore 2012 (27) STR 134 (Kar.).**

3. The ratio of the above Tribunal decision is squarely applicable to the present case as the Tribunal in the above case has held that the software maintenance service is classifiable under the category of Management and Maintenance or Repair Service (MMRS) during the relevant period and in the present case it is clearly established that the appellants have paid the service tax on MMRS and availed credit.

4. Further the Tribunal Mumbai Bench in the case of **CCE, Pune Vs. Barclays Technology Centre (I) Pvt. Ltd 2014 TIOL-2641-CESTAT-MUM** by relying the decision in the case of **Tata Consultancy services Ltd. Vs. CST, LTU, Mumbai, - 2013 (29) STR 393 (Tri.-Mum.),** rejected the revenue appeal and allowed the refund of input services utilized in the export of software services to SEZ.

5. Hence, the appellants are eligible for refund under Rule 5 of CCR on the input services used in the export of service.

6. On the issue relating to the computation of total turnover vis-'-Vis export turnover for determining the refund amount as per the formula prescribed under Notification No, =. 05/2006-CE (NT) dated 14.03.2006. While calculating the quantum of refund eligible as per the formula prescribed under Rule 5 of CCR, the appellant claimed the refund on the export turnover of both SEZ and STPI units. For the purpose of total turnover, the appellants have computed total turnover of both SEZ and STPI units as the appellants being one entity whereas the adjudicating authority, while computing the value, has deducted the value of SEZ exports from the export turn over (numerator) but retained the SEZ export turn over

in the total turnover (Denominator). The appellants contended that the adjudicating authority when deducting the value of SEZ exports from the turnover, ought to have deducted the same from the total turnover or, if he has included it in the turn over, he should have also included it in the export turn over.

7. In an identical issue in **CCE, Pune Vs. Computer Land UK Ltd., - 2015 (10) TMI 517 CESTAT-MUMBAI,** the Tribunal discussed the correct method of computation of total turnover vis-'-Vis export turnover and upheld the impugned order and rejected the revenue appeal.

8. Further, in **CIT & Others vs. Tata Elxsi Ltd. & Others 247 CTR- 334,** in respect of computation of deduction under Section 10 (A) of IT Act, dealt the identical issue of computation of export turn over and total turnover, High Court dismissed the revenue appeal and upheld the Tribunal order.

9. The above decision are squarely applicable to the facts of the present case in so far as the computation of the export turnover and total turnover for computing the export value as per the formula prescribed under Clause 5 of Notification No. 5/2006 dated 14.03.2006. In the present case, the lower authorities while computing the turn over deducted the value of SEZ exports from the export turn over (numerator) and retained the same in the total turnover (denominator) which has resulted in the anomaly and the reduction in the quantum of refund when Clause 5 of the Notification No. 5/06 dated 14.3.2006, clearly stipulates that the formula has to be applied only for the activity to which the claim relates and it is for the entity as a whole.

10. Hence, when the revenue proceeded to include the value of SEZ exports in computing the total turnover, the same should also have been included in computing export turnover. The order of the Learned adjudicating authority in rejecting the refund claim by adopting the wrong method of computation is not justified and liable to be set aside to that extent of restriction of the refund claim.

Hence, the assessee's appeals were allowed with consequential relief and the department's appeal rejected.

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Levy of tax by State:

The standard adopted as a measure of the levy may be indicative of the nature of the tax but it does not necessarily determine it. The nature of the mechanism by which the tax is to be assessed is not decisive of the essential characteristic of the particular tax charged, though it may throw light on the general character of the tax. When deciding an issue of legislative competence in relation to a taxing statute, the court is required to determine whether the nature of the tax is such that it does not fall within the fields of legislation that are earmarked for the Legislature concerned. While there may have been an express understanding between the various State Governments that the provisions of the value added tax legislations in the respective States would have some common features, a legislative provision that is introduced by one of the States cannot be struck down on the ground that it goes against the State Government's commitment to an empowered committee. One cannot attribute mala fides to a Legislature while considering the validity of a legislative provision. Once it is found that the State Legislature has the legislative competence to introduce the levy in question, the mere fact that other State Legislatures have not

CA. V.V. SAMPATHKUMAR

introduced a similar levy cannot be cited as an instance of discrimination. State Legislatures have a greater freedom when it comes to economic legislations and they can pick and choose the subjects of taxation reasonably. Other than increasing the rate of tax on specified textile articles, when the turnover in respect of the articles crosses a specified threshold level in the hands of some dealers, the levy does not meet out discrimination in the matter of taxation to any specified class of dealers. **[2016] 90 VST 267 (Ker) KERALA TEXTILE AND GARMENTS DEALERS WELFARE ASSOCIATION AND OTHERS v. STATE OF KERALA AND OTHERS (and other cases)**

Statutory forms:

Even though, the petitioner had availed of the concessional rate of tax, it failed to furnish the requisite statutory forms,

within the stipulated period as prescribed in the Puducherry Value Added Tax Rules. However, it could not be lost sight that the Central Sales Tax Rules did not provide for any time-limit. Furnishing of the statutory forms was not within the control of the petitioner and was dependent on the other State dealers' co-operation. If on sufficient cause, the petitioner satisfied the requirements of law, then the claim could not be rejected unjustifiably merely on the ground of belated submissions of statutory forms. The petitioner also made rectification applications. Therefore the petitioner could be given an opportunity to produce all the statutory forms for making appropriate assessment orders. **[2016] 90 VST 297 (Mad) PANDI DEVI OIL PRIVATE LIMITED v. ADDITIONAL DEPUTY COMMERCIAL TAX OFFICER (1AC), PONDICHERRY AND ANOTHER**

Remand orders:

Where an order of remand lays down limits for the enquiry to be made by the lower court that court ought to confine itself to questions which fall within those limits. It is not open to any of the parties or to the court below to enlarge the scope of the remand order. Even when a matter is remitted to High Court by the Supreme Court, the High Court cannot assume a wider field of jurisdiction than one which has been permitted by the Supreme Court through the order of remand, and enter into examining the whole controversy afresh and as if all contentions of all parties are open before it. When evidence of experts is tendered and when the expertise of the persons tendering such evidence is established, such materials can be rebutted only through such contra evidence as could be held to be of more evidentiary value in comparison by competitive evaluation by a duly informed adjudicator. The scope of enquiry following of an order of remand would necessarily stand guided by the directions contained in the order of remand. **[2016] 90 VST 304 (Ker) STATE OF KERALA v. M. R. F. LIMITED**

Authorisation:

Where there was no order in writing by any Commissioner authorising the Sales Tax Officer, Siliguri to discharge functions of the Commissioner or a Special Commissioner or an Additional Commissioner under section 67 of the Act, the order of seizure conducted by the Sales Tax Officer, Siliguri Range was liable to be set aside and such was to be directed to return immediately all seized items. As a consequence no penal or other action may be taken against the dealer in respect seizure conducted without jurisdiction.

[2016] 90 VST 326 (Cal) SAPTRISHI INFRATRADE PRIVATE LIMITED v. SALES TAX OFFICER, SILIGURI RANGE, SILIGURI AND OTHERS

Jurisdiction:

The petitioner had submitted its application for amendment of certificate of registration, furnishing the information as required under the Act, whereupon the competent authority issued amended certificate of registration, in favour of the petitioner on February 5, 2015, wherein the K branch was also mentioned. The inspection report on record mentioned that the person in charge of the business premises informed that the dealer was centralised registered. Thus in that view of the matter the Assistant Commissioner, K Circle, exceeded his jurisdiction and illegally passed the order dated January 23, 2015. Moreover, the third proviso to section 19 of the Act, which is a deeming Clause, says that if the dealer applies for grant of certificate of registration in the prescribed manner and that the application is duly filled in, he shall be deemed to be in possession of a valid certificate of registration from the date of application for the purpose of exercising all rights and performing all duties or bearing all liabilities under the Act or the Rules made there under. Thus, once the dealer applied for amendment of certificate under the Act furnishing the information required under the Act, it could not be treated as a dealer evading registration. Therefore, the order passed by the Assistant Commissioner, K Circle, was without jurisdiction as well as based on wrong notion of law. The Court also held that since there was complete lack of jurisdiction in the officer or authority to take the action in question, the jurisdiction under article 226 of the Constitution of India needed to be invoked. **[2016] 90 VST 356 (Patna) V MART RETAIL LIMITED v. STATE OF BIHAR AND ANOTHER**

Revision:

The scope of judicial scrutiny in a revision petition is limited to a question of law and not a question of fact. The Tribunal, for the purpose of a question of fact is the ultimate fact-finding authority. The court may interfere with such finding of fact if it is a mixed question of law and fact or the view taken by the Tribunal on the basis of the facts available on record is an impossible view and not the possible view. If it is a possible view, this court may not sit in an appeal over such finding of fact. The first appellate authority after examining the contentions of the dealer had come to the categorical finding that the benefit of circular was not available to the dealer. The Tribunal after re- appreciation of whole

material had reiterated the finding of fact concurring with the view of the first appellate authority. The contention that the Tribunal had not properly considered the other clauses of the circular or that the Tribunal had not considered that the formula was applied by the petitioner but was found to be erroneous by the assessing officer was not tenable for two reasons: that the first appellate authority after having considered all aspects did find that the action was not unintentional and that the Tribunal had found that there was no confusion about applicability of the formula and it was clear. When the formula was clear as found by the Tribunal, and if it was not applied, the view taken by the Tribunal that the action was not unintentional was not an impossible view, which may call for interference by the court. **[2016} 90 VST 220 (Karn) BHARATH EARTH MOVERS LTD. V. STATE OF KARNATAKA**

Input tax credit:

The word "business" is defined in an inclusive manner. If a manufacturer-dealer sets up a research centre for undertaking the research of a product or may be a new product in which he is dealing, it can be said to have a direct nexus to the principal activity of manufacture. It is out of various researches undertaken one may possibly decide to manufacture a particular product or of a particular quality having better prospects in the business. When the dealer was not running an independent research institute, but was also dealing in the manufacturing or sale of the products and that the principal activity of the dealer was manufacturing of the product and research was limited to the variety of products which may be manufactured by the Dealer and if dealer is manufacturing a particular product and is also undertaking research activity pertaining thereto for itself, such can be said to be an incidental activity to the manufacturing activity and hence would fall within the definition of the word "business". The dealer was entitled to input- tax credit on the purchases made for research unit as claimed. **[2016] 90 VST 236 (Karn) HINDUSTAN UNILEVER LTD. V.STATE OF KARNATAKA**

Constitutional validity of Section 19(20) of TNVAT Act:

As per section 19(20) of TNVAT Act 2006, made retrospectively, there is need for the reversal of the amount of the input tax credit over and above the output tax of those credit when dealer has sold goods at a price lesser than the price of the goods purchased by him. When the question of the validity of this enactment and that too made retrospectively came into question the Court held that whenever concession

is given by statute or notification etc. the conditions thereof are to be strictly complied with in order to avail such concession. Under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. When a concession is given by a statute, the Legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for Section 19 of the VAT Act. That apart, there were valid and cogent reasons for inserting Section 19(20) to protect the Revenue against clandestine transactions resulting in evasion of tax. The challenge to constitutional validity of sub-section (20) of Section 19 of VAT Act has to fail. With respect to the retrospective effect sub-section (20) of Section 19 of the TNVAT Act it was held that sub-section (20) of Section 19 is altogether new provision introduced for determining the input tax in specified situation, i.e., where goods are sold at a lesser price than the purchase price of goods. The manner of calculation of the ITC was entirely different before this amendment. This is clearly a provision which is made for the first time to the detriment of the dealers. Such a provision, therefore, cannot have retrospective effect, more so, when vested right had accrued in favour of these dealers in respect of purchases and sales made between January 01, 2007 to August 19, 2010. Thus, while upholding the vires of sub-section (20) of Section 19, the Court set aside and strike down Amendment Act 22 of 2010 whereby this amendment was given retrospective effect from January 01, 2007.

JAYAM & CO. Vs ASSISTANT COMMISSIONER & ANR [2016] (SC) CIVIL APPEAL NOS. 8070-8073 OF 2016 etc. (SC) Dated: 05.08.2016

Accounts:

The Assessing Officer who is enjoined with the statutory duty to complete the assessment, inadequacy or adequacy of information gathered by the enforcement wing is of no consequence, when the Assessing Officer takes up the case for assessment to tax. The Assessing Officer cannot be bowed down by the observations of the enforcement wing and in several cases that appears to be so and this malady is on account of the fact that the enforcement officers are superior officers to the Assessing Officer. It is true that the Rules stipulate the manner in which the accounts have to be maintained. However, it is not the case of the first respondent that the data available with the

petitioner does not confirm to the Rules. The petitioner's justification is that the accounts are maintained in that particular format, which is a specially designed software and this helps them in monitoring the business throughout the country. The Assessing Officer is a statutory authority who plays a very vital role in assessing dealers to tax. Therefore, the endeavour of the officer should be to ensure that not a rupee of revenue payable to the Government is missed out in collection that is why financial experts have said that an assessment proceedings is an outcome of dialogue and deliberations. In certain cases to understand the nature of activity, done by a dealer/assessee, the Assessing Officer must equip himself to the nuances of the particular trade, so as to ensure that the disclosure made by the Assessee in their return is full and true. There is no reason as to why the respondent should fight shy of visiting the place of business of the petitioner or in the alternative, the entire data in the format maintained by the petitioner can be made available in the office of the first respondent with the infrastructure being set up at the cost of the petitioner. **HINDUSTAN UNILEVER LIMITED Vs** THE **DEPUTY COMMISSIONER (CT)-II, LTU, CHENNAI etc., [2016] (Mad) W.P.Nos.28818 & 28819 of 2014 Dated 29.08.2016**

Penalty:

Levy of penalty is not justifiable if at the time of assessment turnover has been recorded as per the books of accounts and verified by the department, in such circumstances, suppression cannot be attributed. Transaction giving rise to taxable turnover, has been categorically declared by the assessee as composite works contract and at the concessional rate of 4%, tax has been paid. Though penalty is leviable under the provisions of the Act, while exercising discretion, the AO is required to take note of the bona fides of the assessee. In view of the explanations to Section 12(3) of the Act the contention of the department that levy of penalty under Section 12(3) is automatic, cannot be accepted. Tribunal is not right in applying explanation (iii) to Section 12(3) (b) of the Act, to sustain the levy of penalty, despite the fact that the petitioner had opted for compounding of tax under Section 7C of the Act. **SHYAM AIR FRIDGE Vs THE STATE OF TAMIL NADU REP. BY THE DEPUTY COMMISSIONER (CT), VELLORE [2016] (Mad) Tax Case (Revision) No.186 of 2009** Dated**: 28.07.2016**

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LEGAL UPDATE ON DIRECT TAXES

I. Whether interest on partners' capital is an expenditure envisaging disallowance under rule 8D read with section 14A of Income tax Act [ITA], if the partnership firm has invested in shares and mutual funds?

CA. G. PARI & CA. P. PRADEEP KUMAR

The issue came up for consideration in the case of **QUALITY INDUSTRIES *v.* JCIT, Range-2, NASHIK, [2016] 73 taxmann.com 363 (Pune - Trib.),** SEPTEMBER 9, 2016

FACTS:

1. The assessee is a partnership firm engaged in the business of chemicals and for the assessment year 2010-11 has earned and claimed exemption of dividend income derived out of investment in mutual funds made by the firm in earlier years and also in the year of assessment out of capital introduced by its partners. While completing assessment u/s 143(3), the AO observed and completed the assessment that investment in mutual funds has been made out of interest bearing funds, which includes partners' capital also; thus invoked rule 8D read with section 14A of ITA on interest on partners' capital as an expenditure incurred in relation to earning of exempted income viz. dividends by rejecting the assessee's plea that interest on partners' capital is not an expenditure and the firm and partners are not different persons in the eye of Indian Partnership Act 1932.

2. CIT(A) confirmed the order of AO; aggrieved and further appeal to Tribunal;

ITAT DECISION:

3. Section 40(b) of ITA, by virtue of the Finance Act 1992, enable a firm to claim deduction of interest on partners' capital subject to some upper limits with effect from the assessment year 1993-94, which in turn is taxable as business income in the hands of partners. Further, disallowance of interest has been spelt out only in section 40(b) and not in section 36 and 37 of ITA.

4. It is noted that there is no consequent amendment in Indian Partnership Act on this aspect and partnership is not a separate legal entity. Consequently

interest and salary to partners remain as distribution of business income and partnership and partners are not treated as distinct persons under Partnership Act, although treated as separate persons for the purpose of tax assessment. Therefore no relationship of lender of funds (by partners) and borrower of funds (by firm) can be inferred for the application of section 36(1) (iii).

5. Finally, the matter has been remanded back for fresh assessment by holding that interest paid to its partners cannot be treated at par with the other interest payable to outside parties.

BUTTRESSES/GROUNDS for the DECISION:

Firm and partners are not distinct persons under Indian Partnership Act:

6. As per the scheme of taxation, section 28(v) of ITA interest on partners' capital and salary is chargeable to tax in the hands of partners as business income. This taxation is line with the apex court's ruling in the case of **CIT v. R.M. CHIDAMBARAM PILLAI** reported in **[1977] 106 ITR 292 (SC)** wherein it has been ruled that *'payment of salary to partners represent as special share of profits and therefore taxable as business income' as under:*

"A firm is not a legal person, even though it has some attributes of personality. In Income-tax law, a firm is a unit of assessment, by special provisions, but it is not a full person. Since a contract of employment requires two distinct persons, viz., the employer and the employee, there cannot be a contract of service, in strict law, between a firm and one of its partners. Payment of salary to a partner represents a special share of the profits. Salary paid to a partner retains the same character of the income of the firm."

Salary, interest and profits received by partners are business income even prior to 01.04.1992:

7. The business of the firm is business of the partners of the firm and, hence, salary, interest and profits received by the partner from the firm is business income and, therefore, expenses incurred by the partners for the purpose of earning this income from the firm are admissible as deduction from such share income from the firm in which he is partner - **CIT v. RAMNIKLAL KOTHARI [1969] 74 ITR 57 (SC)**.

II. Whether rule 8D read with section 14A would be applicable even when the assessee claimed that he has not incurred any expenditure? Or whether rule 8D is automatic or can be resorted to as a measure of last resort?

The issue came up for consideration in the case of **RANIGANJ CO-OPERATIVE BANK LTD. *v.* DCIT [2016] 73 taxmann.com 90 (Kolkata - Trib.)** SEPTEMBER 2, 2016

FACTS:

1. The assessee, being a co-operative bank, for assessment year 2008-09 has received dividend income out of UTI investments made in earlier years and also partly invested in the year under assessment. The AO, while completing assessment u/s 143(3) invoked rule 8D read with section 14A of ITA and disallowed interest under rule 8D(2)(ii) and administrative and other expenses under rule 8D (2)(iii). The claim of the assessee that it has not incurred any expenditure for the purpose of earning dividend income and the capital is adequate to cover the investment in mutual funds were negated by the AO.

2. CIT(A) confirmed the order of AO rejecting the contention of the assessee that i) AO has not recorded any satisfaction while invoking rule 8D read with section 14A of ITA ii) no expenditure has been incurred for earning dividend income and iii) its reliance on **GODREJ & BOYCE 328 ITR 81 (Bom.)** that no disallowance on interest u/s 14A where the capital of the assessee is adequate to cover the investments or where there is no nexus for the investments made out of the borrowed funds.

3. Aggrieved appeal has been filed before ITAT and decision has been rendered for the assessment year 2008-09 and also for the assessment year 2009-10, wherein disallowance has also been made u/s 14A even where there was no receipt of dividend (exempted) income in that year.

ITAT DECISION:

The expression 'shall' in section 14A (2) shall be read as 'may':

4. Sec. 14A(2) of ITA reads that "The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed"; a plain reading of the expression enunciates that when the claim of expenditure has not been accepted by AO, it is not mandatory for him to invoke the method of calculation prescribed by Rule 8D(2) of the Rules, but he is free to make the disallowance on any reasonable basis. In other words, Rule 8D is not automatic and the methods prescribed thereunder ought to be taken as a measure of last resort. The expression `shall' used in section 14A (2) shall be read as `may'.

No disallowance on interest; however the claim that no expenses were incurred not accepted by ITAT:

5. Considering the availability of funds for investment, it is held that disallowance of interest will not arise; however ITAT negated the claim that no expenditure were incurred during the year for earning the exempted income and recomputed the disallowance for administrative and other expenses under rule 8D(20(iii) being 0.5% on average of UTI investments.

Sec 14A cannot be invoked in a year where there was no exempted income:

6. For the assessment year 2009-10 it has been held that no disallowance of expenses u/s. 14A of ITA since no income was earned during the year.

III. Whether income from licensing of property is taxable under the head 'income from business' or income from house property?

The issue came up for consideration in the case of **BOMBAY PLAZA (P.) LTD. *v.* ACIT, Circle-5, Kolkata [2016] 73 taxmann.com 91 (Kolkata - Trib.)** SEPTEMBER 2, 2016

FACTS:

1. The main objects of the assessee, being a private limited, envisages 'acquiring properties by way of purchase, lease and license and further leasing or sub-leasing, licensing or sub-licensing of these properties'; on 16.04.1991 it entered into a leave and license agreement with M/s. East India Hotels Limited to acquire under a license an area of 9000 sq. in Hotel Oberoi Towers, Mumbai, for a tenure of 50 years at an agreed monthly license fees, for the purpose of using the same as shopping centre.

2. The assessee, intern, licensed the area to various licensees with a condition that each licensee shall subscribe specific number shares in the licensor company apart from paying monthly charges, which termed as 'contribution from shops'. The assessee also provided various services like air-conditioning, telephone services, maintenance, electricity, water, sanitary, security etc. the consideration for such services are also included in the monthly contribution charges as determined by its Board of Directors. These contributions have been offered as business income and the license fees paid by the company has been claimed as an expenditure of business.

3. While making assessment U/s 143(3) for the assessment year 2007-08, the AO by relying on the decision of apex court in the case of **CIT v. PODDAR CEMENT LTD.226 ITR 625** assessed the income as 'Income from Property' on the premise that the assessee has an

irrevocable right of 50 years over the shopping space, which in view of section 27(iiib) deemed the assessee to be owner of space licensed and, therefore, income accrued over this property rights are property income.

4. CIT (A) confirmed the order of AO and on further appeal to ITAT;

ITAT DECISION:

5. Considering the objects of the assessee and the facts and circumstances of the case, it is concluded that the assessee carried on a systematic and regular activity in the nature of business and therefore the income from granting the premises on sub-license was to be assessed under the head income from business. The concept of deemed owner u/s.22 read with Sec.27 (iiib) of the Act, no longer assumes importance for this purpose.

BUTTRESSES/GROUNDS for the DECISION:

If the main objects of the assessee is leasing or licensing of properties, income therefrom is taxable as business income:

6. Where rent is the main source of income or the purpose for which the company is incorporated should be to earn income from rent, then such rental income shall be taxable under the head 'Profits and Gains of Business or Profession'. - Civil Appeal No.6437 of 2016 dated 11.08.2016. **RAYALA CORPORATION PVT. LTD. v. ACIT [SC]** *by referring the case of* **CHENNAI PROPERTIES AND INVESTMENTS LTD. V CIT 373 ITR 673(SC)**

7. Where the main object of the assessee was acquiring on license properties and giving them on sub-license and deriving income therefrom, such income from sub-licensing has to be regarded as income under the head 'Income from Business' - **SHAM BURLAP CO. LTD v. CIT 380 ITR 151 (Cal).**

AUTHORS' NOTE:

Lease Vs License:

8. A lease is a transaction with respect to immovable property and creates a right to enjoy such property for a certain term and for consideration on the conditions mentioned in it, whereas a license is a mere permission to do something without transfer of an interest.

9. In case of lease, the right to possess and enjoy the property is transferred in favour of the lessee and he acquires interest through the conveyance of lease, whereas in the case of license, the licensee is not having any property rights and further he cannot defend the possession in his own name.

10. The lease does not come to an end either on the death of lessor or lessee, whereas a license comes to an end with the death of either grantor or the grantee.

Leasing right, whether construed as 'property' for the purpose of capital gains:

11. The expression ' Property of any kind' used in section 2(*14*) of ITA has wider implications. A right to obtain conveyance of immovable property is also a 'property' contemplated by section 2(*14*) of ITA - **CIT v. TATA SERVICES LTD. [1980] 122 ITR 594 (Bom.)**. The word 'property' does not mean merely physical property, but also means the right, title or interest in it - **CIT v. DAKSHA RAMANLAL [1992] 197 ITR 123 (Guj.)**. Interestingly for the purpose of invoking section 50C whether lease rights are included in the expression ' 'Capital asset being land or building or both' it has been held that lease rights are not applicable in a land - **ATUL G. PURANIK v. ITO [2011] 132 ITD 499 (Mum.)**

12. Giving up of the right to claim specific performance by conveyance in an immovable property amounts to relinquishment of a right in ' Capital asset', accordingly, it is a transfer of capital asset within the meaning of the Act - **CIT v. VIJAY FLEXIBLE CONTAINERS [1990] 48 Taxman 86 & CIT v. Smt. LAXMIDEVI RATANI [2008] 296 ITR 363 (MP)**.

13. A lease consists of a right of possession *cum* use of property owned by some other person. The leasing out of a capital asset for exploitation by the lessee like mining lease amounts to transfer of capital asset - **A.R. KRISHNAMURTHY & A.R.RAJAGOPALAN v. CIT [1982] 133 ITR 922 (Mad.); RAJENDRA MINING SYNDICATE v. CIT [1961] 43 ITR 460 (AP)**

14. Leased out of plots carved out for a period of 99 years for a consideration of 'salami' or `premium' is subject to capital gains as it amounts to transfer of property - **R.K. PALSHIKAR (HUF) v. CIT [1988] 172 ITR 311 (SC)**

15. Where lease right was surrendered by the lessee and compensation was received for premature termination of the lease, it is capital gains taxable - **CIT v. PRAMIA ENGG. (P.) LTD. [1992] 63 Taxman 579 (Cal.)**.

IV. Whether clause (c) to section 200A substituted by the Finance Act, 2015 with effect from 1-6- 2015 empowers the AO to charge/collect fees under section 234E prospectively and not prior to 01.06.2015?

The issue came up for consideration in the

case of **GAJANAN CONSTRUCTIONS *v*. DCIT, GHAZIABAD [2016] 73 taxmann.com 380 (Pune - Trib.),** SEPTEMBER 23, 2016

FACTS:

1. Bunch of appeals filed by different assessee's against the orders of CIT (A) relating to different assessment years on the common issue whether intimation issued under section 200A of the Act and / or order passed under section 154 of the Act in charging fees payable under section 234E of the Act is valid?

2. In all the appeals CIT (A) held that the appeal of assessee was not maintainable, in view of the ratio laid down by the Hon'ble Bombay High Court in **RASHMIKANT KUNDALIA v. UNION OF INDIA [2015] 54 Taxman.com 200 (Bom),** in which case by upholding the constitutionality of section 234E, it is held that the delay on the part of the deductor in furnishing the TDS statement causes delay in issue of refund to the deductees and puts extra burden on all concerned.

ITAT DECISION:

3. The amendment to section 200A (1) of ITA is procedural in nature and shall be applied prospectively; therefore intimations issued by AO prior to 01.06.2015 by way of raising demand u/s 234E of ITA are not valid.

4. It is further held that intimation issued by the AO after processing the TDS returns is appealable under section 246A(1)(a) and (c) of ITA since the demand raised by way of charging of fees under section 234E of the Act is equivalent to the demand raised u/s 156, which is generally appealable.

SCHEME OF TDS PROVISIONS:

5. As per 200 of ITA the deductor has to prepare a statement in such form and verified in such manner and shall deliver statement within such time as may be prescribed. Rule 31A of the Rules provided the time limit for the furnishing of statement for tax deduction at source on quarterly basis. in addition to interest u/s 200(1A) of ITA both these amounts, clause (c) to section 200A (1) (b) of ITA, there is a levy in the form of additional fees u/s 234E of ITA, with effect from 01.07.2012, for the default in furnishing the statements of tax deducted at source.

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RECENT DECISIONS IN EXCISE

CA. B.DEBASIS NAYAK & CA. SRIHARI V.K.

Debit notes raised for excess amount of material used – excise duty not payable prior to 1st July 2000 but payable thereafter as valuation is based on Transaction value

In the case of **CCE vs Hyundai Unitech Electrical Transmission Ltd 2016-TIOL-2749-CESTAT-MUM**, the Taxpayer manufactured Electrical Transmission Towers (ETT) of a specified weight and discharged Central Excise duty as per the invoices value. Subsequently, they raised debit note on the purchaser for excess amount of material used by them in manufacturing of such ETT and recorded the same in the account books as amount receivable from purchaser.

Revenue authorities demanded excise duty on the said amount during the scrutiny of the balance sheet and ledger account. The demand was confirmed for the period April 1999 to March 2003. However, Commissioner (A) set aside the order and the Revenue has filed an appeal before Tribunal

The Tribunal held that for the period April 1999 to 30th June 2000, provision of Section 4 of the Central Excise duty, 1944 would apply and the duty was leviable on normal price. In the case in hand, taxpayer cleared goods as per contracted price which was normal price as per said section 4. Tribunal held that no addition was required for the period April 1999 to 30th June 2000.

With respect to the period Post July 2000, the Tribunal observed that Section 4 has been amended to bring in the concept of transaction value. The demand of duty arises on any price payable for the goods. In view of this Tribunal held that the taxpayer is liable to discharge duty on the debit notes raised by them for the period post July 2000. However, the Tribunal also held that the duty liability cannot be demanded entirely on the amounts of debit notes and the duty should be determined on cum-duty basis.

Activities of decoiling, straightening and cutting, bending and bundling of TMT Bars and Rods will not amount to manufacture.

In the case of **CCE vs Casting India Inc. 2016-TIOL-2327-HC-JHARKHAND-CX** the issue before the High court is whether the activities of decoiling, straightening and cutting, bending and bundling of Bars and Rods undertaken by the taxpayer in terms of the Work Contract placed upon them amounts to manufacture chargeable to excise duty.

The High court held the following:

- If the characteristics of the raw material and final product remain same before and after processing, there is no manufacture, even though, there is process of unwinding, cutting/slitting and packing;
- Even if the TMT Bars/Rods fetch more price in market than TMT coil that does not mean that there is manufacturing because, essentially article is the same. The increase in price may be on account of labour involved, mind set and satisfaction of the customers or demand in the market for TMT bars/rods in comparison with TMT coils.
- Merely because TMT coil is classified under Entry no. 72.13 and TMT bars/ rods are classified under Entry no. 72.14 it does not mean that process applied upon TMT coil i.e. de-coiling, straightening and cutting into desirable sizes, tantamount to manufacturing of TMT bars and rods.

Last date of filing appeal being Sunday, appeal filed on next day, Monday, cannot be said to have been delayed but filed in time in view of s.10 of General Clauses Act, 1897

In the case of **Glenmark Generics Limited Vs CCE & ST 2016-TIOL-2572-CESTAT-MUM**, the taxpayer had received order of adjudicating authority on December 17, 2008 and the Commissioner (Appeal) was to be filed within 60 days from receipt of order. However, the appeal was filed on February 16, 2009 while the last date was February 15, 2009 which was a Sunday. Taxpayer's appeal was dismissed by the Commissioner (Appeals) as no application was filed for condonation of delay.

The Tribunal observed that Section 10 of the General Clauses Act, 1897 states that where the last date of filing the appeal is Sunday, then the next working day shall be the last date for filing the appeal. Tribunal, after reverting to the above section, held that the appeal was filed by the taxpayer within the time period of 60 days and the delay is condonable. The impugned order holding that the appeal has been filed beyond the period of limitation is set aside and the matter was remanded back to the Commissioner (Appeals) to pass order on merits after giving an opportunity of being heard to the taxpayer.

Place of removal is depot of the taxpayer - Discounts allowed in the price contracted for sale from the depot would be allowable as a deduction from such price

In the case of **M/s Havells India Ltd Vs Commissioner of Central Excise LTU, Delhi 2016-TIOL-2527-CESTAT- DEL**, the tax payer made a request for provisional assessment under Rule 7 of the CER, 2002

and the same was ordered on the ground that the taxpayer was claiming various types of discounts such as cash discount, quarterly and annual turnover discount etc. and though the fact of extending these discounts were known at the time of removal, the actual quantification could be arrived at only after achieving the sales target. The provisional assessment was finalized by the commissioner holding that the taxpayer will not be entitled to the deduction of discounts in respect of goods sold from their depot after their clearance from the factory.

On an appeal filed before the tribunal, it observed that Section 4(1) (a) of CEA is not applicable as the initial clearance of goods from the factory to depot does not involve actual sale and valuation should be done in accordance with Rule 7 of the Valuation Rules. The tribunal relied on the decision of the apex court in the **Purolator case 2016-TIOL-193-SC-CX** wherein it was held that duty needs to be charged at the transaction value which was the agreed contractual price and discounts forming part of sales agreement will need to be granted even if such discounts are not passed on. Thus it has been held that the place of removal is the depot of the tax payer and not his factory gate and discount allowed in the contracted sale price would be allowable as deduction.

Amount received for modification/ replacement of leaf springs before fabricating body on said chassis not to be included in the assessable value for body building on chassis

In the case of **Hyva India Pvt Ltd vs CCE, 2016-TIOL-2725-CESTAT-MUM**, the taxpayer is primarily engaged in the activity of body building on the chassis. Taxpayer discharges excise duty liability on the body which is built on the chassis and for which the appellant avails the benefit of Notification No. 3/2001-CE and 6/2002-CE, as the case may be.

Taxpayer replaces certain parts of the chassis in order to execute their work. Taxpayer receives some consideration from the manufacturer of the chassis towards such replacements. Revenue authorities sought to include the amount received from the manufacturer in the value of body building. The lower authorities upheld the demand and the taxpayer is before the Tribunal against the order of lower authorities.

The Tribunal observed that the chassis is manufactured by the motor-vehicle manufacturer along with the leaf springs for fabrication of body. Even if the modification/replacement of the leaf spring is considered as a manufacturing activity, it would be manufacturing activity on the chassis and not on the body building activity. As per notification 3/2001-CE and 6/2002-CE, value of the chassis needs to be excluded, therefore there cannot be any demand on the said value/amount received by the appellant for modification/ replacement of the leaf springs before fabricating the body on the said chassis. The Tribunal set aside the order passed by the lower authorities.

Footwear supplied in bulk to industries would be valued under section 4A of Excise Act

In the case of **CCE vs Arvind Footwear Pvt Ltd 2016-TIOL-2683-CESTAT-MUM**, the issue before the Tribunal is whether the footwear supplied to industries would be valued under section 4 or undersection 4A of the Central Excise Act, 1944. The Revenue authorities ordered to value under section 4 on the ground that the supply made to industry is in bulk and there is no requirement to declare the retail sale price in the bulk sale to industrial buyers. The Commissioner (Appeals) set aside the order of lower authorities, both on merits as well as on limitation. Revenue filed an appeal before the Tribunal against the above order.

The Tribunal observed that footwear supplied in packages to the industries is not eligible for exemption provided under Rule 34 of the Standards of Weights & Measures (Packaged Commodities) Rule, 1977 an the supplier is required to affix the MRP on each package of product. When the requirement to affix the MRP on packaged goods is made under Section 4A of Central Excise Act, 1944, the valuation of the said goods shall be covered by Section 4A. The Tribunal held that even though the supplies were made in bulk, in absence of exemption under Rule 34 of The Standards of Weights & Measures (Packaged Commodities) Rule, 1977, the valuation of footwear shall be correctly made under Section 4A and not under Section 4 of the Central Excise Act, 1944. Tribunal upheld the decision of the Commissioner (Appeal).

Customs

Question of addition of royalty to assessable value of imported goods becomes irrelevant if no royalty was ever paid

In the case of **EMS Technologies Pvt Ltd vs CC and CCE 2016-TIOL-2682-CESTAT-MUM** the taxpayer imported goods from foreign partners in the joint venture. Said imports were picked up for examination by GATT Valuation Cell. The memorandum of understanding between the parties provided that the royalty would be payable when the joint venture has become healthy and financially sound. Revenue authorities sought to include the value of royalty in the value of imported goods. The taxpayer is before the Tribunal against an order passed by the Commissioner (Appeal) remanding the matter back to the Adjudication officer.

The Tribunal observed that as per the memorandum of understanding between the parties to Joint venture, royalty is payable only when the joint venture becomes healthy and financially sound. No royalty has been paid yet. The Tribunal further observed that the order-in-original has not examined the impact of relationship under Rule 4(3) of the Customs Valuation Rules, 1988, if any.

The Tribunal disposed the appeal on the ground that if no royalty have been paid, deciding on the matter is only for an academic interest.

If refund application filed by party is incomplete, Refunding Authority can always return back same. Interest on refund order allowed.

In the case of **Shelf Drilling International Inc. vs UOI 2016-TIOL-2187-HC-MUM-CUS**, the taxpayer challenges the order dated 29 April 2016 passed by adjudicating authority holding that they are not entitled to any interest on the refund granted under the provisions of Section 27A of the Customs Act, 1962.

The taxpayer imported certain goods and could not claim exemption for want of prescribed documents. Taxpayer paid the applicable duty on October 14, 2002 and took clearance of the said goods. The taxpayer filed a refund application on April 4, 2003.

The Assistant Commissioner of Customs returned the refund claim on May 6, 2003 on the ground that claim is premature for want of the certain documents (i.e. Essentiality Certificate).

Thereafter, many years later, taxpayer submits a letter dated June 20, 2011 resubmitting all the documents required for the claim. After several rounds of litigation, the refunding authority passed refund order on **June 23, 2014.** However, interest was not granted.

The taxpayer is before the High court for the interest on the refund allowed. The High Court observed that it is clear if a refund is granted and not given to the applicant within three months from the date of receipt of the refund application, then the applicant would automatically be entitled to interest on the said refund, from the date immediately after expiry of three months from the date of receipt of such refund application, till the date of the refund of such duty.

The taxpayer observed that the taxpayer had made an application for refund on April 4, 2003. However, this application was returned back as premature for want of submission of the Essentiality Certificate with the refund application. Even though this fact (of non-submission of documents) is disputed by the taxpayer, the taxpayer, by letter dated June 20, 2011 enclosed copies of the relevant documents. The High court held that the taxpayer would be entitled to interest on the refunded sum from the date immediately after expiry of three months from **20th June, 2011 till 11th July, 2014** (being the date when the refund was actually paid to the Petitioner).

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ABOUT DEBENTURES UNDER COMPANIES ACT 2013

CS. S. DHANAPAL

Debenture under the Companies Act 2013 is primarily construed as one of the capital market instruments used to raise funds from corporate and friends and public subject to the limitation and conditions as prescribed under the Act which acknowledges a loan and is executed under signature of a Director of the company duly authorized by the Board of Directors for the purpose of issuing debentures. The Debenture deed / certificate generally construed as a document which contains provisions as to payment, of interest and the repayment of principal amount and giving a charge on the assets of a such a company, which may give security for the payment over the some or all the assets of the company. Debenture is an important source of funding to the financial requirements of the company.

NOW LET US GO THROUGH THE PROVISIONS OF THE COMPANIES ACT 2013 TO UNDERSTAND WHAT IS THERE IN STORE

"Debenture" includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not;

- Debentures may be for a fixed term or repayable on demand;
- Debenture is not part of Share Capital however debentures certificates are issued for debenture holders;
- Debenture holders do not have any right to vote at any meeting;
- Debenture is a loan for the company which may be unsecured or secured by way of creating charges on the assets of the company or mortgage any property;
- Debentures carry interest at a fixed rate and interest at such rate shall be paid by the company whether it makes profit or not;

[SECTION 2(30)]

CATEGORIES OF DEBENTURE UNDER COMPANIES ACT 2O13

The Debentures can be categorised differently based on the nature and terms and conditions governing the issue of debentures and benefits or privileges attached to it

- Unsecured Debenture:
- Secured Debenture:

- Non-convertible Debentures:
- Partly Convertible Debentures:
- Fully Convertible Debenture:
- Redeemable Debentures:
- Irredeemable Debenture:
- Registered Debentures:
- Unregistered Debentures:

PROVISIONS RE TO ISSUE AND REDEMPTION OF DEBENTURES (SECTION 71)

General Provisions

- No company shall issue any debentures carrying any voting rights.
- A company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption provided that a special resolution has been passed at a general meeting for this purpose.
- A company shall pay interest and redeem the debentures in accordance with the terms and conditions of their issue.

a) Conditions for Issue of Secured Debentures

Particulars	Conditions
Term	10 years subject to exceptions given to few infrastructure companies.
Security	Issue of debentures shall be secured by the creation of a charge, on the properties or assets of the company or its subsidiaries or its holding company or its associate companies, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon. The charge shall be created in favour of the debenture trustee. NOTE : besides creation of charge on the assets or properties of the company for issue of secured debentures, the properties and assets of its subsidiaries, holding company and associate company are also included **[vide the Companies (Share Capital and Debenture) Third Amendment Rules, 2016 with effect from 19.07.2016]**

Debenture Trustee	Debenture trustee shall be appointed before: • The issue of prospectus; or • Letter of offer for subscription of its debentures; Within 3 months from the closure of issue or offer, debenture trust deed shall be executed for protection of interest of the debenture holders in Form SH.12 or as near thereto as possible;

NOTE : *The requirement of execution of trust deed within 60 days of allotment of debentures has been changes to within 3 months of closure of issue of offer - vide* ***Companies (Share Capital and Debentures) Amendment Rules, 2015 effective from 18.03.2015***

b) Conditions for appointment of debenture trustee

No company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding 500 for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees after complying with the conditions given below:

Particulars	Conditions
Name of debenture Trustee to be included in the prospectus / letter of offer	The names of the debenture trustees shall be stated in: • The prospectus; or • The letter of offer inviting subscription for debentures; and • In all the subsequent notices; or • Other communications sent to the debenture holders
Written Consent from Debenture Trustee	Written consent shall be obtained from debenture trustee(s) prior to his / their appointment. Further a statement to that effect shall appear in the prospectus or letter of offer issued for inviting the subscription of the debentures.
Who cannot be appointed as Debenture Trustee	No person shall be appointed as a debenture trustee, if he: • Beneficially holds shares in the company; • Is a promoter, director or any other officer or an employee of the company or its holding, subsidiary or associate company; • Is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;

	• Is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company; • Has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon; • Has any pecuniary relationship with the company amounting to 2% or more of its gross turnover or total income or `50 Lakhs or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year; • Is relative of any promoter or any person who is in the employment of the company as a director
Casual Vacancy in the office of Debenture Trustee	• Casual Vacancy in the office of debenture trustee may be filled by the Board; • If the vacancy continues - the remaining trustee(s) may act; • If such vacancy is caused by resignation of a debenture trustee - such vacancy shall only be filled with the written consent of the majority of the debenture holders
Removal of Debenture Trustee	Approval of holders of not less than 3/4th in value of the outstanding debentures is required to be obtained at their meeting, for removal of any debenture trustee before the expiry of his term.

a) Duties and Powers of Debenture Trustees

- A debenture trustee shall take steps to protect the interests of the debenture holders and redress their grievances and more specifically it shall be the duty of every debenture trustee to-

o Satisfy himself that the prospectus or letter of offer does not contain any matter which is inconsistent with the terms of the issue of debentures or with the trust deed;

o Satisfy himself that the covenants in the trust deed are not prejudicial to the interest of the debenture holders;

o Call for periodical status/performance reports from the company;

o Communicate promptly to the debenture holders defaults, if any, with regard to payment of interest or redemption of debentures and action taken by the trustee therefor;

- Appoint a nominee director on the board of the company in the event of:

  (i) Two consecutive defaults in payment of interest to the debenture holders; or
  (ii) Default in creation of security for debentures; or
  (iii) Default in redemption of debentures.

- Ensure that the company does not commit any breach of the terms of issue of debentures or covenants of the trust deed and take such reasonable steps as may be necessary to remedy any such breach;

- Inform the debenture holders immediately of any breach of the terms of issue of debentures or covenants of the trust deed;

- Ensure the implementation of the conditions regarding creation of security for the debentures, if any, and debenture redemption reserve;

- Ensure that the assets of the company issuing debentures and of the guarantors, if any, are sufficient to discharge the interest and principal amount at all times and that such assets are free from any other encumbrances except those which are specifically agreed to by the debenture holders;

- Do such acts as are necessary in the event the security becomes enforceable;

- Call for reports on the utilization of funds raised by the issue of debentures;

- Take steps to convene a meeting of the holders of debentures as and when such meeting is required to be held.

- Ensure that the debentures have been converted or redeemed in accordance with the terms of the issue of debentures;

- Perform such acts as are necessary for the protection of the interest of the debenture holders and do all other acts as are necessary in order to resolve the

- The **meeting of all the debenture holders** shall be convened by the debenture trustee on

- Requisition in writing signed by debenture holders holding at least 1/10th in value of the debentures for the time being outstanding ;

- The happening of any event, which constitutes a breach, default or which in the opinion of the debenture trustees affects the interest of the debenture holders.

- Where at any time the debenture trustee comes to a conclusion that the assets of the company are insufficient or are likely to become insufficient to discharge the principal amount as and when it becomes due, the debenture trustee may file a petition before the Tribunal and the Tribunal may, after hearing the company and any other person interested in the matter, by order, impose such restrictions on the incurring of any further liabilities by the company as the Tribunal may consider necessary in the interests of the debenture-holders.

b) Liabilities of Debenture Trustees

Any provision contained in a trust deed for securing the issue of debentures, or in any contract with the debenture-holders secured by a trust deed, shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, any liability for breach of trust, where he fails to show the degree of care and due diligence required of him as a trustee, having regard to the provisions of the trust deed conferring on him any power, authority or discretion. However, the liability of the debenture trustee shall be subject to such exemptions as may be agreed upon by a majority of debenture-holders holding not less than 3/4th in value of the total debentures at a meeting held for the purpose.

c) Inspection of Trust Deed

A trust deed for securing any issue of debentures shall be open for inspection to any member or debenture holder of the company, in the same manner, to the same extent and on the payment of the same fees, as if it were the register of members of the company and a copy of the trust deed shall be forwarded to any member or debenture holder of the company, at his request, within 7 days of the making thereof, on payment of necessary fee.

d) Creation of Debenture Redemption Reserve

The company shall create a Debenture Redemption Reserve (DRR) for the purpose of redemption of debentures out of the profits of the company available for payment of dividend and the amount credited to such account shall not be utilized by the company except for the redemption of debentures.

Where a company intends to redeem its debentures prematurely, it may provide for transfer of such amount in Debenture Redemption Reserve as it necessary for redemption of such debentures even if it exceeds the limits specified in the sub-rule **[vide the Companies (Share Capital and Debenture) Third Amendment Rules, 2016 with effect from 19.07.2016]**

REMEDY FOR DEFAULT AND PENAL PROVISION:

- Where a company fails to redeem the debentures on the date of their maturity or fails to pay interest on the debentures when it is due, the Tribunal may, on the application of any or all of the debenture-holders, or debenture trustee and, after hearing the parties concerned, direct, by order, the company to redeem the debentures forthwith on payment of principal and interest due thereon.
- Contract with the company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.
- If any default is made in complying with the order of the Tribunal under this section, every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 3 years or with fine which shall not be less than ' 2,00,000/- but which may extend to '. 5, 00,000/-, or with both.

Non-applicability:

The provisions relating to issue and redemption of debentures, as provided above, shall not apply to

- Any amount received by a company against **issue of commercial paper** or any other similar instrument issued in accordance with the guidelines or regulations or notification issued by the Reserve Bank of India – ***vide Companies (Share Capital and Debentures) Amendment Rules, 2015 effective from 18.03.2015***
- Offer of **foreign currency convertible bonds** or **foreign currency bonds** issued in accordance with the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 or regulations or directions issued by the Reserve Bank of India, unless otherwise provided in such Scheme or regulations or directions.*

Wrap up:

Though debenture is a good source of raising fund for needs of the company as alternate to Bank loans, equity shares, and bonds being other sources used by companies to raise money, those specific requirements need to be followed and conditions to be met with under the provisions of the Companies Act 2013 to make any instrument issued by the company to qualify as debenture under the provisions of the Act in order to qualify itself as exempted deposit. Therefore, Corporate and Professionals shall ensure that the criteria prescribed for issue of debentures are duly met with in such a way to ensure they reap the real benefits as contemplated under the Companies Act 2013.

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HOW SCEPTICAL IS SCEPTICAL ENOUGH FOR A QUALITY AUDIT?

- 27 September 2016 By Alex Malley

The English Court of Appeal once stated that the auditor "is a watchdog, but not a bloodhound." Since that famous judgment by Lord Justice Lopes in favour of the auditor in the Kingston Cotton Mills case 120 years ago expectations of auditors have evolved significantly.

Being a 'watchdog' may no longer be enough. It is now generally accepted that to be an effective auditor, you need to be able to exhibit a healthy dose of 'professional scepticism.' In fact, regulators and standard setters have been calling for an increased level of professional scepticism from auditors to improve audit quality.

Auditing standards describe professional scepticism as "an attitude that includes a questioning mind, being alert to conditions which may indicate possible misstatement due to error or fraud, and a critical assessment of evidence."

Defining a concept is always fraught but it is reasonable to question the broad spectrum of behaviours that could fit within this definition.

A questioning mind could range from the "watchdog" approach: posing the question but accepting reasonable answers at face value; to the "bloodhound" approach: pursuing every avenue of enquiry exhaustively.

If professional scepticism is to be a useful characteristic of auditors, the lack of clarity as to what scepticism is, how it interacts with the ethical principles of the profession and why it is necessary needs to be addressed.

The International Auditing and Assurance Standards Board (IAASB) has been concerned about professional scepticism, fuelled by regulators querying whether auditors too readily accept management's position.

The IAASB recently invited comment on audit quality and asked how professional scepticism could be enhanced. This was a positive step and now the IAASB is working with other standard setters on joint initiatives to address stakeholder feedback.

Our organisation suggested numerous avenues for improvement including the need for the audit team to have the competence and industry knowledge required for it to have an effective understanding of the client, and the confidence to challenge the client appropriately.

Recent synthesis research on professional scepticism commissioned by CPA Australia identifies that professional scepticism can be heightened by increased

The research suggests that the most productive means of increasing auditors' distrust is to provide perceived rewards or positive consequences for the auditor in displaying professional scepticism. This could be encouraged within the audit team through inclusion of professional scepticism in performance reviews, positive mentoring, encouragement of questioning, challenging the evidence and escalating concerns.

Conversely, if rewards for the audit team are weighted too heavily towards managing the budget or meeting a deadline, it can discourage the auditor from applying an appropriate level of professional scepticism, as this may necessitate further enquiries and gathering further evidence.

Encouraging and training future audit professionals to challenge and question while they are at university is an important component of instilling a culture of professional scepticism. Auditors would also benefit from insights from liquidators after they have examined a corporate collapse and forensic accountants once they have identified how a fraud has been perpetrated. There is certainly scope to better systemise usage of these experiences to heighten professional scepticism.

Current audit practice involves selective testing based on a risk assessment and application of materiality. As a consequence, regardless of the auditor's professional scepticism, material misstatements or fraud can still be missed.

If a company fails without any warning signs, the spotlight often turns on the auditor, with questions posed about what the auditor was doing and why they didn't identify the underlying problem. Moves for enhancing documentation requirements to demonstrate professional scepticism need to be assessed carefully. Specifying in too much detail what should be documented risks a negative effect on audit quality by promoting a 'tick box' or compliance mentality at the expense of the exercise of effective professional judgement.

The answer may not only lie in whether an appropriate level of professional scepticism was exercised and the audit quality was sufficient, but whether the scope of the audit meets users' needs.

Maybe we need to be asking if auditors should shift focus from historical information to forward-looking information, such as the appropriateness of the business model or on how operational and business risks facing the company are managed.

All things considered, Lord Justice Lopes in that historic judgement from 1896 was

firmly of the view that "Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud, when there is nothing to arouse their suspicion."

While this view may still resonate to some extent today, expectations of auditors have certainly shifted. Advances in technology, the evolution of online trading and the 24-hour news cycle are all realities of the growing complexity of the capital markets in which auditors operate. Bringing a questioning mind to an audit has never been more critical. And with ongoing efforts to improve audit quality - from the profession and regulators - we're making strides in informing the evolving needs of investors and building confidence in the capital markets.

Alex Malley is chief executive of CPA Australia.

Source : http://www.theaccountant-online.com

Direct Tax Notifications

Notification No.	Dated	Particulars
86/2016/F.No.133/23/2015-TPL/ SO 3075(E)	29 Sept , 2016	Section 145 of the Income - Tax Act, 1961 - Method of Accounting - Revised Income Computation and Disclosure Standards (ICDS)
87/2016,F.No.133/23/2015-TPL]/SO 3079 (E)	29 Sept , 2016	Section 145 of the Income - Tax Act ,1961 - Method of Accounting - Revised Income Computation And Disclosure Standards (ICDS) Notification
88/2016/F.No.133/23/2015-TPL	29 Sept , 2016	Income tax (Twenty Third Amendment) Rules, 2016 - Amendment in Form No. 3CD - Inclusion of clauses for ICDS Reporting
90/2016/F.No.370142/26 2016- TPL	5 Oct , 2016	Income - tax (25th Amendment) Rules , 2016. Application - Grant of Immunity Section 270AA
94/2016/F.No. 370133/30/ 2016-TPL	17 Oct, 2016	Determination of amount received by the company in respect of share under section 115QA

EXCEL TIPS

I. Entering Text/Contents in two lines within a cell

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Many a time, we observe that we need to display contents/ description in a cell into two lines.

For example, THE CHARTERED ACCOUNTANTS in one line and STUDY CIRCLE in the second line within the same Cell.

Solution used by most users is to format the cell with the "wrap text" option and then adjust the column, so that the width is just sufficient to display the description "THE CHARTERED ACCOUNTANTS ". This will cause the text "STUDY CIRCLE" to flow to the next line.

This method is not reliable as the presentation will appear only in the one's computer and the contents may run off to the next line if the users uses another resolution.

Contents / description can be maintained in two different lines within the cell under all conditions for which we need to use the **"ALT" key and "ENTER"** key together.

Steps to do the same:

1) Place the cursor after the word "THE CHARTERED ACCOUNTANTS" (either by editing the cell using the function key F2 OR point the mouse button at the formula bar immediately after the word "THE CHARTERED ACCOUNTANTS" and click on the left mouse button)

2) Press the button "ALT" together with the "ENTER" key. The text is immediately separated into two lines in a cell. Hit the "ENTER" key to confirm the change.

II. Entering Text/Contents in two lines within a cell using Formula

A line break in Excel can be used to end the current line and start a new line in the same cell.

As noticed above, "STUDY CIRCLE" is in the second row in the same cell. This has been done by inserting a line break in this text string.

For manually doing this, we can type Alt + Enter (after placing the cursor where we want the line break to be). But where we need to use the line break (i) in a Cell using formula or (ii) in a Cell where there is a formula, Alt + Enter would not work.

Here is how we do it in such scenario:

1. In the formula, where we want to insert a line break, we add **CHAR (10)**

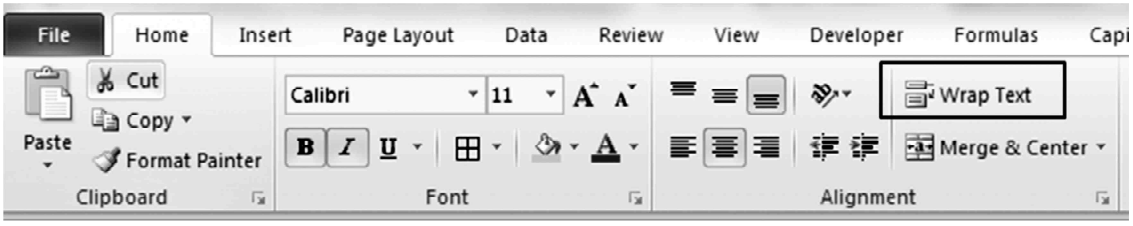
   for example, instead of = A1 & A2,

   we use = A1 & CHAR (10) &A2.

CHAR *formula returns the character based on the ASCII code. And 10 represents the ACSII code for a line break.*

2. Select the cell with the formula, go to Home -> Alignment -> Wrap Text

   - o If the Wrap Text is NOT applied, adding CHAR (10) would make no changes in the formula result.



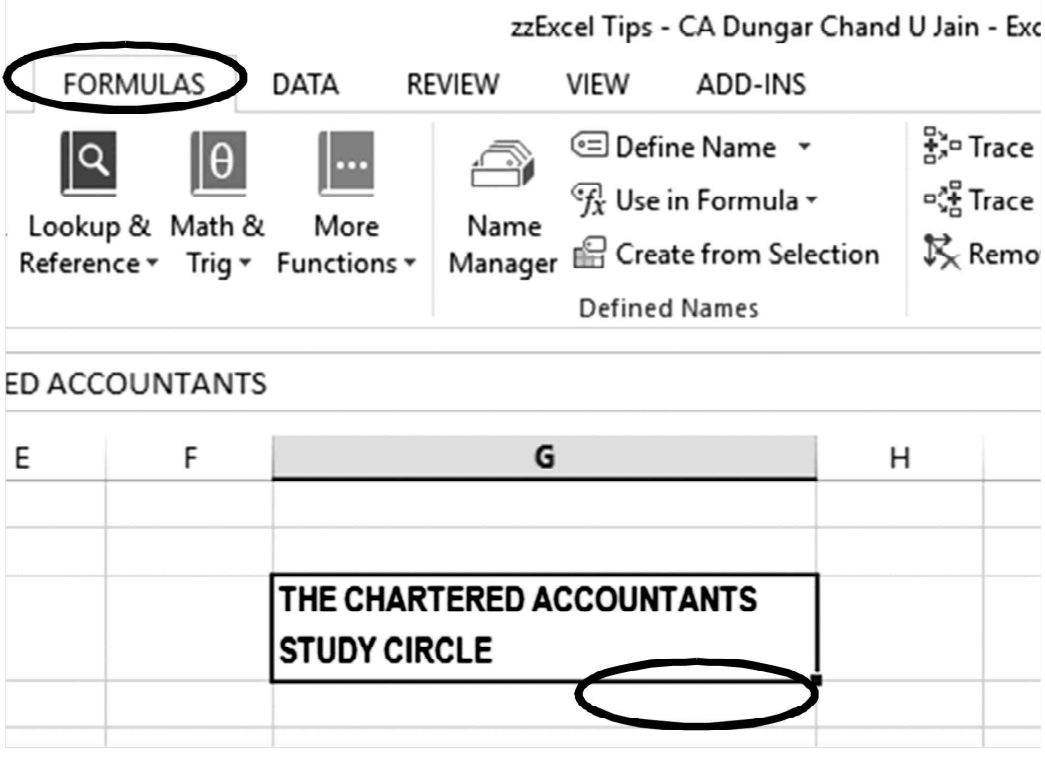
Note : use CHAR (13) instead of CHAR (10), if you are using Mac

III. Using Define Name Instead of CHAR (10)

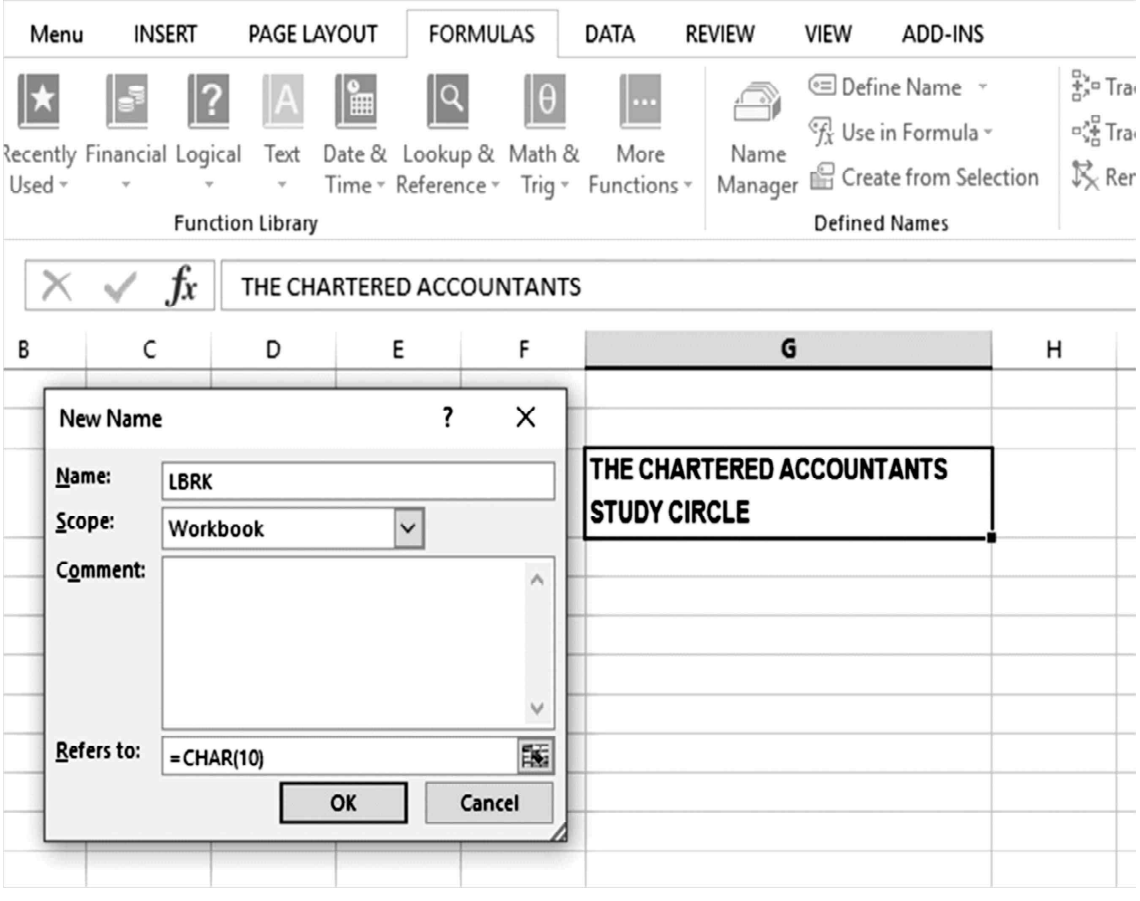
Instead of using CHAR (10) or CHAR (13) in Mac, an alternative way to assign a name is to create a defined name.

To do this:

- Go to Formulas -> Defined Name



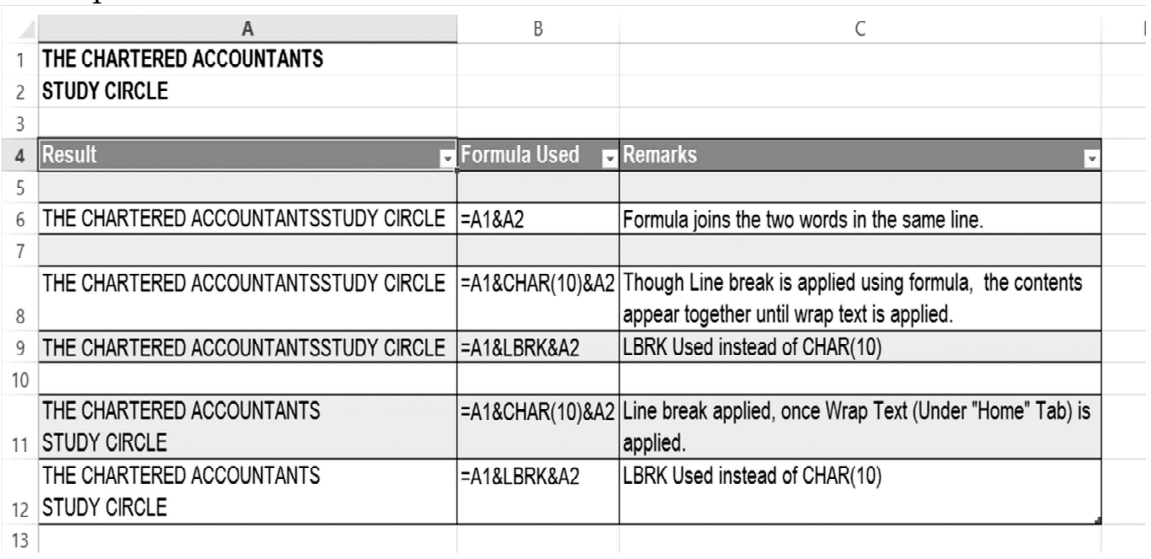
- In the New Name dialogue box, enter the following details:
    - o Name : LBRK (We can name it whatever we want but without spaces)
    - o Scope : Workbook
    - o Refers to : = Char(10)



- Click OK.

Now we can use =LBRK instead of = CHAR (10)

Example:



	A	B	C
1	THE CHARTERED ACCOUNTANTS		
2	STUDY CIRCLE		
3			
4	Result	Formula Used	Remarks
5			
6	THE CHARTERED ACCOUNTANTSSTUDY CIRCLE	=A1&A2	Formula joins the two words in the same line.
7			
8	THE CHARTERED ACCOUNTANTSSTUDY CIRCLE	=A1&CHAR(10)&A2	Though Line break is applied using formula, the contents appear together until wrap text is applied.
9	THE CHARTERED ACCOUNTANTSSTUDY CIRCLE	=A1&LBRK&A2	LBRK Used instead of CHAR(10)
10			
11	THE CHARTERED ACCOUNTANTS STUDY CIRCLE	=A1&CHAR(10)&A2	Line break applied, once Wrap Text (Under "Home" Tab) is applied.
12	THE CHARTERED ACCOUNTANTS STUDY CIRCLE	=A1&LBRK&A2	LBRK Used instead of CHAR(10)
13			

Aayakar Seva Kendra Contact Details for Tamilnadu as on 30th April , 2014			
Sl No	**State**	**City**	**Address Details**
1	**Tamilnadu**	**Chennai**	**Main Building, Aayakar Bhavan**
			121, M G Road, Nungambakkam, Pin Code - 600 034
2	**Tamilnadu**	**Coimbatore**	**Main Building**
			67-A, Race Course Road, Pin Code - 641018
3	**Tamilnadu**	**Krishnagiri**	**Income Tax Office**
			24, 4th Cross Co-Operative Colony, KRN Complex, Pin Code - 635 001
4	**Tamilnadu**	**Kumbakonam**	**Main Building**
			13, Krishnasamy Iyengar Road,, Gandhi Nagar
5	**Tamilnadu**	**Madurai**	**Annexe Building**
			2, V P Rathinasamy Nadar Road, Cr Bldg., Bibikulam, Pin Code - 625 002
6	**Tamilnadu**	**Salem**	**Old Building**
			3, Gandhi Road, Pin Code - 636 007
7	**Tamilnadu**	**Thanjavur**	**Main Building**
			100, Nanjikkottai Road,, Pin Code - 613 006
8	**Tamilnadu**	**Tiruchirappalli**	**Main/ Old Appeal/Annexe Bldg.,**
			New No.44, Old No.4, Williams Road, Cantonement, Pin Code - 620 001
9	**Tamilnadu**	**Vellore**	**Income Tax Office**
			2, Barracks Cross Street, Officers` Line, Pin Code - 632 001

CASC ANNOUNCES ITS 18TH ANNUAL RESIDENTIAL CONFERENCE

EXOTIC VENUE AT HAAILAND RESORT, GUNTUR

26th, 27th, 28th January 2017

- Interesting Topics
- Intellectual Content
- Eminent Speakers
- Entertainment Sessions

TRAVEL ARRANGEMENTS :

Train will be mode of Travel. We will be leaving Chennai on 25th January 2017 night and returning on 29th January 2017 morning.

DELEGATE / PARTICIPATION FEES - ALL INCLUSIVE RATES

- FOR DELEGATES (MEMBERS) : Rs. 9,500/-
- FOR DELEGATES (NON - MEMBERS) : Rs.10,500/-
  (Including One Year Membership Fee)
- FOR ACCOMPANYING SPOUSE/PERSONS : Rs. 8,500/-
- FOR CHILDREN (BETWEEN 5 TO 12) : Rs. 6,000/-
- NON RESIDENTIAL DELEGATE FEES : Rs. 3,000/-*

TERMS AND CONDITIONS :

Registration will be restricted to 120 on first come first booked basis based on Enrolment Forms Received.

*- Subject to Conditions

For Further Information Please Feel Free to Contact

- CA. R. Sundararajan : 9444393420
- CA. J. Murali : 9841028000