Price ₹ 80/- per copy

ETHICS EDUCATION EXCELLENCE

FOR MEMBERS ONLY

ALL INDIA FEDERATION OF TAX PRACTITIONERS JOURNAL

January 2014 | Volume 16 | No. 10

March of the professional

Tax World

In Pursuit of Knowledge

Quest

Nut Crackers

Happy Republic Day

ALL INDIA FEDERATION OF TAX PRACTITIONERS

215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020
Tel.: 22006342 | **Fax**: 22006343 | **E-mail**: aiftp@vsnl.com | **Website**: www.aiftponline.org

17TH NATIONAL CONVENTION HELD ON 26TH & 27TH DECEMBER, 2013 AT Y. B. CHAVAN AUDITORIUM, MUMBAI

Inaugural Session

Students from Smt. Kamla Mehta Dadar School for the Blind performing Saraswati Vandana. Also seen Master of Ceremony CA. Akbarally Merchant and Ms. Zenobia Ishwar Nankani.

Hon'ble Mr. Justice H. L. Gokhale, Judge, Supreme Court of India inaugurating Convention by lighting of lamp.

Mr. Kishor Vanjara, Chairman, Conference Committee delivering welcome address.

Mr. S. K. Poddar, National President addressing the gathering.

Mr. P. C. Joshi, Past President paying tribute to Late Shri B. C. Joshi, Past President, AIFTP.

Mr. Y. P. Trivedi, Sr. Advocate, Member of Parliament (Rajya Sabha) addressing the delegates.

Hon'ble Mr. Justice J. K. Ranka, Judge, Rajasthan High Court addressing the gathering.

Hon'ble Mr. Justice Rajesh Bindal, Judge, Punjab & Haryana High Court addressing the gathering.

Hon'ble Mr. Justice H. L. Gokhale, Judge, Supreme Court of India delivering Inaugural speech.

Dignitaries on Dais at Inaugural session. Seen from left to right S/Shri P. C. Joshi, Harish N. Motiwalla, Hon'ble Mr. Justice J. K. Ranka, Hon'ble Mr. Justice Rajesh Bindal, Kishor Vanjara, Hon'ble Mr. Justice H. L. Gokhale, Y. P. Trivedi (MP), S. K. Poddar, J. D. Nankani and Narayan P. Jain.

CONTENTS

ALL INDIA FEDERATION OF TAX PRACTITIONERS
215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020. • Tel.: 22006342
Telefax: 22006343 • E-mail: aiftp@vsnl.com • Website: www.aiftponline.org

Membership of AIFTP as on 15-1-2014

		Life Members			
	Associate	*Individual*	*Association*	*Corporate*	*Total*
Central	0	785	23	3	811
Eastern	3	1142	35	3	1183
Northern	0	924	17	0	941
Southern	1	869	13	5	888
Western	4	1680	33	16	1733
Total	**8**	**5400**	**121**	**27**	**5556**

Subscription Rates w.e.f. 1-4-2011

1. Life Membership of the AIFTP ` 2,500/-
   Subscription of AIFTP Journal (for 1 year) ` 600/-
   Subscription of AIFTP Journal (for 3 years) ` 1,500/-
2. For Non-Members
   Subscription of AIFTP Journal (for 1 year) ` 800/-
   Subscription of AIFTP Journal (for 3 years) ` 2,000/-
   Single copy of the AIFTP Journal ` 80/-
3. Corporate Membership

Nature of fees	Type I (5 Yrs.) `	Type II (10 Yrs.) `	Type III (15 Yrs.) `	Type IV (20 Yrs.) `
Admission	500/-	500/-	500/-	500/-
Subscription	5,000/-	7,500/-	11,500/-	15,000/-
Total	5,500/-	8,000/-	12,000/-	15,500/-

Note: Members may download the membership form from the website of AIFTP., i.e., www.aiftponline.org

ADVERTISEMENT TARIFF FOR AIFTP JOURNAL
(W.e.f. 15th July, 2013)

	Particulars	Per Insertion
1.	Quarter page	` 1,500/-
2.	Ordinary half page	` 2,500/-
3.	Ordinary full page	` 5,000/-
4.	Third cover page	` 7,500/-
5.	Fourth cover page	` 10,000/-

There shall be Discounts on bulk advertisements.

DISCLAIMER

The opinions and views expressed in this journal are those of the contributors. The Federation does not necessarily concur with the opinions/views expressed in this journal.

From the Editor-in-Chief

INCOME-TAX SETTLEMENT COMMISSION IS NOT ACHIEVING THE DESIRED OBJECTIVE DUE TO LACK OF TRANSPARENCY IN APPOINMENT OF MEMBERS AND FAILURE TO APPOINT MEMBERS FROM PROFESSION

Income-tax Settlement Commission which was established in the year 1976 to expeditiously settle disputes between the assessees and the Revenue. The Income-tax Settlement Commission (the "Commission") is one of the most high-powered commissions under Direct Tax laws. Section 245B(3) of the Income-tax Act (the "Act"), in express terms, requires the Central Government to appoint the Chairman, Vice-Chairman and its other members "from amongst persons of integrity and outstanding ability, having special knowledge of, and, experience, in problems relating to direct taxes and business accounts".

As per section 245-I, the orders passed by the Commission shall be conclusive as to the matters stated therein and no matter covered by such orders, shall be reopened in any proceedings under the Act or under any other law, unless otherwise provided. The Commission has its benches at Delhi, Kolkata, Chennai and Mumbai. There would be number of vacancies in the posts of Members during the year 2014 and 2015. In its 37 years of existence, more than 125 members have been appointed to the Commission. Ironically, not a single professional has ever been appointed as its member. Till date, more than 30 Chairmen have been at its helm of which some did not get even one month to serve the Commission.

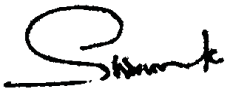
Unfortunately, at present, there is no transparency in the appointment of the Members of Settlement Commission. In antithesis to this, is the manner of appointment of Members of the Income Tax Appellate Tribunal (the "ITAT"). The applications for the posts of Members of the ITAT are invited from professionals and Commissioners of Income-tax who are selected by the committee headed by the senior most Judge of the Supreme Court, the Law Secretary and independent professionals (Additional Advocate General or member of the Law Commission) and the President of the ITAT.

Dr. Vijay Kelkar's Committee recommended instituting transparent procedures for the appointment of members and Chairman of the Central Board of Direct Taxes [(2012) 258 ITR (Journal) 1 (45)]. We are of the opinion that the appointment of Members of the Commission, being a quasi-judicial body, must be done in a manner as transparent as

possible. This will help gain confidence of the taxpayers in this Institution. Taking cue from the recent advertisements in leading national dailies inviting applications for appointment of Members of the nascent National Company Law Tribunal, it would serve the Commission in good stead to embrace a similar process.

The Federation conducted a survey on various issues – including the appointment of Members of the Commission – relating to tax administration, the findings of which were released at the 12th National Convention at Mumbai on 24-12-2012. (Souvenir, P. No. 149). 97% of the professionals surveyed opined that the Government should appoint at least few members from the profession. In order to achieve the desired end in settlement proceedings, it is imperative that the benches of the Commission consist of persons of diverse backgrounds. The ideal combination of a bench would be a Member each from the Department, law profession and accountancy profession. The Members should ideally have tenure of at least five years and the Chairman, of at least two years, so that she or he can take important decisions relating to the regulation of its procedures.

There ought to be a mechanism wherein, if a Member is found to be a person not of integrity, he or she should be removed promptly following due process of the law. As per amended Service Rules applicable to the Members of the Customs, Excise and Service Tax Appellate Tribunal and the ITAT, a Member cannot practice before the same forum after retirement. The introduction of such a provision for the Members of the Commission would undoubtedly further elevate the stature of the Institution and should be deliberated upon. As a dutiful stakeholder in the effective functioning of the Commission, the Federation has earlier sent two representations to the Government on these issues, to which regrettably, the Government has neither responded nor taken any positive steps to address. I hope the Government gives due consideration to these germane concerns and prevent professionals and professional associations like ours from feeling constrained to knock the doors of the High Court by way of a PIL so that transparency can be brought in the process of appointment of Members of the Commission. Readers may send their views to the AIFTP, aiftp@vsnl.com which enable the Representation Committee to prepare an effective representation.



Dr. K. Shivaram
Editor-in-Chief

President's Message

Dear brothers and sisters,

I wish you a very **HAPPY AND PROSPEROUS NEW YEAR – 2014 !**

I am indeed grateful to all members of AIFTP for posing the trust and electing me as National President for the term 2014 and 2015.

The 17th National Convention held at Mumbai, from 26th to 27th December, 2013, was successful and I would like to place on record my appreciation to the members who worked hard for its success.

During my tenure, amongst other things, I would like to share with you the following agenda to which we should devote our time and energy to improve upon the working of the AIFTP, because it is an ongoing process:–

(i) Giving qualitative and timely service to all the members;

(ii) Pay visit to unrepresented areas of our country to highlight the activities of AIFTP and appeal to the professionals to become members of AIFTP, with the support of National Executive Committee as well as Zonal Managing Committees;

(iii) Enhance the contents of our Journal;

(iv) Review the ITAT Bar Associations' Co-ordination Committee;

(v) To make an sincere attempt to see that the information contained in the AIFTP Times is reached to all the members;

(vi) To establish Co-ordination Cell of senior members to ensure timely and proper representation with various Govt. Departments, especially, pertaining to Direct and Indirect Taxes; and

(vii) To remain in direct touch with all Zonal Chairmen & Chairmen of various committees in order to better functioning of the educational activities of the Federation.

Needless to mention, there may be additional points to be taken on my 'Agenda' for consideration. I, therefore, earnestly urge all my brothers and sisters to mail me their suggestions and feedback on various issues, and their expectations what is to be done from time to time so that AIFTP marches on the path of growth.

With best wishes and warmest regards,

Wish you all a Happy Republic Day.

J. D. Nankani
National President

Tax Jurisprudence – Challenges Ahead

N. M. Ranka
Senior Advocate

1. Tax Laws

Article 265 of the Constitution of India demands, no tax shall be collected without authority of law. The Indian Income-tax Act, 1922 was enacted, which was simple, short with less than 70 small sections, was easily understandable and not much complex. It was repealed by the Income-tax Act, 1961, with 296 sections, innumerable sub-sections, provisos, explanations, deeming and over-riding provisions, apart from 14 Schedules and assisted by the Income Tax Rules, 1962, with sub-rules and forms. It became bulky, highly complicated, complex, beyond understanding of even technical persons, resulting in large number of appeals, revisions, references and irrecoverable outstanding tax, interest, penalties and prosecutions. Basic concept of burden on the plaintiff and prosecutor has been done away with, and shifted on a tax payer. On non-furnishing of explanation to the entire satisfaction of an Assessing Officer, un-explained credits / expenditure / investment is deemed as income with tax at flat 30%, apart from liability for penalty and sword of prosecution. Discretion though conferred, is not judiciously and judicially exercised. Rate of interest charged on default / delay is more than on amount refundable. Equal treatment is not given. Provisions for tax deductions are rigorous, confiscatory and are being expanded every year.

Now the 1961 Act settling complex concepts over 50 years is being replaced by the Direct Taxes Code, 2010, with 319 sections including definition section in the last with 297 clauses, with 22 Schedules, apart from Rules and power to modify / amend without amending Act / Finance Act. It is hanging for over 5 years and is still in making, may be aborted. Tax laws are going to be further complex. Concepts and connotations settled over years would be unsettled or made iotoise with minor changes of phraseology and vocabulary. Lately, there has developed a tendency to amend tax laws frequently and retrospectively on a slight provocation as to misuse by ignorable few. Amendments are made, very often retrospectively, to nullify the view expressed by the Hon'ble Supreme Court. Such amendments are made on the pretext that view expressed by the Apex Court is against the intention of the legislatures, but it is more tainted with the wishes of the bureaucrats. It may be legal but is immoral and unethical. It does not very much affect the national exchequer but puts a greater injury to a citizen of this great democracy. It shakes faith of the tax payers in tax laws, puts hurdles to voluntary compliance and drags the tax payer to adopt immoral means. Making way simpler towards such dirty path is not in national interest. It drags the tax payer to immoral means, which in long run breeds corruption and mal-administration.

2. The Tax Authorities

Earlier all functions for an assessment, rectification, recovery, stay etc. were with an Income-tax Officer and he had complete control on an assessment. To expand the tax administration, to please the tax authorities, new posts were created, facilities were provided, more powers were conferred and discretions expanded. To reduce the work load on an Assessing Authority – the philosophy of doing away with

issue of notices for advance-tax and furnishing of return; provisions for tax audit by technically qualified Chartered Accountants; self-assessment, payment of tax and interest, scrutiny in less than 3% cases and only in survey, search and other specific category of cases were introduced. Power to assess conferred on Assistant Commissioner, Deputy Commissioner, Joint Commissioner and higher authorities and by lower authorities on approval from the higher authorities.

With unprecedented expansion by re-structuring a tax payer is unable to find out in which Ward his/her case falls. Records are in a mess. Old records are untraceable. Even PAN/TAN number are not issued on time. Refunds are abnormally delayed, are issued after repeated reminders, grievance petitions and shelling of money. Rectifications and appeal effects have to be reminded again and again. Some of the Officers do not have proper place to hold office peacefully. Staff for administrative work is in plenty but very little number to assist an Assessing Officer for assessment. The 'Great Income Tax Officer' cannot frame special assessment in search cases and his jurisdiction in other cases has been substantially curtailed. It is apparent and patent that there is no accountability. Transparency is absent. Work culture is no more. Discipline has diminished. Right hand does not know what left hand is doing. Corruption is flagrant and at its peak at all levels. Many officials possess in tons and lead aristocratic life, accountable to none even to oneself. Image of the tax administration has been tarnished.

In order to expedite approvals, grant of registrations, rectifications, disposal of applications, appeals, revisions and renewals time frame was inserted, but of no result. The mighty tax administration feel it is above law. All India Federation of Tax Practitioners have to file public interest litigation titled *'Court on its own motion v. CIT (2013) 352-ITR-273 (Delhi)*. The Hon'ble Court realized hardships faced by assessees owing to faulty processing, lethargy and inaction of the tax authorities, casual working etc., issued exchaustive regulatory/directions to the department. The Central Board of Direct Taxes issued Circulars/Instructions No. 3 & 4 of 2013 dated 5-7-2013 (See. 2013 355-ITR-82-83) with instructions to decide within 2 months by speaking order etc., but with no effect on errant tax authorities, as they have no fear of the higher authorities and higher authorities have become lame, indolent, selfish, inactive and ineffective.

Power corrupts a person. The persons in tax administration are not an exception. However, steps like inculcating work culture, infusing efficiency and taking immediate action, may contribute to curbing of malpractices, etc. The concept of authority and power exercised by the public functionaries has many dimensions. The authority empowered to function under a statute while exercising power discharges a public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bonafidely, loss may accure to the exchequer. It would be tolerable. But where the duty is performed arbitrarily, capriciously or the exercise of power results in harassment and agony, then the concerned authority should be held personally responsible. In a democratic society, no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and as a result quite often a taxpayer is made to run from pillar to post with no result. Even in ordinary matters, a small assessee, who has neither the political backing nor the financial strength to match the inaction in public-oriented Departments, gets frustrated and it erodes credibility in the system. Slogan of 'SARAL SAMADHAN & SAMMAN' as well as "Citizens Charter" have proved only paper bullets for political gain, with negligible effect on tax authorities. It has been generally of no effect on tax authorities. It has been noticed that the human rights of tax payers at the time of survey, search, recovery and recording of statements are violated and complaints ignored even by the higher and highest authorities. The experience reveals that the behaviour and treatment is not humane, rather in-human. 'VISION 2005' and instructions of higher authorities have not changed mind-set

of Assessing Authorities. Honest Tax payers have fear phychosis and are at sufferance. Present scenario is pathetic.

3. The First Appellate Authority

There exists tendency to make uncalled for, unreasonable, excessive, arbitrary, unsustainable, unlawful additions; disallow deductions, exemptions and incentives; make high pitched assessments with creation of substantial demand with malafides. First appeal is provided to the Commissioner of Income-tax (Appeals), who is also superior assessing officer, with power of enhancement. Appeals remain pending, particularly when tax is outstanding, to enable the Assessing Officer to recover coercively. During pendency of appeal, stay of demand is not attended and granted by the tax as well as appellate authority. Hon'ble Dr. Justice Vineet Kothari in *Maheshwari Agro Industries v. Union of India (2012) 346-ITR-375 (Rajasthan)* gave guidelines for staying demand. He observed on page 419 : *"The tendency of making high pitched assessments by the Assessing Officers is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice and sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro revenue manner. It may be like execution of death sentence, whereas the accused may get even acquittal from higher appellate forums or courts. Therefore, this court is of the opinion that such powers under sub-section (6) of section 220 of the Act also have to be exercised in accordance with the letter and spirit of instruction No. 96, dated August 21, 1969, which even now holds the field and its spirit survives in all subsequent Central Board of Direct Taxes Circulars quoted above, and undoubtedly the same is binding on all the assessing authorities created under the Act"*. He advised : *"The CBDT should issue appropriate guidelines for grant of stay in the spirit of Instruction No. 96, dated August 21, 1969, to all subordinate authorities and to clarify the uniform application all over the country at the Department level that the first appellate authority shall have power to entertain and decide stay applications during pendency of appeals before it upon relevant considerations for grant of stay against recovery of disputed demand of tax"*, but no such instructions have been issued though it is more than one year and there is no valid reason for non-compliance. It is defiance of law and contempt of the court. Other High Courts have also issued similar orders and have expressed same feelings.

It is a routine practice to prefer second appeal, if allowed, by the Commissioner of Income-tax, provided tax effect is more than specified amount. In some cases it has been seen same person allowed appeal as Commissioner of Income-tax (Appeals) and on transfer same person recommended second appeal as Commissioner of Income-tax (Administration). Funny situation. Second appeal costs heavily a tax payer with no/negligible cost to the Revenue. Even fee for Income Tax Appellate Tribunal is not required to be deposited by the Revenue though assessee is required to deposit ` 10,000/- No additional arguing fees is incurred as appeals are argued by the Departmental Representatives on permanent pay rolls.

4. Commissioners of Income-tax, Chief Commissioners & Central Board of Direct Taxes

Commissioner of Income-tax is administrative head of the Assessing Officers falling within his jurisdiction. He is authority for registration of charitable institutions, approval of charitable and other institutions, revising authority u/s. 264 for small assessees, for waiver of interest, penalty and prosecutions, sanctioning authority for escaped assessments, second and succeeding appeals, transfer of cases and many other allied judicial functions. He is revisional authority u/s. 263 for revision of assessment, if the order of the lower authority is erroneous and prejudicial to the interests of revenue. He is expected to be judicious, just and fair to safeguard interests of a tax payer as well as revenue. However, it is being noticed that large number of sanctions/initiates uncalled for assessments/revisions, rejects registration applications, withheld approvals, mainly concentrate in collection, recovery of highly disputed demands to achieve targets

and sanction prosecutions on irrelevant and extraneous considerations. It is disregard and dereliction of duty cast by the statute. Some High Courts have levied cost.

Section 263 cannot be invoked to correct each and every type of mistake; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. It is not correct to say that the Commissioner can invoke the power of revision under s. 263 only in cases of acts or orders which are subversive of the administration of revenue or that there must be some grievous error in the order which might set a bad trend or pattern for similar assessments. This is too narrow an interpretation. If due to an erroneous order of the Assessing Officer the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue; for example, when an Assessing Officer adopts one of the courses permissible in law and it results in loss of revenue or when two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Officer is unsustainable in law : *Malabar Industrial Co. Ltd. v. CIT (2000) 243-ITR-83 (SC). Same view has been followed in C.I.T. v. Max India Ltd. (2007) 295-ITR-282 (SC).* However, in many cases, action is contrary to provisions of law and binding precedents. A tax payer has no option but to challenge before the Income-tax Appellate Tribunal or by way of writ. Both are costly remedies.

Chief Commissioners have been appointed to supervise and have overall control on the Commissioners and subordinate officers. Central Board of Direct Taxes is the sole authority to regulate all tax administrators and have power to issue circulars and instructions, which are binding on the tax authorities. The entire department functions under the Ministry of Revenue/Finance Minister.

5. Income Tax Appellate Tribunal

In order to render justice second appeal was provided and Income Tax Appellate Tribunal was constituted in 1941, with the motto "SULABH NYAY - SATWAR NYAY". Criteria for its working is (i) Cheapness; (ii) Accessibility; (iii) Freedom from technicalities; (iv) Expedition; and (v) An expert knowledge of the subject.". It is functioning under the Ministry of Law & Justice not Finance, to maintain its independence. A golden handshake in between law and accountancy has been maintained. Over years it had applause from the judiciary, tax payers and the tax department. So much so that it use to be called as a model or mother Tribunal and other Tribunals have been formed on the same pattern. The Appellate Tribunal is final fact finding authority. Its finding on facts is final and no appeal lies to the Hon'ble High Court, except on substantial question of law. The powers are very wide but there is no power of enhancement. All questions, whether of law or a fact which relate to the assessment of an assessee may be raised before the Tribunal. In disposing of the appeal, the Tribunal has the power to give appropriate directions and to pass such orders as it thinks fit, after an opportunity of being heard to both the parties to an appeal. The powers include the power to annul an assessment order or set aside or remand. The powers have been expressed in the widest possible terms. It has power to grant stay and rectify its own order, with no right to review.

I have the pleasure and privilege of appearance before this prestigious institution since 1954 and I cherished appearance. However, for the past twenty and odd years there have been a substantial fall in the standard, stature, status and actions of its honourable members. Flagrant corruption is noticed. So much so that the Hon'ble

Supreme Court had to direct for enquiry against few senior members after the kolkata episode. Position of the President has been lowered down and some of the Presidents remain inactive, indolent, dormant and unconcerned, even if number of complaints supported by *prima facie* evidence / proof / material for misbehavior, ill-treatment, misdeeds, *malafides,* inaction, corruption, favritism etc. are submitted / adduced. One tainted member was transferred from Jodhpur Bench after boycott by the Bar for more than 6 months. No regular Division Bench functioned for over one year. Similar complaints were against him from Lucknow & Agra Benches. Detailed written complaints were filed. Jaipur Bar too has boycotted since 25th August, 2013 with several representations, meetings with the present President, his repetitive assurances but with no result. Boycott continues for the last 6 months with great inconvenience to the tax payers. Such indolence and casual approach with pathetic conditions have caused the legislature to substitute Sub-Section (3) of Section 252 from 1-6-2013 and to seek power, to appoint a sitting or retired judge of a High Court, with not less than seven years service as a High Court Judge, as President. It is learnt from reliable sources that new President is in search. Some of the Past Presidents, Presidents are responsible for the amendment and deserve to be blamed for such drastic change in law after 70 years.

Such tainted, spotted, blemished members are on increase, who have spoilt / are spoilting the clean image of a very good institution, of which the country was proud of and where a large number of doyens of profession, even late Mr. N. A. Palkhivala, used to cherish appearance. Basic problem is if one wrong person enters the august institution, there is no expeditious mechanism to expel, suspend, terminate, punish exemplary to the errant and lesson to others. Weak administration with hand-in-glove of some tax consultants and the concerned higher authorities need to be blamed for such situation. It needs immediate remedial measures and expose publicly such members. Transfer is no solution, it would mean Fifth at one place is shifted to another place, without ultimate remedy. The head of the institution on receipt of complaint from a Bar / from individuals, should immediately make the complained member non-functional on judicial side, set up a committee to report on correctness of the complaint and suspend / terminate on verification and satisfaction. The President and the collegium shall have to be bold with strong determination to get rid of such tainted member(s). It would be setting an exemplary and commendable example. Sooner the better to save this great institution from further decay and to regain its past glory. It should dispense justice without any fear or favour or ill-will and make it temple of justice in accord with its motto.

6. Income Tax Settlement Commission

Commissioners used to settle the tax liabilities, but there was no codified law and uniform procedure. To regulate Chapter XIX-A "Settlement of Cases" was inserted from 1-4-1976, which is a self-contained code in itself. Its motto is "SAMYAK SAMADHAN", like arbitration or mediation, in between the mighty income-tax department and errant tax payer. Statutory settlement machinery is, where the big evader of taxes could make a disclosure, disgorge what the Commission fixes and thus buy quittance for himself and accelerate recovery of tax in arrears by the State, although less than what may be fixed after long protracted litigation and recovery proceedings. It should not indulge in technicalities, but must have a liberal approach to settle at a fair and reasonable amount with immunity from penalty and prosecution and let a tax payer correct himself and discharge future liabilities in accordance with law. It is like mediation in Civil Procedure Code, which is being popularised and propagated all over the country.

With passage of time some amendments were made and major amendments were from 1-6-2007 to provide machinery only once, to big evaders and to settle over specified time

with little discretionary powers. The Supreme Court / High Courts entertained writs, curtailed discretionary powers and made the machinery more strict. Jolts were given by *C.I.T. v. Express Newspapers Ltd. (1994) 206-ITR-443; Kuldeep Industrial Corporation v. ITO (1997) 223-ITR-840; Ajmera Housing Corporation vs. C.I.T. (2010) 326-ITR-642;* and *latest C.I.T. v. Godwin Steel P. Ltd. (2013) 353-ITR-353 (Delhi) and Others. In C.I.T. v. Anjuman M. H. Ghaswala (2001) 252-ITR-1 (S.C.)* it was held that the settlement will have to be in conformity with the Act and not contrary to or in conflict with it. Power to grant immunity/waiver of interest was drastically curtailed and would be as that of the powers of C.B.D.T. / Commissioner. Power to grant immunity from prosecution is no more on applications after 1-6-2007.

An application made for settlement shall not be permitted to be withdrawn by the applicant on any circumstance. However, the Commission may send the case back to the Assessing Officer, if it is of the opinion that the applicant has not co-operated with it in the proceedings before it. The Assessing Officer shall thereupon dispose of the case in accordance with the provisions of the Act as if so settlement application had been made. Since my appearance before the Commission since 1977, I noticed till 2008 the honourable Commission use to pass orders u/s. 245D(4) in 4-5 pages and as that of arbitrator or mediator. But on account of the judicial precedents, bias against tax evaders, withdrawal of power to grant immunity from prosecution, one time opportunity and expeditious disposal limitation, now the final orders are liberal not liberal, full of technicalities and not in accordance with the prime object with which machinery was inserted. When one goes for balanced mediation or arbitration, tax payers expect fairness and equity. Even with material change, in appropriate case settlement is the only remedy to avoid long drawn protracted investigation, high cost, uncertainty and to live peacefully with prosperity. Entry for small or medium assessees have been closed, requiring them to fight tooth and nail with unending tax machinery.

7. Advance Rulings

With liberalisation, globalisation policy from 1991 and in order to attract foreign investment, Chapter XIX-B by way of Advance Rulings consisting of Sections 245-N to 245V was inserted by the Finance Act, 1993, with effect from 1-6-1993. Indian Tax Laws unlike other laws are highly complex and complicated. The Non-Resident before making any investment or entering into any transaction with Resident Indian want to know the tax liability arising out of the transaction which has been undertaken or is proposed to be undertaken. Such determination is known as Advance Ruling. It has been later expanded to residents falling within any such class or category as may be notified by the Central Government.

An "Authority for Advance Rulings" has been constituted; consisting of a Chairman, who is a retired judge of the Supreme Court and other Members being officers of Indian Revenue Service or Indian Legal Service. The office of the authority is located in Delhi. The authority has framed the AAR (Procedure) Rules, 1996, laying down the procedure for its functioning.. The application shall be made in quadruplicate with fee of 2,500 rupees and can be withdrawn within 30 days from the date of application. The Advance Ruling pronounced by the authority shall be binding on the applicant in respect of the transaction in relation to which the Ruling had been sought and on the Commissioner and the Income-tax Authorities subordinate to him. Such Ruling shall be binding till there is a change in law or facts on the basis of which the Advance Ruling has been pronounced. The Authority is a body exercising judicial power conferred on it and is a "tribunal" within the meaning of the expression in articles 136 and 227 of the Constitution. When an advance ruling of the Authority is challenged before the High Court under Articles 226 and 227 of the Constitution, it should be heard directly by a Division Bench of the High Court and decided as expeditiously as possible : *Collumbia Sportswear Company v. DIT (2012) 346-ITR-161.* SLP lies against order of High Court to the Supreme Court.

8. High Court / Supreme Court

Section 260A from 1-10-1998 provides for Third Appeal to the State High Court against order of the Income Tax Appellate Tribunal on substantial question(s) of law. Prolvisions of the Code of Civil Procedure, 1908, relating to appeals to High Court shall apply. It is heard by the Division Bench. Further appeal lies to the Supreme Court under section 261 on grant of certificate by the High Court or directly under Article 136 of the Constitution.

National Tax Tribunal Act, 2005, was introduced but stands stalled on account of writ petitions pending against its constitutional validity before the Apex Court. On operation of the N.T.T. Act and on its constitution appeal would lie to National Tax Tribunal and pending appeals would stand transferred from the High Court. National Tax Tribunal would not be a proper substitute to the High Court, as it would be primarily manned by the senior members of the Income Tax Appellate Tribunal, with experience exceeding seven years. Instead Advocates with tax base be elevated and a regular tax bench be constituted in every High Court, till liquidity of pending matters. Substitution of National Tax Tribunal would be a black day and mockery of appeal. Trust and confidence which has been earned over years including elevations process of the High Court is commendable. The National Tax Tribunal Act deserves to be withdrawn forthwith.

9. Our duties and obligations

The tax consultant has a tripartite relation; one with his colleague, another with the tax administration and the third with the tax payer. The duties of the tax consultants are unique and that is why it has all along been known as a noble profession. Tax consultants are everywhere deemed essential to protect the public interest and safeguard interest of the tax payer in an orderly society. The tax consultant's participation is ordinarily an assurance that the tax payer shall not be required to pay a single rupee more or a single rupee less than due to the exchequer. A tax consultant is an officer just as an Advocate is an officer of the Court. He is master of an expertise but more than that accountable to the tax administration and governed by high ethics. The success of tax assessment depends upon the services of the tax profession to the society.

Tax profession is not a craft but a calling; a profession wherein devotion to duty constitutes the hallmark. Sincerity of performance and the earnestness of endeavour are the two wings that will bare aloft the tax consultants to the tower of success. Given these virtues other qualifications will follow on their own. The tax consultants have onerous duties to perform. A strong united and independent bar ready to see that due taxes alone are paid, will have a very sobering effect on the tax administration. A principled tax consultant with sterling character will be a great check on the tax administration as well as tax payers. The tax professional should have a sense of sacrifice and sense of service. The tax consultants are professionals and not businessmen.

A tax consultant should have the professional capacity, proper professional training, good knowledge of tax laws and the procedure. He should maintain a very good library with latest books on tax laws and should devote at least two to three hours a day in the study of the tax laws and different decisions of the Supreme Court, High Courts and different benches of the Tax Tribunals. He should see that the taxpayer remains on the right path and is not misguided or ill-advised. A strong, united and independent bar, ready to see that justice should be done, will have a very sobering effect on the tax administration. A principled tax consultant with sterling character will be a great check on both the corrupt officers and dishonest tax payers. Honour the really honest officer of integrity and socially boycott a corrupt officer. But unless one keeps his own house in order, it may not be possible to tackle the problems of corruption. First of all, the profession should get rid of corrupt and corrupting elements prevailing in the ranks of the

tax consultants. The members must unite to fight this evil. Unity is strength. A sense of sacrifice and sense of service would be required to tackle this problem. Code of conduct and a code of ethics should be formulated.

A tax consultant should be very punctual, methodic and systematic. The tax consultant should represent his client's case to the best of his ability. No effort should be spared in properly arming onself on the questions of law and fact. Submission of all relevant evidence at proper time and proper stage would help the tax payer. Detailed submissions and explanations should be furnished with sufficient evidence, direct as well as circumstantial, before the assessing authority itself. The return should accompany all the required papers, documents and accompaniments. Grounds of appeal should be detailed and should accompany Statement of facts. As far as possible written submissions should be submitted before the First Appellate Authority. First one should marshal out the facts. Law should be placed only after full placement of facts. While selecting judicial citations, one should be very choosy and selective. He should see that facts of the instant case match with the facts of the cited decisions. One different fact may make a lot of difference.

We live in a world of fast changing technology, the internet, robot, explorations of Mars. Various facets of e-commerce need to be carefully attended to. Electronic type-writers, e-mail, fax, fast communication gadgets, Computers, CD Rom and other facilities deserve to be availed of but with a rider 'MACHINE' is no substitute to 'MAN' & 'HUMAN MIND' is superb – not 'COMPUTERS'; Machines are to aid and assist but not to replace a human being. Man makes Machines and not Machines make MAN.

The tax payer need a helping hand from the tax profession. No effort should be made or allowed to be made by which a tax payer is deprived of his rights, statutory as well as constitutional and is put to sufferance, financial as well as mental. Any communication between the client and the Counsel is secret and it is the duty of the tax professional not to divulge or disclose or discuss without permission of the tax payer. Loose talks deserve to be avoided. Gossips impermissible. Utmost care and caution is essential in proper discharge of duty and trust else may amount to misconduct.

10. Challenges Ahead

Tax profession is highly technical, specialised, nobel and honourable. Tax consultants are respected citizens, entrusted with specific duties by the Legislature and have obligations towards the Society. Their path is full of thorns and brick-bats – not flowers. They need discharge their duties with caution, care, diligence and expedition. I.T.A.T. Bar Associations Co-ordination Committee of All India Federation of Tax Practitioners has adopted Standards of Professional Conduct and Etiquette. They need be followed. Non-complier need be socially bycotted.

The State is the largest litigant. High pitched assessments are framed, due deductions are not allowed, exemptions are denied. In a large number First Appeals are allowed, but challenged by the Revenue before the Income Tax Appellate Tribunal. 80% of the appeals are by the Revenue. Hardly 5% are allowed. Similar is the situation in appeals before the Hon'ble High Courts and the Apex Court. (ii) The quality of pleadings, preparation and arguments, as compared to earlier years, are year after year deteriorating. May be on account of heavy load of work, wastage of time in waiting in the offices and fall in patience and tolerance; (iii) The scale of fees was just, fair reasonable to enable to live comfortably and happily, whereas now it is not only high, but differs on various reasons – sometimes guarantee briefs, to amass wealth to enable to lead a luxurious 'seven star life' with all pomp and show; (iv) The Seniors used to freely mix-up with own juniors, juniors of others and upcoming lawyers; guide them, teach them and promote them; whereas the seniors are becoming self centered, living in their own world.; (v) The junior and new entrants use to give fatherly respect and due regard to the seniors; whereas

now they keep sitting without noticing the seniors and meeting them frequently. **There appears fall in values and degeneration at all levels, which is not a healthy sign for the noble profession. Remedial measures need be taken. Earlier the Better.**

In my humble view, what is needed is – an 'introspection' by all concerned, to evolve ways and means whereby to change the work culture and mindset for public good and in public interest. What is required is : **Unity of thoughts, unity of understanding and unity of action to achieve the goal as envisaged in the Constitution with due regard of dignity, liberty and humanity of the people.**

Tax profession has dignity, commands respect in the society and is a noble profession. For a righteous tax professional, there is always a place and no competition. **The future is bright and the profession is flourishing. Do your duty diligently, regularly and lead a disciplined life. Success is at your door. Never feel, profession is over-flooded and there is no place for you.** There is marked increase in litigations under civil, criminal, revenue, taxation corporate, international, constitutional, economic, insurance, service and other fields and at all levels. We are living in a jungle of laws. More legislations are bound to follow to curb immorality, violence, insecurity, corruption, evasion of tax, unlawful acts and activities. In all fields necessity of a professional is a must. **India is bound to be supreme power. Future is bright. Join the noble profession. Maintain its dignity, honour and reputation. Serve the Humanity. Join in Sacred Cause. Be Clean. Maintain Ethics and Be Happy, Healthy and Peaceful.**

[Source : Article published in Souvenir of 17th National Convention held on 26th and 27th December, 2013 at Mumbai]

RTI & Taxation

CA Narayan Varma

This article deals with Income-tax Issues, though some parts of it will be applicable to Indirect tax issues also.

RTI & Professionals

Citizens in general and professionals alike in the financial fields are more often than not stuck in a major traffic jam of bureaucrats, red tapism, 'babudom', corrupt officials, unconcerned staff, rude misbehaviour, etc. There is almost no way to wade through this. There are a lot of tiny issues that are present in the government departments which are so deeply imbibed into their system that they are almost synonymous with the department in itself. The common man too has this fixed negative notion towards these departments but has never tried to change it since he thinks that his individual effort would go entirely futile and that a mass movement is required to extract this absorbed venom from the veins of our democracy. October 2005 was the lucky time when the Government came up with the anti-venom, the Right to Information Act.

The Right to Information Act (RTI Act) became effective law w.e.f. 12-10-2005. It is a short and simple Act comprising 31 sections but extremely powerful, the likes of which India has never before witnessed.

The RTI Act has heralded citizens' right to be recognised and thereby made participative democracy possible. If well implemented and well used, real swaraj will dawn.

As we proceed into the eighth year of the use of the RTI we need to look – not only at the shortcomings which we always do – but at our immense gains. Not so much to compliment ourselves as to strengthen our resolve to carry on with millions of our struggles that its use has spawned. The RTI has forced the redistribution of power, demanded participatory decision-making and specific accountability. It has legitimised questioning as a part of decision-making. It has questioned representative democracy and pushed the system to acknowledge, though reluctantly, that it has an obligation to the sovereign citizen.

The RTI Act empowers citizens. RTI is a tool to know how Governments function. Information can be demanded from public authorities; i.e. all Government departments and any body owned, controlled or substantially financed directly or indirectly by appropriate Government, i.e. NGOs, PSUs, co-operative societies, etc.

RTI is fundamental to a democracy and democracy, in order to stay alive with its principles in fact, needs the RTI.

The RTI Act has the power to lead to transparency and accountability in governance, and to contain corruption.

I request professionals to become part of RTI users' family. We urge you to join this movement to benefit you and to benefit your clients & others. Your rights under the RTI Act include:

Inspection of work, documents, records, taking certified samples of material used for any project, obtaining information in the form of

floppies, tapes or any other electronic media or through printout, etc.

All citizens have a right to know status of their applications for any matter such as ration card, passport, water-connection, Income-tax refund due, etc. Any citizen may like to know how his MP/MLA has used funds allocated to him and how funds are earmarked for different projects.

Common Issues in Income Tax

Grievances and the Income Tax Department are almost synonymous for the common taxpayer. There are some very general and rather common issues that are faced by many taxpayers due to certain inbuilt cracks in the walls of the Income Tax Department. Hereunder I deal with those issues, their nature, how RTI can help and refer the judgments that have already been pronounced on these common issues.

The following are the common issues faced and the common inquiries made by way of RTI applications to the Income Tax Department along with their outcomes and relevant judgments:

1. Information on Income Tax Refunds
2. Information on Rectification Applications
3. Information regarding Income Tax Returns of third parties
4. Information regarding PAN and TAN of third parties
5. Information on Search, Seizure, Raids
6. Information relating to an ongoing court trial
7. Information on status of tax evasion petitions

1. Information on Income Tax Refunds

Refunds are the one of the most common issues faced by the assessees. This issue has sky-rocketed after the introduction of the electronic system as there is still a huge gap between the electronic and the manual system in terms of updation and coordination. This widespread complaint that the taxpayers have, has been noticed because of following two reasons:

a. E-filing of Income Tax returns and lack of coordination between the Assessing Officer and the Centralised Processing Centre (CPC) in relation to revised returns and/or Rectification Applications filed online and vice versa;

b. Adjustment of arrears in demand payable against any existing refunds; an electronic adjustment that generally skips any applications/letters filed manually with the Assessing Officer.

An RTI application can in most cases, solve this issue in a very simple and hassle free manner. The procedure to file an RTI application for a refund is very simple:

Please refer the sample of RTI application at the end of this article. The following points must be taken care of while drafting of an RTI application for obtaining Income Tax Refund:

- The question posed before the PIO (as termed in the RTI Act i.e. your assessing officer. PIO is acronym of public information officer) must not be "Why is my Income Tax Refund not being processed/released?" No direct allegations of any kind whatsoever must be made. The purpose of the RTI is to receive relevant information held and on record and not accuse the functioning of the system.
- The question must be, "Please provide the status of my Income Tax Refund" or "As per the schedule of issuing Income Tax refunds, when I can expect to get my refund?"

- Further, the PAN of the assessee, the assessment year for which refund is pending, amount of refund are details that must be mentioned in the application with all details.
- Any prior correspondences with the Department, Rectification Applications or any other documents filed must also be duly enclosed.

However, in some cases these RTI applications are rejected or incomplete/ incorrect information is provided to the assessee.

The following application made to the CPIO is an interesting example of how an application was blindly rejected and what the grounds were for it:

Applicant	Smt. Usha Devi Agarwal
Respondent	Income Tax Officer, Mumbai
Query	"Will you please provide me information on when I will get my Income Tax Refund for the A.Y. 2008-09 along with interest till the date of payment?"
Reply	"The above information sought by the applicant is exempted from disclosure as per the provisions of Section 8(1) (j) of the RTI Act, since the information sought by her relates to personal information, the disclosure of which has no relationship to any public activity or interest. Hence, the application filed by the applicant is hereby rejected. However, as far as the refund for the A.Y. 2008-09 is concerned, the same is under consideration."
Final Outcome	The application was forwarded to the concerned CPIO and the said refund was subsequently received by the applicant within the stipulated time period.

In the above case, the applicant has requested information pertaining to her very own tax refund. The information thus, does not pertain to any third party or any Public Authority. Her application has been rejected on the grounds of it being "personal information not related to any public activity or interest". The information solicited is undoubtedly personal information but of the very same individual who is requesting the information. The clause of non-disclosure of personal information is applicable only if the information sought belongs to some third party and/or Public Authority; which obviously is far from the current scenario. But well, the irony is that genuine applications are blindly rejected on such unsustainable grounds causing citizens further trouble of having to move the Appellate Authorities. (In this case, First Appellate Authority (FAA) is Additional/ Joint commissioner of that A.O). It is also pertinent to note that the CPIO, in spite of rejecting the application has concluded in a statement that says that the refund is under consideration and the refund was subsequently received by the applicant as well. Now, this sort of non-disclosure along with an open statement towards the end is not only confusing for a genuine applicant but also shows the level of ignorance on part of the Public Authority.

In most cases though, as also in the abovementioned one, the RTI application does certainly expedite the process of receiving the Income Tax Refund thereby fulfilling the motto of the applicant.

FAQs

1. Can I file a single RTI for refunds pertaining to multiple assessment years?

   ✓ Yes. A single RTI application containing specific details of every assessment year can be

filed. The application must clearly mention the PAN of the assessee, the assessment years for which refund is pending, amount of refund for each assessment year and other relevant details.

2. Can a CA make an application on behalf of the assessee?

   ✓ No. A CA cannot apply on behalf of the assessee. The RTI application must be signed by the assessee himself. However, an assessee may authorize a CA or an Advocate or any other person to represent the assessee in the course of hearing before the PIO or the Appellate Authorities by way of a Power of Attorney that specifically provides for delegation of power with respect to RTI matters.

3. Who is my PIO?

   ✓ Your Assessing Officer is your PIO. If you file your application with another PIO, he shall forward your application to your concerned PIO within a period of 5 days.

4. Can I ask why my refund has not been issued?

   ✓ It is not advisable to ask "Why". However, questions can be on the status of the refund, whether it has been processed, when has it been dispatched, if so, whether it has been returned from the assessee's address, etc.

2 Information on Rectification Applications

Rectification Applications filed in the Income Tax Department often remain pending for long periods of time. Filing an RTI application to inquire about the status of the Rectification Application provides the assessee with the requisite information and also expedites the process of rectification by alerting the concerned officer.

Refer **Annexure** – as noted in issue 1 above A Sample RTI Application also covers to know the status of the Rectification Application already filed with the Income Tax Department.

3 Information regarding Income Tax Returns of third parties

Income Tax Returns have been declared as confidential information as per Section 138 of the I.T. Act. The information contained in Income Tax Returns is of high importance and very confidential to the said individual. Thus, as can be observed from a list of judgments; Income Tax Returns of third parties (i.e., any person other than self) are confidential information which are exempted from the purview of disclosure u/s. 8(1)(j) of the RTI Act.

However, there are certain exceptions to the above exemption:

- If a 'larger public interest' derived from obtaining the ITRs can be proved
- If the ITR is requested as a Shareholder/ Stakeholder in the Public Authority/ Private Institution
- If the ITR pertains to a Political Party
- Matters relating to 'dowry' have a larger public interest for the society and hence disclosure of information required for defence in alleged false dowry cases is permitted. Income Tax Returns as required have to be provided.

In the case of *Shri Girish Ramchandra Deshpande vs. CIC and others (2012) 351 ITR 472 (SC) (pg. 46)* the Hon'ble Supreme Court held: "The details disclosed by a person in his income tax returns are 'personal information' which stands exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless it involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information. On facts, as the Petitioner has not made a *bona fide* public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual u/s. 8(1)(j) of the RTI Act."

FAQs:

1. Can a CA apply for copies of his client's Income Tax Returns of previous years?
   - ✓ No. A CA cannot apply on behalf of the assessee. The application has to be made by the assessee himself. An assessee can ask for copies of his Income Tax Returns of previous years for the purpose of maintaining records or for submitting them before some other Authorities.
2. Can an assessee apply for copies of Income Tax Returns of his family members?
   - ✓ An assessee may apply for Income Tax Returns of his family members. However, as per the provisions of Section 11 of the RTI Act, the PIO will release the copies of the third parties only after obtaining a written confirmation from them for the same. If they approve, the Income Tax returns of the family members may be provided to the assessee.

What is a 'third party'?

As per Section 2(n) of the RTI Act, "third party" means a person other than the citizen making a request for information and includes a Public Authority.

Section 11 of the RTI Act deals with the 'Disclosure of third party information'. The following are the important clauses with respect to the said section:

- If an individual wishes to seek any information pertaining to a **third party** and the concerned PIO intends to disclose any information or record, or part there of on a request made under the RTI Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer (CPIO) or State Public Information Officer (SPIO), as the case may be, shall, **within five days** from the receipt of the request, give a written notice to such third party of the request and of the fact that the CPIO or SPIO, as the case may be, intends to disclose the information on record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed and such submission of the third party shall be kept in view while taking a decision about disclosure of information
- The third party shall, within ten days from the date of receipt of such notice, be given the opportunity to make representation against the proposed disclosure
- The CPIO or SPIO shall, within forty days after receipt of the RTI application, if the third party has been given an opportunity to make representation, make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party
- The notice given by the CPIO or SPIO, shall include a statement that the third party to whom the notice is given is

entitled to prefer an appeal under section 19 of the RTI Act against the decision

- In the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

4. Information regarding PAN and TAN of third parties

PAN and TAN of any individual / authority are the unique identification numbers provided to them by the Income Tax Department. These identifications numbers carry all the important and sensitive information of the assessees. Disclosure of these numbers would open the doors to all this sensitive information and could prove very destructive for the assessee. Hence, **disclosure of PAN and TAN** of individuals / companies / authorities is not permissible as held in *Shri. Arun Verma vs. DGIT(Systems), New Delhi.*

In the abovementioned case, the First Appellate Authority stated that *"PAN is a unique identification and required to be disclosed by a person whenever he is required to do so by operation of law. It is the number which is personal to the holder and its disclosure to any other person would cause unwarranted invasion of privacy of the holder. Further, the appellant has failed to make a case that information sought by him is in larger public interest".*

Supporting the view of the FAA, the Commission decided that, *"PAN is a statutory number, which functions as a unique identification for each tax payer. Making PAN public can result in misuse of this information by other persons to quote wrong PAN while entering into financial transactions and also could compromise the privacy of the personal financial transactions linked with PAN. This also holds true for TAN. Information relating to PAN and TAN, including the dates of issue of these numbers, is composite and confidential in nature under Section 138 of Income-tax Act. The appellant has not made a case of bona fide public interest for disclosure of PAN/TAN Numbers of 26 companies in the grounds of submissions of their application for above purposes"*

My comments: The PAN and TAN are undoubtedly sensitive information whose non-disclosure can be justified. However, it is pertinent to mention at this stage that obtaining the PAN or TAN of any individual / company is not a difficult task in our technology-friendly age. The official website of the Income Tax Department itself has a feature called "Know your PAN" whereby one can obtain any PAN by a mere input of the Name and the Date of Birth / Date of Incorporation of the individual / company. Also, obtaining information about the name and Date of Birth / Date of Incorporation is very simple with the help of the large spread social media and openly available online databases. Thus, when it is as easy to gain information about the PAN and TAN online, then non-disclosure of the same under the RTI Act certainly builds up a conflicting string of interest for the citizens.

FAQs:

1. Can I know the status of my own PAN application?
   - ✓ Yes. An RTI application can be filed to know the status of your own PAN or TAN application.
2. Can I know the status of correction application made for PAN / TAN details?
   - ✓ Yes. An RTI application can be filed to know the status of the correction application made for your own PAN or TAN.
3. Can a CA make an application to know the status of a client's PAN or TAN application?
   - ✓ No. A CA cannot apply on behalf of the assessee. The RTI application has to be signed by the assessee himself.

5. Information on Search, Seizure, Raids

The highest authority questionable in case of Search, Seizure and Raids conducted under the Income-tax Act, 1961 is the DGIT (Investigation). Now, u/s. 24 of the RTI Act, the DGIT (Investigation) has been declared as an "exempted organisation" and hence, is no more questionable. No queries/applications pertaining to the DGIT (Investigation) are replied to under the RTI Act. This exemption to the DGIT (Investigation) did not form part of the original RTI Act but was later paved in by way of an amendment to The Second Schedule of the RTI Act on 27-3-2008, as disclosure of information relating to Searches, Seizures and Raids was hampering the process of unbiased investigation that needed to be carried out.

FAQs:

1. Can I know the reasons for selection of my case for scrutiny assessment?
   - ✓ Yes. An RTI application can be filed to know the reasons for selection of your case for scrutiny assessment.
2. Can I know by when will my seized books of account be released and returned to me?
   - ✓ Yes. An RTI application can be filed to know by when your seized books of account will be released. The release of books of account seized is possible only after completion of the assessment to the satisfaction of the Revenue Authorities and an RTI before completion of assessment shall not receive a positive reply.
3. Can I know under whose directions was the search/seizure activity conducted on me?
   - ✓ No. The DGIT (Investigation) is the revenue authority in charge of searches, raids, etc. and it has been specifically excluded from the purview of the RTI Act.

6. Information relating to an ongoing court trial

The RTI is often used as a tool to procure certain information that would help the applicant in another court of law by acting as evidence. This is permissible and not specifically exempted. However, trying to procure a decision using the RTI Act, when the same matter is already pending before some other court of law is generally not appreciated. The CIC has in several cases held that it cannot pronounce a verdict or an opinion on a matter that is subjudice as it could be prejudicial to the interest of the applicant as well as could hamper the current proceedings of the law. Thus, generally, information can be obtained but pronouncements on subjudice matters are not made.

In the case of *Smt. Durgesh Kumari vs. Income Tax Department*, the Full Bench of the CIC held that "the process of 'prosecution' is not yet over and it is still continuing, for, it is open to the court to affirm, modify or reverse the trial court judgment and thereupon any of the parties may further agitate the matter before the apex court. The process of prosecution, thus, is a continuing process which can be said to be over only when all judicial remedies have been fully exhausted."

Also, the RTI Act does not have the power to announce decisions in areas where specific trial courts/redressal mechanisms are already set up and functional. For instance, the Income Tax Department has a well defined hierarchy moving from the Assessing Officer to the Income Tax Appellate Tribunal and/or the High Court and the Supreme Court. One can surely procure information using the RTI Act to facilitate the proceedings at any of the above courts but cannot expect the SIC/CIC to pronounce judgments on technical matters already in consideration by the specified courts. The above has been reiterated by a Full Bench of the CIC in *Shri Rakesh Kumar Gupta vs. ITAT, New Delhi.* In the said case, the Commission inferred that, *"It is our conclusion, therefore, that given that a judicial*

authority must function with total independence and freedom, should it be found that an action initiated under the RTI Act impinges upon the authority of that judicial body, the Commission will not authorise the use of RTI Act for any such disclosure requirement. Section 8 (1) (b) of the RTI Act is quite clear, which gives a total direction to the court or the Tribunal to decide as to what should be published. An information seeker should, therefore, approach the concerned court or the Tribunal if he intends to have some information concerning a judicial proceeding and it is for the concerned Court or Tribunal to take a decision in the matter as to whether the information requested is concerning judicial proceedings either pending before it or decided by it can be given or not."

7. Information on status of Tax Evasion petitions

Tax Evasion Petitions (TEPs) are filed with the Income Tax Department by people who feel that some people are evading taxes very evidently and they wish to bring these malpractices to the notice of the Department. Being an open democracy, our country encourages such whistleblowers and also has certain compensation/awards for the ones who file true TEPs and help the Department. Thus, wanting to know the outcome of a TEP filed does fall under one's Right to Information.

However, the courts have been of the view e.g. in *Shri Brij Ballabh Singh vs. DGIT (Investigation), Lucknow* that complete disclosure of the outcome of a certain TEP can be misused and thus only a broad outcome can be provided as information to the initiator of the TEP. Thus, in case of information requested on the status of a TEP, the broad outcome can be provided without disclosing the details of the investigation and any other data that could hamper the process of investigation.

FAQs:

1. Can I know the status of Tax Evasion Petition filed by me?

   ✓ Yes. An RTI application can be filed to know the status of Tax Evasion Petition filed by you.

2. Can I know the status of the reward I am supposed to receive as a whistleblower?

   ✓ Yes. An RTI application can be filed to know the status of the reward you are eligible to receive as a whistleblower.

Above noted seven issues as stated are common income-tax issues. There may be more, common or non-common. In this connection, one point needs to be noted:

Vide Notification dated 31-7-2012 of DoPT certain Central Government RTI rules have been amended. One of the amendments reads as under:

3. Application Fee: An application under s/s (1) of section 6 of the Act shall be accompanied by a fee of rupees ten and shall ordinarily not contain more than five hundred words, excluding annexures, containing address of the Central Public Information Office and that of the applicant.

   Provided that no application shall be rejected only on the ground that it contains more than five hundred words.

   Hence, if you cover more than one issue in one RTI application, please be careful that words refund to above do not exceed 500.

- The Right to Information Act is not grievance resolution mechanism, for which the departments have separate scheme. This Act is for seeking information. However, indirectly it achieves in large measure compliance and redress of grievance such as non-receipt of refunds, etc.

  If response is not given within the time as prescribed, the concerned Public Information Officer is liable for penalty or for persistent default even disciplinary action can be taken under the applicable service rules.

- Default can be one of the following six types: If PIO—
  - — Refuses to receive an application for information.
  - — Does not furnish information within the time specified under sub-section (1) of section 7.
  - — Malafidely denies the request for information.
  - — Knowingly gives incorrect, incomplete or misleading information.
  - — Destroys information which was the subject of the request.
  - — Obstructs in any manner of furnishing the information.

  Penalty, I would say, is steep though many RTI activists opine that it is mild. It is ` 250 for each day till the application is received or information is furnished. The upper cap is ` 25,000. Same is to be paid personally by the concerned officer. Of course before the penalty is imposed the officer is given a reasonable opportunity of being heard to submit that default was not without reasonable cause.
- All economic laws and many other laws prescribe penalties for citizens and power is granted to the administrative officer. To say something in lighter vein:

  Citizens offer bribe to the officers to save them from levy of penalties. Day should not come when the officers offer bribe to the citizens to save them from levy of penalties!
- We, professionals, suffer very often in our practice, so also our clients suffer all the time. It is often that we do not get proper hearing, do not get adequate notice for hearing. The assessee does not get the assessment order or appellate order in time because he has refused to pay "consideration" for it. Very often, in number of cases, refunds do not get issued. We do nothing about it, sometime citizens (clients) do not allow us to do anything and everyone suffers.
- Neither we professionals nor the officers of the department bother to see implementation of the Citizen's Charter of Income Tax Department. This Charter shows that the department has made certain commitments. It is our duty and that of the citizens as victims of non-performance of the officials' duties to enquire about the level of implementation, if any, of the points noted in the Charter.
- Under RTI, we cannot ask: Why you have not issued refund due to me but we can ask when you will issue refund due to me. Isn't this interesting! As soon as one seeks this information, like magic wand, refund arrives on your table within 30 days, cost only ` 10!
- I advise all professionals to use facilities available in RTI Act, it is an opportunity to minimise corruption and improve accountability. Let professionals become catalysts for change, catalyst to bring better tax-administration through the use of Right to Information.

Abbreviations

RTI: Right to Information

A.O: Assessing Officer

CA: Chartered Accountant

CPIO: Central Public Information

DGIT: Director General of Income Tax

DoPT: Department of Personnel & Training

FAA: First Appellate Authority

ITR: Income Tax Return

NGO: Non Government Organisation

PAN: Permanent Account Number

PIO: Public Information Officer

PSU: Public Sector Undertaking

SPIO: State Public Information Officer

TAN: Tax Deduction Account Number.

[Source : Article published in Souvenir of 17th National Convention held on 26th and 27th December, 2013 at Mumbai]


Advance Pricing Agreement (Sections 92CC & 92CD)

Smriti Tripathi & Vasu Nigam
Law Students, National Law Institute University, Bhopal

I. Introduction

With globalisation driving the world economy in recent years, Multinational Enterprises ("MNEs") have gained much prominence as countries have increasingly engaged in cross-border trade and MNEs have adequately addressed their needs by setting up their units across the world. A natural implication of this has been a continued increase in intra-group transactions within these various units which are driven by common interests of the group. However, this has also opened up Pandora's Box resulting in a gamut of disputes with respect to the pricing of such cross-border and intra-firm transactions that occur between associated enterprises of an MNE group, referred to as "Transfer Pricing". Transfer pricing can be defined as manipulation of prices in an international transaction between parties having the same interest, such that profit made in one country is moved to another tax haven country, with the intent of reducing the tax liability.[1] Though we might not have enough data so as to determine exactly the share attributable to these intra-group transactions, a recent OECD study that looked at data available in nine OECD countries concluded that intra-firm exports of foreign affiliates already represent 16% of total exports.[2] Further, if the exports of parent companies to their affiliates abroad are added, one could conclude that export sales to related parties represent one-third of the exports, as is the proportion suggested by US trade statistics which do track intra-firm trade.[3]

From a taxation perspective, it is very important to understand its implications as this is arguably the most disputed area of international taxation today due to a host of reasons such as the complexity involved, possible manipulation in setting the transfer price and risk of double taxation to name a few. In view of this inevitable conflict of interest between MNEs and tax authorities, where MNEs always aim at greater profits while tax authorities pursue higher tax revenues, there has been a push towards a more co-operative approach between MNEs and tax authorities to solve their disputes and remove any obstructions in the smooth flow of international trade. This is evident by the use of instruments such as Mutual Agreement Procedures ("MAPs") and Double Taxation Avoidance Agreements ("DTAAs") worldwide.

Against this background, Advance Pricing Agreements ("APAs") are a step forward in the same direction in an attempt to check the rising number of disputes in this area. Under this arrangement, tax authorities and MNEs agree in advance as to the transfer pricing method ("TPM") that will be used in its transactions with the associated enterprises. This is a revolutionary step for a highly litigious country like India as it will go a long way in reducing wasteful

1 Iljin Automotive Private Ltd .v .Asstt. CIT [2011] 16 taxmann.com 225 (Chennai).

2 R. Lanz and S. Miroudot, Intra-Firm Trade: Patterns, Determinants and Policy Implications, OECD Trade Policy Working Papers, No. 114, OECD Publishing (2011) , http://dx.doi.org/10.1787/5kg9p39lrwnn-en (last visited on 6th September, 2013).

3 Ibid.

expenditure of tax authorities' and taxpayers' resources in settling these disputes[4] while at the same time boosting foreign investors' confidence in the rather gloomy Indian market.

This research paper has been written with the objective of analysing the APA Scheme which was introduced last year in India and is still at a nascent stage. To begin with, the concept of transfer pricing has been explained in brief so as to give context to the analysis of APA. Once the fundamental problems involved with Transfer Pricing and, thus, the need for an APA regime has been identified, the relevant provisions[5] in the Income-tax Act, 1961[6] have been elaborately analysed. This has been done by explaining the procedure and mechanism involved in entering into and finalising an APA while providing a comparative analysis with some other mature APA jurisdictions such as USA, UK, Japan, Australia and Canada who have gained much experience in functioning and fallouts of such a regime over the past two decades. Further, in light of such analysis, the merits and demerits of the Indian APA scheme have been discussed. Lastly, the authors have put forth certain suggestions that are expected to increase its efficacy and help achieve the desired objectives.

II. Background to Advance Pricing Agreements

Concept of Transfer Pricing

Before discussing Advance Pricing Agreements, it is important to understand the concept of Transfer Pricing so as to appreciate the context in which APAs have been introduced. Transfer Pricing works on the premise that commercial transactions between associated enterprises of an MNE may not be subject to the same market forces as those which determine relations between two independent firms. To explain better, let us take an illustration:

- Company "A" purchases goods for ` 100 and sells it to its associated company "B" in another country for ` 300. This price at which one party transfers goods or services to another associated party is called the “transfer price."
- "B", in turn, sells the goods in open market for ` 600.

Let's assume that the tax rate in "A" is 30% and that in "B" is 20% on the same goods. Now, had "A" sold it directly in the open market, it would have had to pay tax at the rate of 30% on the entire amount. But by routing the transaction through B, it restricted its own profit to ` 200 and let B appropriate the balance. The profit of ` 300 is, therefore, transferred to the country of B and taxed at a lesser rate of 20%. MNEs manipulate such a scenario by arbitrarily fixing the transfer price to a figure which benefits them the most, thus, negating the role of market forces. The purpose of this manipulation is to achieve greater tax savings and, consequently, greater overall profits to the group per se. Tax authorities, understandably, identify it as a problem as the result is revenue loss and drain on foreign exchange reserves to the country.

Indian context

Liberalisation and globalisation in the post-1991 India has resulted in increased participation of MNEs in economic activities in India. This, in turn, has given rise to new and complex issues emerging from commercial transactions between different parts of such groups.

4 The Internal Revenue Service in USA resolved a transfer pricing dispute with GlaxoSmithKline Holdings (Americas) Inc. & Subsidiaries (“GSK”), the largest tax dispute in its history for $ 3.4 billion in exchange of abandoning a refund of $ 1.8 billion in overpaid income taxes, as part of the parties' long-running transfer pricing dispute for the tax years 1989 through 2005.

5 Sections 92CC and 92CD, Income-tax Act, 1961.

6 Hereinafter “Income-tax Act”.

Accordingly, the Finance Act, 2001 introduced the Transfer Pricing provisions[7] in India which provides for the determination of Arm's Length Price ("ALP") in cases of international transactions between associates enterprises. These regulations, which are broadly based on the Organization for Economic Cooperation and Development ("OECD") Transfer Pricing Guidelines,[8] describe the various transfer pricing methods, impose extensive annual transfer pricing documentation requirements and contain harsh penal provisions for non-compliance.[9] This is in consonance with the international standard set out in international instruments such as the UN Model Tax Convention,[10] OECD Model Tax Convention[11] and used by most tax administrations across the world.

Since the introduction of these provisions, transfer pricing has become the most important international tax issue affecting the operations of MNEs in India. In fact, with about 3,500 pending disputes, India has the third largest number of pending cases related to transfer pricing in the world, next only to Japan and Canada.[12] This number is less than six in United States and there are neither any ongoing nor any pending cases for domestic appeal in countries like New Zealand, Taiwan and Singapore.[13] In monetary terms, there was a mispricing of ` 67,768 crores in 2010-11 and ` 43,531 crores in 2011-12 as per the Directorate of Transfer Pricing.[14]

Hence, a need was felt to develop a statutory framework which can lead to tax certainty as well as provide computation of fair and equitable tax so that the profits chargeable to tax in India do not get diverted elsewhere.[15]

III. Need for an Apa Scheme

As mentioned earlier, determination of transfer price between associated enterprises presents itself with its own share of hurdles which an APA scheme attempts to overcome. Therefore, it is pertinent that we look into some of the fundamental issues with the mechanism of Transfer Pricing so as to comprehend the need for introducing an APA regime in the first place:

1. Jurisdiction

When tax base arises in more than one country, tax authorities are faced with the question of prevention of double taxation and as to which

7 Sections 92 to 92F, Income-tax Act (substituted for Section 92 by the Finance Act, 2001, w.e.f. 1-4-2002).

8 OECD, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, OECD Publishing (2010).

9 PricewaterhouseCoopers, International Transfer Pricing 2013/14 (2012), http://www.pwc.com/gx/en/international-transfer-pricing/requirements.jhtml%E2%80%8E (last visited on 8th September, 2013).

10 Article 9(1), United Nations Model Double Taxation Convention between Developed and Developing Countries, United Nations (2011): "Where (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would have been made between independent enterprises, then any profits which would, but for those conditions have accrued to one of the enterprises, but, by reason of these conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

11 Article 9(1), OECD Model Convention with respect to Taxes on Income and on Capital, OECD (2003).

12 Ernst & Young, 2012 Global Transfer Pricing Tax Authority Survey: Perspectives, Interpretations and Regulatory Change (2012).

13 Ibid.

14 India has 3rd largest number of transfer pricing cases: E&Y, THE ECONOMIC TIMES, 20th August, 2012, http://articles.economictimes.indiatimes.com/2012-08-20/news/33288009_1_transfer-prices-e-y-partner-inter-company-transactions (last visited on 8th September, 2013).

15 Central Board of Direct Taxes, Clarification on Provisions governing Transfer Price in an International Transaction, Circular No. 12/2001, dated 23-8-2001.

country should provide the relief.[16] Furthermore, MNEs frequently engage in transfer pricing manipulation in order to shift profits and reduce their aggregate tax burden. This can be done by shifting profits from its units in higher tax countries to units in lower tax countries.

2. Allocation

MNE units share common resources and any trade or taxation barriers in the countries in which it operates raise the MNE's transaction costs, thus, leading to undesired allocation of resources.[17] Furthermore, MNEs cannot disentangle certain common resources from their global income for tax purposes – for instance, intangibles such as intellectual property rights provide MNEs with a competitive advantage by giving uniqueness to the product.[18] Governments, on the other hand, aim towards maximising the revenue base in their respective nation states from the allocation of costs and income received from these MNE resources. Thus, there is a conflict of interest between the MNEs and the governments giving rise to a lot of transfer pricing disputes.

3. Valuation

The aforementioned conflict between the common goals of the MNEs and the overall economic and social goals of countries also extends to disagreement as to determining what the correct transfer price is. Recently, Income Tax authorities have served transfer pricing orders against companies like Shell India (tax liability of ` 5,000 crores),[19] Vodafone (tax liability of ` 460 crores)[20] and Nokia (tax liability of ` 9,000 crores)[21] and these have been challenged by these companies on grounds of incorrect interpretation of tax regulations. Thus, there must be a balance between the Government's attempts to provide a climate of certainty for taxpayers while at the same time trying not to lose out on critical tax revenue.

4. Inadequacy of current dispute resolution methods

India reported at least 1500 transfer pricing disputes pending in litigation, as of February 2011 and twice as many disputes in last 18 months.[22] Other developing economies such as Argentina, Brazil and Venezuela also report significant use of litigation which is very time-consuming.

Alternatively, Mutual Agreement Procedure has proved to be an effective method where an agreement would be reached between the tax authorities of two countries that reduce double taxation or conflicting taxation.[23] Though MAP offers an inherent advantage of offering remedies regardless of domestic tax laws, it is just an optional method in India and often argued as a lengthy procedure which on an average takes 2-3 years to resolve disputes. Also, it is available subsequent to audits and transfer pricing adjustments whereas an APA is more progressive and proactive.

---

16 See UN Tax Committee's Sub-committee on Practical Transfer Pricing Issues, An Introduction to Transfer Pricing (2011).

17 Ibid.

18 OECD Committee on Fiscal Affairs, Revised Discussion Draft on Transfer Pricing Aspects of Intangibles (2013).

19 Shell 'shocked' again with ` 5000 crore tax blow; Vodafone not spared too, THE ECONOMIC TIMES, 31st March 2013,http://articles.economictimes.indiatimes.com/2013-03-31/news/38163249_1_shell-india-transfer-pricing-order-vodafone-teleservices-mauritius (last visited on 7th September, 2013).

20 Ibid.

21 Nokia suspected of flouting transfer pricing rules too, THE HINDU BUSINESS LINE, January 30, 2013, http://www.thehindubusinessline.com/industry-and-economy/info-tech/nokia-suspected-of-flouting-transfer-pricing-rules-too/article4360530.ece (last visited on 7th September, 2013).

22 Supra note 12.

23 Supra note 10, Article 25.

IV. Broad Framework of the Indian Apa Scheme

In order to overcome these bottlenecks, the Finance Act 2012 introduced Advance Pricing Agreement in India by inserting section 92CC and section 92CD in the Income-tax Act, 1961. The Ministry of Finance then notified the "Advance Pricing Agreement Scheme"[24] by inserting Rules 10F to 10T[25] in the Income Tax Rules, 1962[26] while the procedure to deal with requests for bilateral or multilateral Advance Pricing Agreements was laid down in Rule 44GA.[27] This scheme came into effect from the date of its publication in the Official Gazette i.e. from 30th August, 2012.

Before we move on to explain the broad framework of the scheme, certain relevant terms need to be defined.

Important definitions

'International Transaction' is defined in S.92B of the Income-tax Act as a transaction between two or more associated enterprises, either or both of whom are non-residents, involving the sale, purchase or lease of tangible or intangible property; provision of services; lending or borrowing money; or any other transaction having a bearing on the profits, income, losses or assets of such enterprises.

"Associated Enterprises" are defined by S.92A of the Income-tax Act to cover direct / indirect participation in the management, control or capital of an enterprise by another enterprise.[28] This also includes situations in which the same person, directly or indirectly, participates in the management, control or capital of both the enterprises.[29]

The term "Arm's Length Price (ALP)" has been adopted from OECD Transfer Pricing Guidelines[30] and refers to the price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions.[31] The methods to determine the ALP in relation to an international transaction has been laid down in Section 92C(1) of the Income -tax Act:

1. Comparable Uncontrolled Price Method (CUP)
2. Resale Price Method (RPM)
3. Cost Plus Method (CPM)
4. Profit Split Method (PSM).
5. Transactional Net Margin Method (TNMM)
6. Any other method that may be prescribed

The provision gives no particular method precedence over the others. The "most appropriate transfer pricing method" for a particular transaction would need to be determined having regard to the nature of the transaction, class of persons or associated persons, functions performed by such persons and other relevant factors.[32]

---

24 CBDT, Notification No. 36/2012 dated 30-8-2012.

25 Income Tax (Tenth Amendment) Rules, 2012, w.e.f. 30-8-2012.

26 Hereinafter "Income Tax Rules".

27 Ibid.

28 Section 92A(1)(a), Income-tax Act.

29 Section 92A(1)(b), Income-tax Act.

30 Supra note 8.

31 Section 92F(ii), Income-tax Act.

32 Rule 10F(g), Income-tax Rules.

"Advance Pricing Agreements" have been defined by OECD as arrangements that determine, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.[33] The Internal Revenue Service ("IRS"), which has a cumulative experience of more than 20 years of APA practice and has produced more than 1100 unilateral and bilateral agreements since 1991,[34] defines an APA as an agreement between a taxpayer and the Service in which the parties set forth, in advance of controlled transactions, the best Transfer Pricing Method within the meaning of section 482 of the Internal Revenue Code and the regulations.[35]

Under Indian law, APA has been defined as "an agreement between the Central Board of Direct Taxes ("CBDT") and any person, which determines, in advance, the arm's length price with respect to the international transaction for the period specified by the APA."[36]

Scope and applicability of the legislation

The APA process is voluntary and supplements appeal and other DTAA mechanisms for resolving transfer pricing disputes. Sections 92CC provides that the CBDT, with the approval of Central Government, may enter into an APA with any person, in order to determine the ALP or the manner in which it is to be determined, in relation to an international transaction to be entered into by that person.[37] Thus, the ALP of any international transaction, which is covered under an APA, shall be determined in accordance with the agreement so entered into. The provisions of section 92C or 92CA which normally apply for determination of ALP shall be modified to this extent.[38]

The Board is empowered to prescribe a Scheme providing for the manner, form, procedure and any other matter generally in respect of the advance pricing agreement.[39]

Term of the agreement

The APA shall be valid for such previous years as specified in the agreement[40] but shall not exceed five consecutive previous years in any case.[41]

Most of the countries, including USA, UK, Australia, China, Germany and Japan, stipulate similar term of agreement which ranges from 3 to 5 years.[42] Nonetheless, there are exceptions to this norm as well and certain countries specify their own conditions. For example, it depends on the facts of the case in Canada[43], it is unspecified in Israel[44] and it is what the taxpayer specifies in the agreement in Korea.[45]

33 Supra note 8, ¶ 4.124.

34 Internal Revenue Service, Announcement and Report Concerning Advance Pricing Agreements, Internal Revenue Bulletin: 2013-16 (15th April, 2013).

35 Internal Revenue Service, Section 482 – Allocation of Income and Deductions among Taxpayers, Rev. Proc. 2006-9, Internal Revenue Bulletin: 2006-2.

36 Ministry of Finance, Press Release Explaining "Advance Price Agreement (APA) Scheme", dated 31-8-2012.

37 Section 92CC, Income-tax Act.

38 Ibid.

39 Section 92CC(9), Income-tax Act.

40 Section 92CC(4), Income-tax Act.

41 Ibid.

42 Grant Thornton, Indian Advance Pricing Agreement Regime – The Game Changer, (2012).

43 Canada Customs and Revenue Agency, Information Circular 94-4R, March 16, 2001, ¶ 55.

44 Section 85A(d), Income Tax Ordinance, 5721-1961 (Israel).

45 National Tax Service, APA of Korea NTS, October 2012, ¶ 6.4.

Types of APA

The Indian APA scheme provides for three types of APAs,[46] namely, unilateral, bilateral and multilateral which have been briefly discussed below. The applicant may opt to choose any of these at the time of making the application based on his specific requirements.[47] However, a taxpayer is encouraged to apply for bilateral or multilateral APAs considering their efficacy in reducing the risk of double taxation with certainty, which the unilateral APAs do not provide.[48]

1. Unilateral APA: This is an agreement between CBDT and the applicant and does not involve any agreement with the treaty partner.[49] Its main problem is that one cannot be sure of the ALP or Transfer Pricing Method, determined under the APA, of being accepted by the other country. It may be noted that once a unilateral APA has been entered into, there will not be any MAP benefit available to the assessee with respect to the covered transactions.[50]

2. Bilateral APA: The applicant is required to make an application with the competent authority of India while simultaneously applying to the competent authority of the other country either itself or through it associated enterprise.[51] The two competent authorities are then required to reach an arrangement through MAP negotiation.[52] Entering into a bilateral APA is conditional on acceptance by the applicant.

3. Multilateral APA: This is same as the bilateral APA except that the Indian competent authority has to reach an arrangement with competent authorities of more than one country before the agreement could be offered to the applicant.[53]

Stages of an APA process

The overall process for entering into an APA in India can be divided into 4 phases, which is in line with the global practice:[54]

1. Pre-filing phase: The process of an APA starts with request for a pre-filing consultation meeting by making an application[55] to the Director General of Income Tax (International Taxation) ["DGIT (IT)"] who shall assign it to one of the APA teams (presently there is only one APA team in India).[56] This objective of this meeting is to determine the scope of the agreement, understand the transfer pricing issues involved and to determine the suitability of the international transaction for the agreement.[57]

   This stage shall neither bind any party nor will it imply that the person has applied

46 Income Tax Department, Advance Pricing Agreement Guidance with FAQs, Tax-payers Information Series-43, at p.2 ("CBDT Guidance").

47 Ibid.

48 Supra note 46 at p.4.

49 Supra note 46 at p.2.

50 Supra note 46 at p.15.

51 Supra note 46 at p.2.

52 Ibid.

53 Supra note 46 at p.2.

54 Supra note 9 at p.483.

55 Form No. 3CEC, Application for a pre-filing meeting, Rule 10H(2), Income Tax Rules.

56 Supra note 46 at p.6.

57 Rule 10H(5), Income Tax Rules.

for entering into an agreement.[58] Also, no fee is required to be paid at this stage. The applicant may maintain anonymity if he desires to as long as the identity of the authorised representative along with sufficient information about the business operation and international transaction is disclosed.[59]

2. Formal submission phase: If the taxpayer is desirous of applying for an APA after the pre-filing meeting, he is required to make an application in the prescribed format.[60] This will be made to DGIT (IT) in case of unilateral agreement and to the competent authority in case of bilateral/ multilateral agreement.[61] The application is also required to pay APA fees at this stage before filing the application.

3. Negotiation phase: In case the application is accepted, the APA team shall hold meetings with the applicant and undertake necessary inquiries relating to the case.[62] A draft report by the APA team will then be submitted to the competent authority of India[63] which will then negotiate with the competent authority of other country. If the negotiations are successfully completed, the competent authority in India shall formalise a MAP arrangement[64] and the applicant must accept or reject it within 30 days of such communication.[65]

4. Finalisation phase: Once there is a mutually agreed draft agreement, the Board may enter into an APA, with the approval of the Central Government.[66]

Legal effect of APA

An APA is binding on the assessee who has entered into the APA and on the Commissioner of Income-tax along with other Income-tax authorities subordinate to him in respect of that assessee

60 Form No. 3CED, Application for an Advance Pricing Agreement, Rule 10-I(1), Income Tax Rules. and that transaction.[67] However, the Income-tax Act provides that an APA can lose its binding value if there is any change in law or facts having bearing on such APA.[68]

V. Analysis of the APA Scheme

Eligibility and transactions covered

Indian position

CBDT is empowered to enter into an APA with any person undertaking an international transaction, subject to the approval of Central Government.[69] With respect to the transactions that fall within its scope, the provision only talks about international transactions that are entered into by such persons.[70] Domestic transactions are, thus, excluded from the ambit of the scheme.

Cross jurisdictional analysis

Keeping such a wide scope as to the eligibility to enter into an APA is mostly consistent with

58 Rule 10H(6), Income Tax Rules.

59 Supra note 46 at p.7.

61 Rule 10-I(2), Income Tax Rules.

62 Supra note 9.

63 Rule10L(5), Income Tax Rules.

64 Rule 10L(7), Income Tax Rules.

65 Supra note 46 at p.15.

66 Rule 10L(8), Income Tax Rules.

67 Section 92CC(5), Income-tax Act.

68 S.92CC(6), Income-tax Act.

69 Explanatory Memorandum to Finance Bill, 2012, Provisions Relating to Direct Taxes.

70 S.92CC(1), Income-tax Act.

global practice[71] except Taiwan which prefers applications only from taxpayers with a good tax-paying history[72] and Nigeria where the cumulative amount resulting the transaction in every year of assessment should not be less than N250,000,000 (Two Hundred and Fifty Million Naira) of the taxpayer's deductible costs or total taxable revenues.[73]

Fees

In India, a graded fee based on the value of international transaction entered into or proposed to be undertaken is required. The breakdown of this fee payable is as given below[74]:

1. Amount not exceeding ` 100 crores: ` 10 lakhs
2. Amount not exceeding ` 200 crores: ` 15 lakhs
3. Amount exceeding ` 200 crores: ` 20 lakhs

Cross Jurisdictional Analysis

Most of the countries have done away with the requirement of any sort of APA fees, including APA regimes in Australia, China, France, Germany, Japan, Malaysia and United Kingdom.[75] Out of the few remaining countries that still do, it varies from country to country. Some countries, for instance USA,[76] require a fixed fee payable at the time of application while others like Canada[77] base it on certain actual costs like travel and accommodation costs incurred by the revenue authorities in processing an APA application.

Suggestions have been made to incorporate similar rules in the Indian scheme, taking factors like the complexity of transactions involved, time spent in the case, materiality of the amounts involved etc, for determining the fee.[78] However, the authors are of the view that the fee is quite nominal and will not disincentivise participation in the scheme. In fact, given the huge amount of time and resources spent in negotiating an APA, it will go a long way in achieving the objective of screening out non-serious players.[79] Further, determination of fee based on "out of pocket" expenses or other like factors will not only be more complex but also may leave room for arbitrariness on the part of tax authorities.

Critical assumptions

Indian position

Since an APA determines, in advance, the TPM for arriving at the ALP of future transactions, its working is based on certain assumptions about the factual conditions in the future, such as business strategies, market conditions, foreign exchange rates, etc. Such factors are called "critical assumptions". Rule 10F(f) of Income Tax Rules defines these to be "factors and assumptions which are so critical and significant that neither party entering into an agreement will continue to be bound by the agreement if any of those factors or assumptions is changed,"[80]

71 Deloitte, White Paper, Recommendations for a Model Advance Pricing Scheme in India (June 2011), http://www.deloitte-tax-news.de/transfer-pricing/files/apa-india-recommendations-for-a-model-june2011.pdf (last visited on 7th September, 2013)

72 Supra note 9 at p. 771.

73 Board of Federal Inland Revenue Service, The Income Tax (Transfer Pricing) Regulations No.1, 2012 (Nigeria).

74 Supra note 46 at p.8.

75 Supra note 42.

76 Supra note 35, Section 4.12: United States stipulates a fixed user fee of $50,000 for an APA request whereas user fee of $35,000 for an APA renewal.

77 Supra note 43, ¶27.

78 Supra note 71.

79 Supra note 46.

80 Rule 10F(f), Income Tax Rules.

and can be invoked even when they are not within the applicant's control.[81] Such assumptions are defined by the taxpayer in the APA[82] and as such depend on facts of each case.[83]

The validity of the determination of ALP depends on these assumptions being supported by facts when the actual transactions take place. Thus, breach in critical assumptions is an exception to the binding nature of APA. In such a case, either the assessee or the competent authority of India, on its own, may seek to revise or cancel the APA.[84]

Cross Jurisdictional Analysis

The IRS in USA defines critical assumptions as "any fact the continued existence of which is material to the taxpayer's proposed TPM."[85] This may include a particular mode of conducting business operations, a particular corporate or business structure, or a range of expected business volume.[86] Under Canadian law, this includes any objective criterion that would significantly affect the substantive terms of the APA if the underlying conditions changed, irrespective of whether the change is within the taxpayer's control or not.[87] Australia also provides for operational, legal, tax, financial, accounting and economic conditions or assumptions.[88] English law renders the agreement invalid if critical assumptions having a material bearing on the reliability of the transfer pricing method cease to be valid.[89]

Under US laws, the legal effect of failure to meet a critical assumption is that the APA must be renegotiated or, failing that, cancelled.[90] APA laws in UK,[91] Canada[92] and Australia[93] have similar provisions i.e. in case of breach of critical assumption, they provide for revision of agreement failing which the APA can be cancelled.

Revision/Cancellation of APA

Indian position

CBDT is empowered to revise or cancel an agreement, subsequent to it having entered into, in accordance with the procedure laid down in Rules 10Q or 10R respectively.[94] An agreement may be revised in case of:

1. a change in critical assumptions, failure to meet terms of the agreement,[95]
2. a change in law that modifies the agreement but not to the extent which renders the agreement to be non-binding[96] or;
3. a request from competent authority in the other country, in case of bilateral or multilateral agreement.[97]

81 Supra note 46 at p. 20.

82 Supra note 60: Taxpayer will include „Critical Assumptions in its APA request in Form No.3CED.

83 Supra note 46 at p. 20.

84 Rule 10M(4), Income Tax Rules.

85 Supra note 35, Section 4.05.

86 Ibid.

87 Supra note 43, ¶7.

88 Australian Taxation Office, Law Administration Practice Statement 2011/1 (replacing Taxation Ruling TR 95/23, which has now been withdrawn).

89 Statement of Practice on Advance Pricing Agreements, SP2/10, Issued up to 30th January 2012.

90 Supra note 35, Section 11.06

91 Section 225, Taxation (International and Other Provisions) Act, 2010.

92 Supra note 43, ¶54.

93 Supra note 88, ¶137.

94 Rule 10Q(2), Income Tax Rules.

95 Rule 10Q(1)(a), Income Tax Rules.

96 Rule 10Q(1)(b), Income Tax Rules.

97 Rule 10Q(1)(c), Income Tax Rules.

If the assessee is not in agreement with the proposed revision under Rule 10Q, the agreement is liable to be cancelled as per the Income Tax Rules, 1962.[98] Rule 10R further sets out reasons because of which an APA can be cancelled. These include

1. failure on part of the assessee to comply with terms of the agreement,[99]
2. failure to file annual compliance report in time[100] or;
3. material errors in the annual compliance report filed by the assessee.[101]

The agreement may be declared void ab initio if it has been obtained by the person by fraud or misrepresentation of facts.[102]

Any such revision or cancellation shall be done in accordance with principles of natural justice giving the assessee the opportunity to be heard[103] and giving reasons in writing[104] before proceeding to cancel an application.

Cross jurisdictional analysis

Grounds for revision and cancellation of APA in India are in consonance with norms in most of the mature APA jurisdictions.

In United States, an APA may be revised in lieu of being cancelled or revoked as long as it is by agreement of parties and is consistent with the interest of sound tax administration.[105] Canadian Customs and Revenue Agency provides for revision of APA if either failure to meet critical assumptions, a change in law, material change in circumstances or inconsistency with foreign tax administration's APA has been established.[106] Administrative Guidelines in Japan provide for revision where material differences to business and economic conditions essential to the continuation of APA crop up.[107] Under English law, an APA may be revised by consent of the parties where the agreed methodology becomes difficult to apply but does not go as far as to invalidate a critical assumption.[108] The Australian APA scheme allows revision in instances of breach of critical assumptions,[109] making of false or misleading statements, omission of facts without which the statement if false or misleading[110] or failure of timely submission of Annual Compliance Report.[111]

Under American law, an APA may be revoked (relating back to first day of APA's first taxable year) due to fraud or malfeasance[112] or disregard[113] in connection with APA.[114] It may also be cancelled on grounds of taxpayer's misrepresentation, failure of critical assumption,

98 Rule 10Q(4), Income Tax Rules.

99 Rule 10R(1)(i), Income Tax Rules.

100 Rule 10R(1)(ii), Income Tax Rules.

101 Rule 10R(1)(iii), Income Tax Rules.

102 S.92CC(7), Income Tax Act.

103 Rule 10Q(3) and Rule 10R(2), Income Tax Rules.

104 Rule 10Q(5) and Rule 10R(4), Income Tax Rules.

105 Supra note 35, Section 11.05.

106 Supra note 43, ¶93.

107 National Tax Agency of Japan, Commissioner's Directive on the Operation of Transfer Pricing (Administrative Guidelines), ¶5-20.

108 Supra note 89, ¶47.

109 Supra note 88, ¶137.

110 Ibid., ¶200.

111 Ibid., ¶147.

112 As defined in 26 USC § 7121.

113 As defined in 26 USC § 6662(b)(1); 26 USC § 6662(c).

114 Supra note 35, Section 11.06.

failure to state a material fact, failure to file a timely annual report, lack of good faith compliance or material change in governing case law, statute, regulation or a treaty.[115] Japan follows similar grounds for cancellation except it specifies retroactive cancellation in case false facts or material errors in the APA are revealed.[116] Apart from revocation on grounds of critical assumption, English law provides for nullification due to supply of false or misleading information, fraudulently or negligently.[117] In Australia, an APA may be cancelled or suspended after negotiation of revision or modification of APA on grounds discussed earlier falls apart.[118]

Renewal of APAs

Indian Position

Renewal of an APA in India will follow the same forms and procedures as in initial APA request except that pre-filing consultation is not required.[119] The renewal application would be treated as a fresh application and the procedure and fee would apply accordingly.[120] The process is likely to be faster and time-saving if facts of the renewal application are similar to those of the previous APA.[121]

Cross Jurisdictional Analysis

Some jurisdictions suggest a time frame within which taxpayers should file renewal application in order to expedite the process. For instance, tax authorities of US[122] and Canada[123] encourage taxpayers to file the renewal request nine months before the expiration of the APA term.

Similarly, United Kingdom[124] and Australia[125] encourage filing request for renewal at least six months before the expiry of the existing APA. Japan, on the other hand, does not propose a specific timeline for filing of renewal.[126] Expedited processing will be most likely where the taxpayer demonstrates that law and policy remain substantially the same and no material changes have occurred in the taxpayer's facts or circumstances.[127]

Procedure for giving effect to APA

Indian Position

Section 92CD(1) provides that when an APA has been entered into by a tax-payer and he has already filed a return of income for any previous year to which the agreement applies, then he shall file a modified return within a period of three months from the end of the month in which the said APA was entered into, in accordance with the terms of the agreement. Such a modified return of income shall be considered as a return furnished under Section 139[128], for all other provisions of the Act.[129] If the assessment proceedings of such previous year

115 Ibid.
116 Supra note 107, ¶5-21.
117 Supra note 91, Section 226 and Section 227.
118 Supra note 88, ¶137, ¶200.
119 Rule 10S, Income Tax Rules.
120 Supra note 46 at p. 23.
121 Supra note 46 at p. 77.
122 Supra note 35, Section 12.01.
123 Supra note 43, ¶104.
124 Supra note 89, ¶48.
125 Supra note 88, ¶154.
126 Supra note 107, ¶5-22.
127 Supra note 35, Section 12.02.
128 Section 139, Income Tax Act: Provides for filing of return of income by individuals/companies on before the specified due date.
129 Section 92CD(2), Income Tax Act.

17TH NATIONAL CONVENTION HELD ON 26TH & 27TH DECEMBER, 2013 AT Y. B. CHAVAN AUDITORIUM, MUMBAI

Recipients of Awardees for the year 2012-13

Hon'ble Mr. Justice H. L. Gokhale presenting Ranka Public Charitable Trust Best Conference Award 2012 to Dr. Ashok Saraf.

Hon'ble Mr. Justice Rajesh Bindal presenting Ranka Public Charitable Trust Best Conference Award 2013 to Members from Baroda.

Hon'ble Mr. Justice J. K. Ranka presenting Ranka Public Charitable Trust Best Seminar Award 2013 to Members from Varanasi.

Mr. Y. P. Trivedi presenting Ranka Public Charitable Trust Best Zone Chairman Award to Members from Kolkata on behalf of Mr. Indu Chatrath.

Hon'ble Mr. Justice H. L. Gokhale presenting trophy in memory of Late Darsan Lal Ji Gupta to Mr. Dilip Kumar Agrawal, Siliguri for Membership Development 2012 & 2013.

Mr. Y. P. Trivedi presenting trophy in the memory of Late Justice Dr. B. P. Saraf to Mr. M. S. Rao, Eluru for Maximum Participation 2013.

Hon'ble Mr. Justice H. L. Gokhale presenting trophy in the memory of Late Rajaram Agrawal to Mr. Ruchir Bhatia, New Delhi for Best Upcoming Speaker 2013.

Hon'ble Mr. Justice Rajesh Bindal presenting trophy in the memory of Late Justice Dr. B. P. Saraf to Mr. A. Retna Kumar, Trivandrum for Best Zone Vice Chairman (Southern Zone).

17TH NATIONAL CONVENTION HELD ON 26TH & 27TH DECEMBER, 2013 AT Y. B. CHAVAN AUDITORIUM, MUMBAI

Recipients of Awardees for the year 2012-13

Mr. Y. P. Trivedi presenting trophy in the memory of Late Rajaram Agrawal to Dr. M. V. K. Moorthy, Hyderabad for Chairman for Best Zone.

Hon'ble Mr. Justice H. L. Gokhale presenting trophy to Members from Ranchi for Maximum Participants in Conference.

Mr. S. K. Poddar and Mr. J. D. Nankani presenting Trophy to Mr. Mitesh Modi, Surat for Outstanding Tax Conference 2012.

Hon'ble Mr. Justice H. L. Gokhale presenting the Hon'ble Dr. Justice B. P. Saraf Memorial Trophy to Dr. K. Shivaram for his outstanding contribution to the development of tax profession.

Hon'ble Mr. Justice H. L. Gokhale presenting trophy to Mr. Narayan P. Jain as Secretary General.

Hon'ble Mr. Justice H. L. Gokhale presenting Presidential trophy to Mr. Kishor Vanjara.

17TH NATIONAL CONVENTION HELD ON 26TH & 27TH DECEMBER, 2013 AT Y. B. CHAVAN AUDITORIUM, MUMBAI

1st Technical Session

CA. Pradip Kapasi moderating the 1st Technical Session.

Panelists

Mr. P. C. Joshi
Advocate

Dr. K. Shivaram
Advocate

2nd Technical Session

Dignitaries on dais.

Chairperson

CA. Bhavna
Doshi

Rapporteur

CA. Sunil
Gabhawalla

Paper Writer

CA. Ashit Shah

3rd Technical Session

Dr. Anita Sumanth, Advocate moderating the 3rd Technical Session.

Panellists

From Left to Right : S/Shri K. K. Ramani, Advocate, Firoze Andhyarujina, Sr. Advocate and P. C. Joshi, Advocate

4th Technical Session

Mr. S. R. Wadhwa, Advocate, Chairman at 4th Technical Session delivering opening remarks.

Rapporteur

Mr. Ganesh Purohit
Sr. Advocate

Paper Writer

Mr. Ajay R. Singh
Advocate

17TH NATIONAL CONVENTION HELD ON 26TH & 27TH DECEMBER, 2013 AT Y. B. CHAVAN AUDITORIUM, MUMBAI

5th Technical Session

Dr. Ashok Saraf, Sr. Advocate, Chairman of 5th Technical Session delivering concluding remarks..

Rapporteur

Mr. J. V. Rao
Advocate

Paper Writer

CA.
K. Sankaranarayanan

Brains' Trust Session

Shri M L Patodi, Advocate, Co-ordinating the Brains' Trust Session

Brains' Trustees

Shri N. M. Ranka
Senior Advocate

Shri Vikram Nankani
Advocate

Shri P S Sarin
Advocate

Shri C. B. Thakar
Advocate

Mr. J. D. Nankani, President elect addressing at the Valedictory Session.

Section of delegates.

a) Are pending on the date of filing the modified return, then the Assessing Officer shall complete the proceedings in accordance with the agreement.[130] In such a case, the normal period of limitation of completion of proceedings, as provided in Section 153 or 153 B or 144C, is extended by one year.[131]

b) Have already been completed, then the Assessing Officer shall reassess or recompute the total income in accordance with the agreement.[132] Thus, the value of any international transactions entered into by the tax-payer is determined according to the transfer pricing method decided in the agreement. In this case, the Assessing Officer must pass the assessment order within a period of one year from the end of the financial year in which the modified return is furnished.[133]

Cross Jurisdictional Analysis

This provision is purely procedural in nature. It enables a tax-payer to comply with the terms of the APA with respect to previous years and also extends the period of limitation in such cases. USA also has a similar provision: "To the extent the APA covers years for which federal income tax returns were filed prior to or no later than 60 days after the effective date of the APA, the taxpayer must file unless otherwise agreed to in the APA an amended return or returns that reflect any required primary adjustment and pay any tax due because of such adjustments, within 120 days of entering into the APA."[134] The generally applicable Code rules apply with respect to such primary adjustments and the taxpayer is not made subject to penalties etc. for failure to make timely deposits.

VI. Merits & Demerits

Merits

Indian APA scheme is in line with global best practices and offers many advantages.

1. Most importantly, an APA provides tax certainty with regard to determination of ALP of the international transaction with respect to which the APA has been entered into.

2. In case of an MNE operating in various jurisdictions, the risk of potential double taxation is reduced through entering into a bilateral or multilateral APA.

3. Tax-payer cuts down a great deal on the costs of compliance with transfer pricing regulations by eliminating the risk of transfer pricing audit and the long drawn and time consuming litigation that usually follows.

4. Also, entering into an APA alleviates the burden of record-keeping as the taxpayer knows in advance the required documentation to be maintained to substantiate the agreed terms and conditions of the agreement.[135]

5. While a number of non-tax factors are important drivers for Foreign Direct Investment (FDI) decisions, a sound and certain tax policy establishes a basis for fiscal stability that strengthens the business climate.[136] An effective APA scheme, by

130 Section 92CD(4), Income-tax Act.

131 Section 92CD(5)(b), Income-tax Act.

132 Section 92CD(3), Income-tax Act.

133 Section 92CD(5)(a), Income-tax Act.

134 Supra note 35, Section 11.02.

135 Supra note 46 at p. 4.

136 Shanto Ghosh, APAs in India: The Last Frontier in Dispute Resolution, Arm's Length Standard, Deloitte (April/May 2012), http://newsletters.usdbriefs.com/2012/Tax/ALS/120409_3.html (last visited on 8th September, 2013).

providing greater certainty, is likely to boost investors' confidence and thus enhance FDI in India.[137]

6. Section 92CC(2) provides for determination of arm's length price, in accordance with the methods stipulated in section 92C or any other method considered necessary or expedient. This gives flexibility to the tax-payer and the tax authorities which is commendable in view of the complexities and nuances that would be involved in the process.
7. The APA team will include such number of experts in economics, statistics, law etc. as may be nominated by the DGIT(IT).[138]
8. The provision for a pre-filing consultation before entering into a binding APA[139] is an extremely welcome proposition, which will certainly encourage foreign companies to enter into APAs rather than take the risk of litigation in India.[140]

Demerits

Though an APA is certainly far more beneficial to all the stakeholders involved than the traditional route of litigation, there are certain demerits of an APA in India.

1. A huge amount of time and resources are invested in concluding an APA.
2. An APA does not take into account the inherent conflict of interest between the tax and the customs authorities. So the TPM and the ALP determined by an APA may still not be acceptable to the customs authorities.
3. The APA scheme does not prescribe a time frame for conclusion of APA.
4. It is silent on the confidentiality of data received by the tax authorities in the process of concluding an APA. There is no assurance that if the APA fails, the information submitted would not be used against the tax-payer or no adverse conclusion would be drawn and used against tax payer.[141]
5. The process for renewal is same as the original process except the pre-filing consultation142 , thus making it both time-consuming and tedious.
6. There is no provision for roll back in the Indian APA scheme, i.e an APA cannot be used to resolve the past disputes between the tax payer and the tax authorities.
7. The introduction of APA may lead to revenue loss for the tax authorities since there will be compromise and negotiation on the amount of tax to be paid. Experience in USA shows that the scheme of APA has been abused by large MNE's like Apple, Oracle etc. to lower their tax bills.[143]

137 A recent study analyzing the relationship between uncertainty in the corporate income tax regime and FDI found that countries with greater uncertainty in their local tax system suffer from lower FDI. See Martin Zagler & Cristiana Zanzottera, Corporate Income Taxation Uncertainty and Foreign Direct Investment, WU International Taxation Research Paper Series No. 2012-07 (2012).

138 Rule 10F(j), Income Tax Rules.

139 Up to this stage, no fee is payable to the Government and also, anonymity can be maintained.

140 See H P Agarwal, Rule 10H on pre-filing consultation: A unique feature of Advance Pricing Agreements, BUSINESS STANDARD, August 27, 2013, http://www.business-standard.com/article/economy-policy/rule-10h-on-pre-filing-consultation-a-unique-feature-of-advance-pricing-agreements-113061600657_1.html (last visited at 9th September, 2013).

141 The Institute of Chartered Accountants of India – Central India Regional Council, Monthly Newsletter (January 2013 Edition).

142 Supra note 46 at p. 22.

143 Lee Sheppard, Draft Senate Finance APA Report Shows Incompetent IRS, Tax Analysts (2013); Tax Break that Corporate America wants kept secret, CNN MONEY, 22nd July 2013, http://finance.fortune.cnn.com/2013/07/22/irs-corporate-tax-deal/?source=cnn_bin (last visited on 9th September, 2013).

It can be said that on the whole, the India APA programme appears to be a positive development and taxpayers at large would surely benefit from it.[144] International experience suggests that APA is very beneficial in bringing an environment of certainty for tax payers and resolving tax disputes.

VII. Suggestions

We believe that the introduction of APA provisions is India is commendable, especially in view of the increasing geographic footprint of transfer pricing regulations. The Indian legislation, more or less, is in line with international standards. However, there are certain suggestions that, if incorporated, would go a long way in improving the scheme and contributing to its success. These suggestions also address the demerits identified in the previous section.

Confidentiality of tax-payer information

The Indian law as it currently stands allows the disclosure of information to "any officer, authority or body performing any functions under any law relating to the imposition of any tax, duty or cess".[145] Thus, if the APA is not concluded or after its expiration, all information given by the tax payer to the tax authorities in the course of APA negotiations may be used by the tax authority against the tax-payer in the administration of transfer pricing laws. In fact, the CBDT acknowledges such an approach.[146]

It is recommended that certain safeguards against disclosure of confidential information of the tax-payer must be included in the Indian APA scheme. Most of the mature APA jurisdictions, such as the United States[147], United Kingdom[148], Australia[149] and Canada[150] have provisions regarding confidentiality which is ensured regardless of the outcome of the APA negotiations.[151] The OECD guidelines illustrative legislation contains a clause providing that "the tax administration shall ensure the confidentiality of trade secrets and other sensitive information and documentation submitted to it in the course of an advance pricing arrangement proceeding. Such a clause may be incorporated in the APA scheme. The tax authorities may incorporate additional specific assurances in respect of confidentiality of information in an APA.[152]

If one looks at the kind of information that would have to be necessarily supplied by tax-payers in the process of negotiating an APA, like prospective new technology, future business projections, marketing strategies etc., a strong case would be made out for confidentiality.[153] Ensuring confidentiality would encourage tax-payers to enter into APA.

Conflict with other areas of transfer pricing

There is an inherent conflict of interest between Income Tax and Customs Authorities. While the former is interested in assessing a lower transaction price on imported goods so as to

144 See KPMG, Advance Pricing Agreement Rules notified in India, August 31, 2012 available at http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications//Documents/india-tp-apa-aug31-2012no2.pdf (last visited on 9th September, 2013).

145 Section 138, Income-tax Act.

146 Supra note 46 at p. 73: Internationally, most countries allow sharing of APA information with on-field audit officers. The confidentiality provision of the Income-tax Act also allows such sharing within the income tax department.

147 26 USC § 6103: Confidentiality and Disclosure of Returns and Return Information.

148 Supra note 89, ¶33.

149 Division 355 of Schedule 1, Taxation Administration Act 1953.

150 Supra note 43, ¶76.

151 See Grant Thornton, Supra note 42; PricewaterhouseCoopers, Answering Queries: Advance Pricing Agreements (2012).

152 Supra note 71.

153 See Kristin E. Hickman, Should Advance Pricing Agreements be Published?, 19 NW. J. INT'L L. & BUS. 171 (1998).

increase the income tax liability of the Indian enterprise, the latter will seek to enhance the customs duty by assessing a higher transfer price on those imports.

Internationally, there have been efforts to resolve this conflict[154] and India has also shown willingness to harmonise the transfer pricing principles in tax and customs valuation.[155] A convergence, if achieved, will help the MNE to save transaction costs and simultaneously facilitate the revenue authorities in reducing fraudulent claims.[156]

It view of all this, it will be advisable if the APA scheme is broadened in scope to address the customs evaluation as well. We do realise the limitations of the tax authorities and also the difficulties that may arise in the implementation of such a proposal. However, doing so will alone address the problem of the tax-payers in entirety. Since an APA is flexible enough to accommodate the views of all parties involved, it can be possible to get both the authorities to agree to a common price, thus providing certainty to the taxpayer across all spheres of transfer pricing analysis in India.[157]

Public Reporting

Information about Advance pricing agreements entered into by the tax authorities should be published in order to enable tax-payers, especially foreign investors, to know about the scheme of APA in India.

In U.S, an annual report on APA scheme is made for public disclosure. It includes specifically designated information concerning all APAs, but in a form that does not identify taxpayers or their trade secrets or proprietary or confidential business or financial information.[158] Even China has been releasing annual reports on its APA programme since 2009.[159] It would be beneficial to have a similar provision in Indian laws requiring production of annual reports on the activities of India's APA scheme. This report may contain information such as the number of APA applications filed, number of APAs taken into the scheme and executed, types of APAs (unilateral, bilateral), methodologies used, etc.[160]

Roll back of APA

Indian APA scheme does not have any provision for roll back and the authors strongly recommend inclusion of such a provision. Most of the mature APA jurisdictions enable such provisions provided that the facts and circumstances of the previous year/dispute are substantially the same. English law provides that "to the extent such an approach is appropriate and feasible, HMRC will co-ordinate the APA request in respect of future years with any transfer pricing enquiry in respect of prior years in order to improve overall efficiency and reduce duplication of enquiries."[161] This throws light on the need and the rationale for a roll back provision. United States[162] and Australia[163]

154 1st WCO/OECD International Conference on Transfer Pricing and Customs Valuation, Brussels, 3-4 May 2006; 2nd Joint WCO/OECD Conference on Transfer Pricing and Customs Valuation, Brussels, 22-23 May 2007.

155 The Indian Ministry of Finance had constituted a Joint Working Group, comprising officers from Income Tax and Customs, to suggest measures for cooperation between the Income Tax and Customs departments. Accordingly, the Ministry of Finance has laid down that periodic meetings should be held between Income Tax and Customs personnel to discuss joint issues requiring attention. Certain measures have also been taken for exchange of information between the two departments.

156 Bipin Sapra, Transfer Pricing in Customs and Income Tax: Exploring Convergence, in EY, Recent Developments in Transfer Pricing In India, Wolters Kluwer (India) Pvt. Ltd. (2013).

157 See Supra note 71.

158 Supra note 35, Section 13.

159 People's Republic of China State Administration of Taxation, China APA Annual Report (2012).

160 Supra note 71.

161 Her Majesty's Revenue and Customs, INTM483080 - Transfer pricing: Operational Guidance: Working a Transfer Pricing Case: How many years?

162 Supra note 35, Section 2.12.

163 Supra note 88, ¶180, 181.

provide for APAs to be "rolled back" to cover tax years prior to those covered by the APA in appropriate circumstances. China allows a roll back as far back as 10 years.[164] In case of a bilateral/multilateral APA, the consent of the other affected tax administration(s) to the "roll back" would be needed.[165] There have been suggestions to include the provision of roll back in the APA legislation[166] and it would be advantageous as it can resolve many years of potential transfer pricing issues through the APA application process.

Impartiality of the APA team

According to the Rules, an APA team will consists of income-tax authorities as constituted by the board, including such number of experts in economics, statistics, law or any other field as may be nominated by the DGIT (IT).[167] Since the team will be constituted entirely at the direction of DGIT (IT), its impartiality could be in doubt.[168] The apprehension of tax-payers that the composition of team could be biased and pro revenue cannot be ignored.[169] Thus, impartiality and fairness of the team must be ensured.

The Standing Committee on Finance in its report on the DTC Bill, 2010 suggested that "the proposed mechanism for framing Advance Pricing Agreements (APAs), specifying the manner in which arm's length price must be determined in respect of international transactions should be entrusted to an independent agency appointed by the Central Board of Direct Taxes consisting of technical and judicial Members, who will advise the Board on APAs in order to ensure that the APAs reflect the prevalent commercial practices/realities. Procedural safeguards to fortify the interest of applicants may be put in place in the scheme guidelines."[170]

Time frame of concluding an APA

Since one of the major objectives of APA is to save the time of the tax payer as well as the authorities, Indian APA scheme should focus on setting a time frame for conclusion of APAs, at least unilateral ones. Since the time taken in completing APA is one of the most significant factors considered by taxpayers while opting for an APA, lesser time will encourage taxpayers to take up the APA route.[171]

Process for Renewal

It would be advisable if the process for renewal is made more simplistic. The necessary level of details may be reduced with the agreement of the participating tax administrations, particularly if there have not been material changes in the facts and circumstances of the case.[172] Also, if continuity between two APA periods is to be

164 Supra note 159, at p.15.

165 Supra note 8.

166 See Organisation of Pharmaceutical Producers of India OPPI suggests option to rollback APA: Budget 2013, THE ECONOMIC TIMES, 1st February, 2013, http://articles.economictimes.indiatimes.com/2013-02-01/news/36684366_1_oppi-apas-pharmaceutical-producers (last visited at 9th September, 2013). The Organisation of Pharmaceutical Producers of India (OPPI) has recommended that the option of roll back of an Advance Pricing Arrangement (APA) should also be introduced in the APA legislations.

167 See Rule 10F (j), Income Tax Rules.

168 Supra note 140.

169 Ibid.

170 Standing Committee on Finance (2011-12), Ministry Of Finance, The Direct Taxes Code Bill 2010, Forty-Ninth Report, March 2012.

171 See Amod Khare and Sanjiv Malhotra, The Indian Advance Pricing Agreement Regime, BMR EDGE VOL. 7 ISSUE 9.5, 5th September, 2012, http://www.bmrtax.com/PDF/714Vol7%20issue%209%205.pdf (last visited on 6th September, 2013).

172 OECD, Guidelines for Conducting Advance Pricing Arrangements under the Mutual Agreement Procedure – Annexure to the 1995 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations Guidelines, OECD Publishing (1999).

ensured, provision should be made for renewal to be requested well before expiry of the APA. Specific time period may be given as to when an application for renewal should ideally be made. We have already discussed such provisions for renewal in certain other countries earlier.

Appeal

Presently, there is no provision for appeal against cancellation of an APA by the Board. Certain suggestions have been made to include a provision for appeal. We, however, feel that it is in the best interest of the system that such a provision is not there. If such a provision is inserted, one of the major purposes of an APA, which is to avoid the cumbersome litigation route, will be defeated.

These views have been echoed in commerce and trade circles, for instance, according to the Japan Chamber of Commerce and Industry in India, introduction of provisions for "roll back", "firewall" and "timeline" in the current Advance Pricing Agreement ("APA") Scheme would enable foreign companies to embrace APA more effectively, which would encourage greater FDI in various industries.[173]

VIII. Conclusion

After a detailed analysis of the APA provisions in India as well as existing APA regimes across the world, we find that APAs have emerged as the most preferred method for dispute resolution with respect to transfer pricing issues. This is due to their efficacy in resolving these issues while balancing the interests of both the taxpayer as well as tax authorities at the same time. Amongst the manifold advantages that an APA scheme provides, certainty in determining the valuation method, preventing double taxation and reducing wasteful expenditure on compliance and litigation are the most significant. Considering the highly litigious nature of our judicial system, introduction of such a scheme in India is indeed a laudable step. In this paper, we have made an attempt to identify the major problems involved in transfer pricing disputes and, thus, highlight the need for an APA scheme. Further, we have discussed the recent APA legislation in India, provided a comparative analysis with respect to experienced APA jurisdictions and identified the merits and demerits of the scheme.

The experience with the earlier mechanisms to provide certainty in the field of transfer pricing, namely, safe harbour rules and the Dispute Resolution Panel, must not be repeated. One of the reasons for their failure was the mistrust amongst the tax-payers and lack of suitable and timely directions by the CBDT. We believe that recognizing the need for a co-operative approach by tax authorities is definitely a step in the right direction. The legislation has been drafted in line with the established international norms and can be expected to deliver on most of its desired objectives. However, we have also brought to light certain suggestions such as introducing provisions for confidentiality, roll-back and public reporting that will improve the scheme. Furthermore, broadening the scope of APA to address conflict with customs valuation, specifying a time frame for conclusion of APA and a simpler procedure for renewal should also be considered. In conclusion, we must understand that the success of the APA scheme will mostly depend upon the ease of negotiations between the tax-payer and the tax authorities. For this, it is imperative that an environment conducive to such discussion is introduced by the tax authorities and maximum co-operation is shown by the tax-payers.

[Source : Second Best Research Paper of 9th Nani Palkhivala Research Paper Competition 2013]

173 Japan Chamber of Commerce and Industry in India, Suggestions for the Government of India by JCCI 2013, 6th March, 2013, http://www.in.emb-japan.go.jp/PDF/Suggestions_2013.pdf (last visited on 8th September, 2013).

Central Sales Tax Act – Section 6A & Necessity of Form F for Stock Transfers

CA S. Venkataramani

I. Preamble

The amendment to several Sections of the Central Sales Tax Act, 1956 (in short 'CST Act') through The Finance Act, 2002 has caused a lot of uncertainty, confusion and definitely large-scale litigations. The changes reflected in The Finance Act, 2002 and their consequential amendment to the CST Act has far reaching business implications on certain specified nature of transactions. In fact, the settled position of Central Sales Tax Laws on such transactions has invited a thorough re-look and has lead to litigations. In this paper I have attempted to bring out the issues relating to the mandatory requirement of Form F in respect of stock transfers effected under the CST Act.

II. Objects of Section 6A of the CST Act, 1956

1. The presumptions in law have a very vital role and the legislature has the power vested in it to presume certain things under certain circumstances. In this backdrop Section 6-A of the CST Act is in exercise of such power by the Parliament of India. The said Section 6A was inserted in the CST Act by CST (Amendment Act), 1972 with the following objects:

a. "Central Sales tax is not leviable in respect of transactions of transfer of goods from a head office (or a principal) to branch (or an agent) or vice-versa as these transactions do not amount to sales. This aids evasion, in that the dealers try to reflect even genuine sales to third parties as transactions of this nature. **Accordingly it is proposed to provide that the burden of proving that the transfer of goods in such cases is "otherwise than by way of sale" shall lie on the dealer who claims exemption from tax on the ground that there was in fact no sale."**

b. The situation stands since altered by the Finance Act 2002, which inserted the words "and if the **dealer fails to furnish such declarations,** then the movement of such goods shall be deemed for all purposes of this Act to have been occasioned as a result of sale."

2. It has resulted in a controversy that the relevant declaration in Form F (in short 'Form F') has now become mandatory and the transaction of stock transfer or consignment sale duly supported by the evidence of transportation and other documents will now be taxable as sales if Form F is not furnished.

3. Section 6A of the CST Act provides that where the dealer claims that he is not liable to pay tax in respect of the goods sent as aforesaid to another State i.e., to his **own** place of business or to his agent or to his principal, on the ground that the movement of goods was not by reason of sale, then the burden of proving that the movement of goods was so occasioned, is on the dealer. It may be noted that this Section applies only in those cases where the movement of goods is to the place of business of the dealer in another State or to his agent or principal in another State.

4. The Section has no applicability where the goods are sent to another State for purposes other

than those enumerated in Section 6A of the CST Act, 1956 (say for instance an inter-State sale). However, its amendment in 2002 will apply, only when the goods are sent by a dealer to another State to the dealer's own place of business or to his agent or where the dealer is an agent to the place of his principal.

III. Legislative enactment

Section 6A was inserted by Central Sales Tax (Amendment) Act, 1972 (61 of 1972), with effect from 1st April, 1973. Section 6A of the CST Act stood amended with effect from 11-5-2002 and the relevant part of the amended Section reads thus:

"And if the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed for all purposes of the Act to have been occasioned as a result of sale".

The Finance Act, 2002 (20 of 2002) dated 11-5-2002 sought to amend Section 6A so as to make it compulsory, the furnishing of Form F together with the evidence by the dealer and authorising levy of tax in cases where the dealer fails to furnish Form F. Thus by virtue of the amendment, the production of Form F and proof of movement of goods by dispatching branch to its assessing authority has been made mandatory.

IV. Effective date of the amendment

There was some confusion and guesses with regard to the effective date from which the amendment came into force. There were a few experts who opined that it will be effective from 1-4-2002 when the Financial Year commences, some others said it is 11-5-2002 when the President gave his assent and still others who opined that it was 13-5-2002 when the amendments were officially published in the Gazette of India as Act No. 20 of 2002. However, the Finance Act, 2002 does not specify the effective date or date of enforcement.

In this scenario, I am inclined to fall back on Section 5 of The General Clauses Act which reads "where any Central Act is not expressed to come into operation on a particular day, then it shall come into operation on the date on which it receives the assent of the President". Thus, by relying on The General Clauses Act, I am of the view that the correct date on which the amendment takes effect would be 11-5-2002.

V. Stock transfer

Section 6A of the CST Act relating to movement of goods otherwise than by way of sale (viz., Stock transfers/Consignment sales), had been amended to make the furnishing of declaration in Form F together with an evidence of dispatch of such goods mandatory. In the event such evidence together with declaration in Form F is not furnished, the transaction will be treated as a sale in the course of inter-State trade or commerce and subjected to tax accordingly.

Thus, it will now be imperative for dealers to produce proof such as, LRs, RRs, Courier receipts, Airway bills, etc., along with Form F to claim such transactions as exempt from payment of tax. **It must be borne in mind that in respect of transfers effected from branch to head office/head office to branches/branches to other branches/ consignment agents, etc., the transit documents assume significance. That is the relevant column in the transit document such as LR/RR/Courier receipts/ Airway bills etc., the consignor/ consignee columns must be correctly and properly filled in with addresses of the branches/ head office/agents, etc. In case such particulars are incorrectly filled in by the transporter there is every possibility of the assessing authority rejecting such evidence and fastening the burden of tax on the dispatching dealer.**

It would also be advisable for the receiving branch / head office / agent to maintain the relevant records and documents relating to movement of goods such as **LR / RR / Courier receipts / Airway bills, etc., together with stock transfer memos and clearly indicate such particulars in the Form F to be furnished to the dispatch entity.** Such receiving branch / head office / agent are also required to maintain such other records viz., stock registers,

transport register, sales / purchase registers, general ledger/cash or bank book, etc.

VI. Burden of Proof

From the language employed in Section 6A of the CST Act it is clear that the provisions are merely procedural. It has shifted the burden of proof on the dealer in case of transfer of goods claimed otherwise than by way of sale – Where any dealer claims that he is not liable to pay tax under this Act, in respect of any goods on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal, as the case may be and not by reason of sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer.

For this purpose he may furnish to the assessing authority, a declaration in form F along with the evidence of dispatch of such goods. However, the latter part of the Section mandates the requirement of Form F/evidence of movement of goods. Up to 10-5-2002 furnishing of Form F is not mandatory and alternative evidence can be furnished to the satisfaction of the assessing authority.

Attention of the Hon'ble delegates is invited to the mode / method of filling in the prescribed Form F. The following particulars are to be correctly and completely filled in:

1. Name and address of the **transferor and his RC No.;**
2. Description, quantity and value of goods (market value or prevailing market price);
3. Stock transfer memo No. / date etc.;
4. **Transporter details (if space is insufficient copies of such document can be attached);**
5. Date of taking delivery by the **transferee**;
6. Signature and designation of the **transferee**.

VII. Prescription of Form "F"

a. In terms of sub-Rule 5 of Rule 12 of the CST (R&T) Rules, 1957, the declaration with respect to branch transfer shall be in Form 'F'. A single Form 'F' could be used that may cover transfer of goods, by a dealer, to any other place of his business or to his agent or principal, as the case may be, effected during a period of one calendar month.

b. If the space provided in the Form 'F' is not sufficient for making entries, the dealer may provide an annexure in this regard and the authorised signatory should duly sign such annexure.

c. Form F shall be obtained by the transferee in the State in which the goods covered by such Form are delivered.

d. In terms of sub-Rule (7) of Rule 12 of the CST (R&T) Rules, 1957, the declarations in Form F should be filed within 3 months from the end of the month to which it relates. If the prescribed authority is satisfied that the person concerned was prevented by sufficient cause from furnishing such declaration within the aforesaid time, that authority may allow such declaration to be furnished within such further time as that authority may permit.

VIII. Non furnishing of Form F – Whether transaction can be subjected to tax

In the event of non-furnishing of Form F together with the evidence of movement of goods the assessing authority is at liberty to treat such movement as an inter-State sale under Section 3(a) of the CST Act and subject such transactions to tax in terms of Section 8 of the CST Act at full rate of tax. Whether such a levy is possible and to what extent the amendments are proper is a question that remains to be answered. To the best of my knowledge, as on date, there are no precedents on this issue. In order to subject such stock transfers to the levy of tax let us examine the possibilities in various scenarios.

Scenario 1 – In light of the relevant definitions

a. In order to constitute a "Sale" in terms of Section 4 "The Sale of Goods Act" all the following conditions should be cumulatively present:

- ✓ A bargain or agreement of sale;
- ✓ The payment or promise of payment of price in cash;
- ✓ The delivery of goods, and
- ✓ The transfer of property (title) from the seller to the buyer.

PS: The Indian Contract Act comprising Sections 76 to 123 was repealed by the Sale of Goods Act, 1930.

b. The amended definition of sale in terms of Section 2(g) of the CST Act, does not take within its sweep and ambit, or provide for a scenario to treat such transactions (where Form F is not furnished) as a sale.

In the background of the definition of the word "sale" under the Sales of Goods Act and the CST Act:

- Whether one can sell goods to himself or whether there can be a deemed transfer of property from one branch to another? *[In my opinion – NO]*
- Whether branches/units/divisions have independent existence apart from the Company itself? *[In my opinion – NO]*

PS: It would be of interest to note that Sections 2(h) and 2(j) of the Karnataka Profession tax Act/AP Profession Tax Act carries an explanation to the definition of the word "Person" which reads "every branch of a firm, company, corporation or other corporate body, society, club or association shall be deemed to be a person.

By inserting the above explanation the AP and Karnataka States sought to levy profession tax on branches separately. This matter was carried before the High Court. The Hon'ble AP High Court in the case of *Karnataka Bank Limited vs State of AP (125 STC 48)* held that "Although the State Legislature is not competent to impose profession tax at a rate more than ` 2,500 per person per annum by virtue of the ceiling contained in Article 276(2) of the Constitution, the Legislature is competent to enact a fiction in the definition of "person" that every branch of a firm, company, corporation or other corporate body, any society, club or association shall be deemed to be a person. The effect of the Explanation to the definition of the term "person" in Section 2(j) of the Andhra Pradesh Tax on Professions, Trades, Callings and Employments Act, 1987, as well as Explanation I of the First Schedule to the Act as amended by Act 29 of 1996 is not to tax a person at a rate higher than ` 2,500 per year, but to treat even a branch of a firm, company, corporation or other corporate body, any society, club or association, as a separate person and a separate "assessee" within the meaning of Section 2(b) of the Act. This the Legislature was competent to do. Therefore, the Explanation to the definition of the term "person" in Section 2(j) of the Act as well as Explanation I of the First Schedule to the Act as amended by Act 29 of 1996 are valid and are not violative of article 276(2) of the Constitution.

[Similar amendments are not forthcoming in any of the definition clauses of the CST Act.]

- Whether the ingredients constituting a sale under the provisions of Section 4 of the Sale of Goods Act are cumulatively fulfilled? *[In my opinion – NO]*

Scenario 2 – Formulation of the principles of inter-State sale in accordance with Section 3 of the CST Act

A sale or purchase of goods is deemed to take place in the course of inter-State trade or commerce, inter-alia, if the sale or purchase:

- occasions the movement of goods from one State to another; or
- is effected by a transfer of documents of titles to the goods during their movement from one State to another.

It may be noted that the words "sale occasions movement" means goods moved by reason of sale. A sale can occasion the movement of goods only when the terms of sale provide that the goods would be moved i.e., when the contract of sale so provides. The principles relating to inter-State transactions were enunciated by the Supreme Court in *Oil India vs Supt. of Taxes-35 STC 445, TISCO v. S.R.Sarkar-11 STC 655, Amritsagar Mills v. CST - 17 STC 405*, etc., From a study of these cases the following points emerge:

- The inter-State movement must be as a result of a covenant, express or implied in the contract of sale or in an incident of the contract;
- It is not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself;
- It would be enough if the movement was in pursuance of and incidental to the contract of sale;
- Passing of property is not relevant. The locale of the goods within the State at the time of sale or later at the time of appropriation is to be regarded;
- Where the transaction is inside that State and yet be causing the goods to move, it would be inter-State sale.

Movement of goods pursuant to stock transfers do not fall within the scope and ambit of any of the above principles formulated by the Apex Court and do not satisfy the conditions stipulated in Section 3 of the CST Act. *[Thus even on this count, in my opinion stock transfers cannot be treated as sales and subjected to tax on account of non filing of Form F].*

Scenario 3 – Legislative enactment

The Parliament is empowered to levy tax under CST Act, *vide* Article 246 of the Constitution of India under the following entries listed in the Seventh Schedule of the Union List:

- Entry 92A relating to taxes on sale or purchase of goods (other than newspaper) where such sale or purchase takes place in the course of inter-State trade or commerce.
- Entry 92B relating to taxes on the Consignment of goods, where such consignment takes place in the course of inter-State trade or commerce.

Article 269(3) of the Indian Constitution provides for formulation of principles for levy of tax on sale or purchase of goods (other than newspaper) or for consignment of goods, in the course of inter-State trade or commerce, to be levied and collected by the Government of India, but assigned to the States in which the tax is leviable. Chapter II of the CST Act, as on date has not formulated any principle to levy tax on such transactions not covered by the declaration in Form F. As such, subjecting stock transfers not covered by Form F will be *ultra vires* Article 269 of the Constitution of India. *[Thus, in my opinion stock transfers cannot be treated as sales and subjected to tax on account of non filing of Form F].*

Scenario 4 - Pre vs Post amendment

Up to 10-5-2002 furnishing of Form F was not mandatory, and the dealer was permitted to

discharge the burden of proof of such movement by any other alternative evidence convincing the Assessing Authority. This was on the premise that, what is taxable is a "sale" and not mere movement and further sub-Section (1) to Section 6A uses the word "may" and not "shall". Section 6A of the CST Act *merely* prescribes a mode of proof and its effect is that if a dispatching dealer can produce a "Form F" in terms of the Section read with Rule 12 of the CST (R & T) Rules, the assessing authority shall not insist on production of any other evidence. Thus, a dealer was left with the option of proving it by any other method if he so desires that the movement was occasioned as a result of transfer of goods to branch or agent. The facts cited in the above paras have been upheld in the following cases:

- ✓ *CST v. Agra Food Products Pvt. Ltd., (67 STC 266)*
- ✓ *Sree Hanuman Rice Mill v. State of Orissa (70 STC 216)*
- ✓ *State of Orissa v. Orissa Small Industries Corporation (67 STC 262)*
- ✓ *State of Orissa v. Ramnarayan Sitaram (68 STC 153)*
- ✓ *Vijaya Mohini Mills v. State of Kerala (75 STC 63)*

In the case of *Sheo Sankar Trading Co. v. State of Orissa (50 STC 389)(Orissa)*, it was held that "the assessee was entitled to prove that the goods had so moved on the basis of his books of account without production of the declaration form". However, in the post amendment scenario the Section mandates the requirement of Form F / evidence of movement of goods. Up to 10-5-2002 furnishing of Form F is not mandatory and alternative evidence can be furnished to the satisfaction of the assessing authority.

The amendment effective 11-5-2002 reads "…….. and if the dealer fails to furnish such declaration, then, the movement of such goods shall be **deemed for all purposes of this Act** to have been occasioned as a result of sale". How far such deeming intendment stands the test of law before Tribunals and Courts is anybody's guess. In my view reference to "all purposes of this Act" would include Central Sales Tax also. Without prejudice to this fact, and in spite of the amendment, in my view, the dealer will be entitled to claim exemption if he is able to establish with evidences that such movement was not as a result of sale. This is because:

Section 6A provides only a Rule of evidence and such Rule of evidence cannot override the statutory provision of the levy of tax. The Hon'ble Supreme Court in the case of *Bimal Chanda Banerjee vs. State of Madhya Pradesh (81 ITR 105)* observed:

"that the basis of statutory power conferred by the statute (which includes Constitutional law) cannot be transgressed by the rule making authority. A rule making authority has no plenary power and has to act within the power granted to it".

It appears that these observations of the Apex Court run counter to the provisions of Section 6A of the CST Act. Further the word "may" still continues to exist in Section 6A of the CST Act, which implies that even post amendment ***it is possible to interpret that*** *the dealer will be permitted to choose to discharge the burden of movement not on account of sale by alternative methods. It may be noted that stock transfers and movement of goods not on account of sale cannot be subjected to tax till the provisions of consignment tax specified in sub-clause (h) in clause (1) of Article 269 of the Constitution are implemented and the Parliament formulates the principles for determining when such transactions take place in the course of inter-State trade or commerce as provided in Article 269(3) of the Constitution.*

Scenario 5 – Unregistered dealers – compliance of statutory evidence of Form F

The main Rule 12(6) of the CST (R&T) Rules, 1957 talks of Form C and Form F which shall be those obtained by the purchasing dealer in which the goods are delivered. Attention is invited to the Explanation to sub-Rule 6 of Rule 12 to the CST (R&T) Rules 1957 wherein the said Explanation speaks of Form C which can be issued by a dealer in the State in which he is registered, if for any reason, he is not able to issue Form C in the State where the goods are delivered. It may be noted that the Explanation is silent about Form F.

It therefore necessarily implies that Form F can be obtained even by un-registered dealers in the State (where there is no compulsion to register), in which the goods are delivered. If this is not the meaning, then the question that arises is whether the fundamental right of an unregistered dealer to carry on business will be affected since he is not compulsorily required to register.

I am given to understand that Surat in Gujarat does not require a dealer in Textiles to get compulsorily registered under the local or CST Act. What happens when say – A textile dealer in Hyderabad dispatches goods to his branch office in Surat, Gujarat. Is the Surat dealer required to issue Form F to the consignor in Hyderabad under the amended provisions? If yes, how does he obtain the prescribed Form F from the prescribed officer in Surat, Gujarat since he is neither registered nor he is required to mandatorily register?

Scenario 6 – Issue of Form F in case of goods not listed in RC

Any registered dealer under the local and CST Act are bound to include the goods to be imported from other States or sale / export to other States or out of Country. One school of thought is such inclusion for the purpose of purchase would *ipso facto* apply to stock transfers under Section 6A of the CST Act. Therefore, there is no necessity to specifically include goods that are stock transferred and Form F is free from such restriction / prohibition. Since there is no such restriction a dealer say – in coffee may well issue Form F in respect of Tea received by way of stock transfers although Tea has not been listed in the certificate of registration in Form B. The other school of thought is that non inclusion of goods in the certificate of registration would necessarily contemplate penal consequences under Section 10(a) of the CST Act.

Scenario 7 – Issue of Form C in case of a branch unable to issue Form F

It appears that certain dealers who do not declare stock transfer amounts in their returns are unable to obtain Form F from their assessing authorities. The question is whether such dealers can issue Form C from Delhi to the consignor branches to reduce the incidence of the levy of tax?

On a combined reading of Sections 8(1), 8(3) & 8(4) of the CST Act, the question of issue of Form C for stock transfers does not arise since there is no sale involved in respect of inter-branch movement of goods. In the event of issue of Form C, consequential penalties under Section 10/10A of the CST Act automatically flow.

IX. Levy of CST - Job Work related issues

1. It is clear from the wording of Section 6A of the CST Act, 1956 cited supra that it applies only in the following circumstances:

   (a) when the goods are sent inter-State to one's principal place of business in other State or to one's agent or one's principal; **and**

   (b) the inter-State movement of goods from one State to the other is otherwise than as sale.

2. It is made clear that both the above conditions should be cumulatively satisfied before the provisions of Section 6A of the CST Act stand attracted. The Honourable Allahabad High Court in *Ambica Steels Ltd. vs State of UP(2008)[12 VST 216 (ALL HC DB)]* has held that "Form F is required to be issued even if goods are sent outside the State for job work or repairs on returnable basis. The facts and judgment in brief are as follows:

   M/s Ambica Steels Limited filed writ petitions challenging the circular dated November 28, 2005 issued by the Commissioner of Trade Tax, U.P. mentioning that under Section 6A of the CST Act, 1956 Form F is required to be filed in respect of all transfer of goods which are otherwise than by way of sale including goods sent or received for job work & returned of it. Unfortunately the

petition filed by the M/s Ambica Steel Ltd. was dismissed and U.P. High Court while dismissing the petition held that;

Section 6 of the Central Sales Tax Act, 1956 is the charging Section creating liability to tax on inter-State sales and by reason of Section 6A(2) a legal fiction has been created for the purpose of the Act that transaction has occasioned otherwise than as a result of sale. Section 6A puts the burden of proof on the person claiming transfer of goods otherwise than by way of sale and not liable to tax under the Central Act. The burden would be on dealer to show that movement of the goods had been occasioned not by reason of any transaction involving any sale of goods but by reason of transfer of such goods to any other place of business or to the agent or principal, as the case may be, for which the dealer is required to furnish prescribed declaration form. If the dealer fails to furnish such declaration, by reason of legal fiction, such movement of goods would be deemed for all purposes of the Act to have been occasioned as a result of sale. The submission that the transactions, where the goods are sent for job work or received for doing job work, do not amount to sale would depend upon the contract entered into between the parties and would be the subject-matter of examination by the assessing authority. Even otherwise, under Section 2(g) (ii) of the Central Act, transfer of goods used in execution of works contract is treated to be a sale. ***If the petitioner claims that it is not liable to tax on transfer of goods from U. P. to a place outside State then it would have to discharge the burden placed upon it under Section 6A by filing declaration in Form F. It would be immaterial whether the person to whom the goods are sent for or received after job work is a bailee. The requirement*** *to file declaration in Form F is applicable in* ***cases of even goods sent for job work and returned thereof.***

Being aggrieved by the above decision Ambica Steels Ltd. filed a Civil Appeal before the Hon'ble Supreme Court which held that - Since the assessee has requested time for filing of declaration in Form F, the issue raised could not be decided on merits. However the decision of Allahabad High Court stands and by virtue of the said High Court decision, filing of Form F is mandatory unless the issue is decided otherwise by Allahabad High Court or Apex Court. Hence declaration in Form F has become mandatory.

3. In such a case it will be practically impossible for the job worker or the person doing the repair work to get the relevant Form F from the sales tax department as he is not registered with the sales tax department. This will badly affect inter-State movement of goods, which will be violative of Article 301 as well as of freedom of trade guaranteed under Article 19(1)(g) of the Constitution of India. In my considered view, this interpretation of Section 6A by Allahabad High Court in the above case needs reconsideration as it involves a lot of practical difficulties. In any case where two interpretations are possible, the one which does not violate the provisions of Constitutional mandate should be followed.

4. In case goods are sent inter-State for job work or for repair outside the State then the movement of goods takes place otherwise than as sales. A pure job work or repair work does not come under the ambit of tax as there is no transfer of property in goods and therefore, the job worker he will not be required to get registered under CST Act or concerned State VAT Act. ***However, the relationship between the job worker and the owner of the goods is not of Principal-Agent but that of Principal to Principal.*** *In this context the question of Form F may* ***not arise at all. However, the decision of the Allahabad High Court cited supra, comes in the way. It is for this reason that I stated earlier that the issues needs re-consideration.***

5. Some issues

Question 1: *What happens in a situation when the "Principal A' sends the goods to a "Job worker B" in another State for carrying out job work and requests him to dispatch the goods onward to the end customer "C" located in the same State of the Job worker or in a different State?*

Reply:

a. The first and foremost test in this case would be to find out as to whether the "Principal A" has a pre-existing order from the end customer "C" in another State.

b. Thereafter, one needs to find out whether the goods (identity of the goods sent by 'Principal A") are the same after the job work is carried out by "Job worker B". Meaning - say the job worker carries out some simple testing process or applies a coat of paint, etc., without the identity of the goods sent by "Principal A" undergoing a change, then the movement of goods pursuant to such order from "C" can be treated as an inter-State sale pursuant to Section 3(a) of the CST Act, 1956 (since the identity of the goods remains the same).

c. However, after carrying out the job work by "Job Worker B" if the identity of the goods changes (substantially) then the sale effected to the end "customer C" from the premises of the "Job Worker B" would be a local or inter-State sale in the hands of "Principal A" (depending on the location of the end customer "C") in the State in which the job worker is located. All other provisions of the local law such as registration, filing of returns, assessments, audit, etc., will follow thereafter in respect of "Principal A".

Question 2: *What happens in a situation when the "Principal A' sends the goods to a "Job worker B" in another State for carrying out job work and the scrap generated by the job worker is retained by the job worker based on the contract between the two entities?*

Reply: There is no difficulty in this case. The title to the goods in the "scrap so generated", would vest in the job worker as per the terms of the contract and therefore, the subsequent sale of scrap by the job worker would become taxable in the hands of the job worker in that State.

Question 3: *What happens in a situation when the "Principal A' sends the goods to a "Job worker B" in another State for carrying out job work and the scrap generated by the job worker is sold by the job worker on behalf of the "Principal A"?*

Reply: There is no difficulty in understanding this case. The title to the goods in the "scrap so generated", would vest in the "Principal A" as per the terms of the contract and therefore, the subsequent sale of scrap by the job worker would be the property of "Principal A" which is sold and would therefore, become taxable in the hands of "Principal A" in that State. All other provisions of the local law such as registration, filing of returns, assessments, audit, etc., will follow thereafter in respect of "Principal A".

Question 4: *What happens in a situation when the "Principal A' sends a "tool or die" to a "Job worker B" in another State for carrying out job work and instructs the job worker to deduct a sum of `100/- for every operation carried in the job work bill issued by the "Job worker B"?*

Reply: On an understanding that the title to the goods i.e., "tool or die" will finally vests in the hands of the "Job worker B" the transaction (value of the "tool or die") will amount to an inter-State sale in the hands of the "Principal A".

Question 5: *What happens in a situation when the goods dispatched by "Principal A' for job work to a "Job Worker B" in another State envisages use of materials which are incidental (negligible – say the job worker carries on welding and electroplating) to the contract of job work)?*

Reply: The transaction between the "Job worker B" and the "Principal A" would be envisaged as one of works contract. This view is based on the law laid down by the Larger bench of the Hon'ble Supreme Court in the case of *Larsen & Toubro Limited vs State of Karnataka (65 VST 1)* wherein it

was held that **"the dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are composite in nature"**. One has to only determine whether such a transaction is an inter-State works contract or not.

Question 6: *Whether the Principal located in "State A" can issue a purchase order on a machinery supplier located in "State B" for supply of the said machinery at a concessional rate to a job worker in "State C" against the issue of the declaration in Form C?*

Reply: In terms of Section 8(1) read with 8(3) of the CST Act, 1956 a registered dealer is entitled to purchase goods in the course of inter-State trade or commerce at a concessional rate by issue of the relevant declaration in Form C if such goods are:

- Specified in his certificate of registration, and
- Intended for resale or for use **by him** in the manufacture or processing of goods for sale.

A sale or purchase of goods is deemed to take place in the course of inter-State trade or commerce, *inter-alia*, if the sale or purchase:

- Occasions the movement of goods from one State to another; or
- Is effected by a transfer of documents of titles to the goods during their movement from one State to another.
- The words "sale occasions movement" means goods moved by reason of sale:
- A sale can occasion the movement of goods only when the terms of sale provide that the goods would be moved i.e., when the contract of sale so provides.

Thus, in the instant case if "Principal A" places an order on the supplier located in "State B" for supply of machinery to a job worker in "State C", such sale by the supplier will amount to an inter-State sale. With regard to issue of Form-C for effecting purchases at concessional rates, the conditions stipulated in Section 8(3)(b) of the Act are required to be cumulatively complied with by the purchaser of such goods. Such conditions are:

- Such goods should be specified in the registration certificate;
- Such goods should be sold or **used for manufacture of other goods by the registered dealer himself;**

The above facts can be better explained by the decision of the Honourable Supreme Court in the case of *Assessing Authority-cum-Excise and Taxation Officer, Gurgaon, and Another vs. East India Cotton Mfg. Co. Ltd. (48 STC 239)(SC)*. The observations and the judgement of the Honourable Supreme Court are reproduced hereunder:

The Excise and Taxation Officer issued notices for the imposition of penalty on the respondent on the ground that it had used the goods purchased partly in manufacturing its own goods for sale and partly for doing job-work for other parties, and that the job-work did not constitute "sale" and therefore the respondent had contravened Section 10 of the Act. A writ petition filed by the respondent to have the notices quashed was dismissed by a single Judge of the High Court but allowed by a Division Bench. On appeal by the Assessing Authorities to the Supreme Court:

Held, affirming the decision of the Division Bench of the High court, that Section 8(3)(b) would clearly cover a case where a registered dealer manufactured or processed goods for a third party on a job-contract and used in the manufacture or processing of such goods, materials purchased by him against his certificate of registration and the declarations in Form C., so long as the manufactured or processed goods were intended for sale by such third party. The expression used by the legislature as well as the rule-making authority was simply "for use . . . in the manufacture . . . of goods for sale" without any addition of words indicating that the sale must be by any particular individual. The legislature had designedly abstained from using any words of limitation indicating that the sale should

be by the registered dealer manufacturing the goods. Where the legislature wanted to restrict the sale to one by the registered dealer himself, the legislature used the qualifying words "by him" after the words "for resale" in one part of Section 8(3)(b), but while enacting another part of Section 8(3)(b), the legislature did not qualify the words "for sale" by adding the words "by him". This deliberate omission clearly indicated that the legislature did not intend that the sale of the manufactured goods should be restricted to the registered dealer manufacturing the goods. ***The word "use" was followed by the words "by him" clearly indicating that the use of the goods purchased in the manufacture of goods for sale must be by the registered dealer himself but the words "by him" were significantly absent after the words "for sale".***

Question 7: *What happens when machinery is moved by the Principal in "State A" to a job worker in "State B" for repair and return? The process of repair by the job worker in "State B" will envisage usage of spare parts.*

Reply: For the purpose of repair the machinery moves from "State A" to "State B". After repairs by the job worker in "State B" including use of parts in the course of repair the machinery comes back to "State A". It is a clear case of inter-State works contract which amounts to Sale after 11-5-2002. When the machinery moves from State A to State B there is no sale. The goods actually move in pursuance to a future contract for sale or works contracts. At this point if the job worker (works contractor) in "State B" is registered in "State B" he would not mind furnishing the relevant "Form F" as it aids during movement and at the check posts. By submitting the relevant Form F the job worker is not committing any breach of law. When the machinery moves back after repairs the job worker in "State B" will seek for "Form C" and not "Form F" as with "Form C" the job worker can offer a concessional rate of tax to the Principal in "State A".

In the same example if the job work involves no transfer of property in goods, then it is a pure labour job. In that case recipient of machinery in "State A" may not mind furnishing "Form F" to the job worker in "State B".

In both the cases the **value** of goods sent outside the State is substantial but the price for "works contract" or for "labour job" may be negligible. The consideration which passes from A to B in such cases is nothing but job work charges. Therefore, if for non submission of Form F the transaction is treated as a sale by the tax department, the amount available for taxation is the "job work price" alone and not the value of goods. Thus, it becomes imperative that in the accompanying "job work invoice" one must write clearly not only the quantity and quality of goods sent for job work but also the "job work charges" agreed upon as per the terms of the contract. The price that should be reflected is the job work price and no more.

X. Conclusion

I have made an attempt to analyse and understand the issues relating to the necessity of Form F under Section 6A of the CST Act. The legislature cannot provide to regulate a transaction which it cannot regulate under the Constitution (service contracts). The CST Act is to formulate the principles of Sale and Purchase of goods which takes place in the course of inter-State trade or commerce. Therefore it would be too early to conclude with great respect, that the Allahabad High Court has concluded the matter. To the best of my knowledge certain issues discussed above may need corrective amendments to the Central Sales Tax law to tide over the issue of failure to comply with the mandatory requirement of under Section 6A of the CST Act, 1956. I have tried to analyse certain factual situations by way of questions and answers which may need further debate. However, I have put forth my candid views on the issues which can be debated by the delegates.

[Source: Article published in Souvenir of 17th National Convention held on 26th and 27th December, 2013 at Mumbai]

Questions & Answers

N. M. Ranka, *Sr. Advocate*

DIRECT TAXES

LLP

Q.1 *A partnership firm having accumulated business losses and unabsorbed depreciation in preceding two years is proposing to convert to a Limited Liability Partnership under the provisions of section 47(xiib). Will the brought forward losses and unabsorbed depreciation be available for set off to the LLP?*

Ans. Yes, the brought forward losses and unabsorbed depreciation would be available for set off and carry forward as to the partnership firm. It is only transformation and not transfer.

Business Income / Capital Gain

Q.2 *An owner of land has entered into an Agreement for transfer of Development Rights in Financial Year 2012-13 and as per the Agreement he will be entitled to 20% of the gross sales revenues as and when the amount is received by the developer. The project will be completely executed by the buyer. The project is likely to be completed after 4 years and the sales will also be realised over the period of 4 years. Will the amount be assessable as business income or capital gain on sale of land in the hands of owner of the land.*

Ans. Answer to the query would be primarily dependent on the clauses of the Development Agreement and the rights conferred on the developer. In case possession or right of enjoyment is transferred, would fall under extended meaning of 'transfer' under sec. 2(47)(V)(VI) of the Act. Capital gain may be attracted. The amount would be assessable as capital gains and not business income, if the querist is not a trader in real estate. There would be computational problem as the amount receivable is unknown. The A.O. may assess on reasonably expected realisation, subject to rectification. (Please refer *Charturbhuj Dwarkadas (2003) 260 ITR 491 (Bom.); Jasbir Singh Sarkaria, In re (2007) 294 ITR 196 (AAR)* and *Mahesh Nemichandra Ganeshwade & Ors. v. ITO (2012) 147 TTJ (Pune) 488).*

Other Sources

Q.3 *Mr. A had invested in fixed deposit worth ` 10 lakhs for 5 yrs. In April 2003 for which he had not accounted for in his books and accrued interest was not offered while filing income tax returns. On maturity he again renewed it for further 2 years along with interest in April 2008. In April 2010 he deposited whole maturity proceeds in his accounted bank account and offered interest for only 2 years as interest income under "Other sources Income" head and rest amount was shown as addition to capital. In scrutiny case can Assessing Officers make addition of whole proceeds as undisclosed income? Or Mr. A can argue for non addition of fixed deposit amount till April 2008 on the basis of copy of FD receipt which shows the date of investment in the Asst. year prior to previous 6 Asst. years?*

Ans. Admittedly there is positive proof of investment in F.D. in April 2003. Hence, it cannot be added in the Asst. Year 2011-12. Action u/s. 148 would be barred by time being beyond 6 years. If interest for other years is not permitted to be taxed, the AO may reopen u/s. 148 for the permissible years and tax interest on annual basis. Querist would be liable to interest as also penalty for concealing interest income.

Deemed Dividend

Q.4 *A private limited company invested ` 10 lakhs in an under construction commercial property. But after 6 months builder changed the policy and informed that it cannot transact with corporate and only individuals can continue. Private Limited Company by passing a resolution transferred the right to one of its directors who was also a share holder carrying more than 10% of voting rights. Will it amount to deemed dividend in the hands of that director if he repays the investment amount to company after 3 months of this transfer?*

Ans. The concept of deemed dividend u/s. 2(22)(e) postulates two factors: Whether the payment was a loan and whether on the date of payment there existed accumulated profits. These two factors have to be correlated. Where the assessee was a shareholder, partner and beneficial owner in closely held companies and firms and the assessee withdraws sums from his capital account and makes investment, the sums debited in the assessee's capital account with the respective firms would be payments on behalf of the assessee, and the transactions would satisfy the test of section 2(22)(e) *CIT v. Mukundray K Shah (2007) 290 ITR 433 (SC).* However, in the instant case the private limited company has not made payment by way of loan or deposit and the second condition is non-existent. The director has repaid the investment. It would not amount to deemed dividend. Section has to be strictly construed.

Tax Deducted at Source

Q.5 *As per Section 234E of the Income-tax Act, 1961, where a person fails to deliver or cause to be delivered a statement within the time prescribed in sub-section (3) of section 200 or the proviso to sub-section (3) of section 206C, he shall be liable to pay, by way of fee, a sum of two hundred rupees for every day during which the failure continues.*

If the deductor is prevented by reasonable and sufficient cause for not filing the statement prescribed u/s. 200(3) of the Act, in time, what is the course of action to be taken by the person if he should not be subject to levy of fee prescribed u/s. 234E of the Act?

Ans. Delay in furnishing of statements of tax deducted at source results in delay in granting of credit of tax deducted at source to the deductee and consequently in delay in issue of refunds to the deductee tax payers or infructuous demand against the deductee tax-payers. Further, furnishing of correct information in respect of tax deduction is critical for processing of return of income furnished by the deductee because credit for tax deducted at source is granted to the deductee on the basis of information furnished by the deductor. New section 234E, therefore, provides for a fee for defaults in furnishing statements in a sum of ` 200 for every day during which the failure continues but not exceeding the amount of tax deductible or collectible, as the case may be. The fee has to be paid before delivery of the statement. The provisions apply to a statement of tax deducted or collected at source, to be delivered or caused to be delivered on or after July 1, 2012.

It is fee and not penalty. It is automatic and the defaulter is obliged to deposit *suo motu.* Section 271H further mandates to be liable for penalty of ` 10,000/- to ` 1,00,000/- over and above the fee. Such penalty may not be leviable if prevented by reasonable cause, because of section 273B of the Act. Over years TDS compliance is made stricter and tax-payers are advised to comply with the provisions meticulously.

[Source: Brains' Trust Queries replied at Brains' Trust Session at 17th National Convention on 27-12-2013 at Mumbai]

Questions & Answers

C. B. Thakar, *Advocate*

INDIRECT TAXES

SIM Card

Q.1 *What is the position of VAT on "SIM Card" obtained by franchisee from company for valuable consideration and thereafter supplied i.e., sold by the said franchisee to customers.*

Kindly enlighten me on the chargeability of VAT on SIM Card particularly in view of the judgment of Hon'ble Supreme Court in the case of Idea Mobile Communication Ltd. v. C.C.E. Kochi – 43 VST 1 (SC).

Ans. Before we examine the issue in light of above judgment, it will be useful to refer to facts of the case as reported in the first para of the judgment. The said para is reproduced below:

> "The facts leading to the filing of the present case are that during the relevant assessment years, i.e., 1997-99, the appellant was selling SIM cards to its franchisees and was paying sales tax to the State and activating the SIM card in the hands of its subscribers on a valuable consideration and paying service tax only on the activation charges. The Department of Sales Tax, State of Kerala, included the activation charges as part of the sale consideration of SIM cards on the ground that activation is nothing but a value addition of the "goods" and thus comes under the definition of "goods" under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as, "the KGST Act") and accordingly levied sales tax on the activation charges. The Department of Central Excise, Ernakulam (Service Tax Department) observed that a mere SIM card without activation is of no use and held that the appellant is liable to pay service tax on the value of the SIM card also. In both the cases interest and penalty were levied."

Ultimately in above judgment Hon'ble Supreme Court held that SIM card is not having intrinsic value and required for giving connection of mobile to subscriber and there is no question of sale of the same. In other words the consideration received by the Mobile Company towards supply of SIM card is considered as part of service consideration liable to Service Tax. It can also be seen that the Mobile Company has not supplied SIM card directly to the mobile subscriber but it is routed through franchisee and still from the very first supply by Mobile Company itself it is considered as part of service. Therefore, even if SIM card ultimately reaches to subscriber through middle men like franchisee, franchisee of franchisee etc., still the nature of supply will not change and the consideration towards SIM card will remain as part of service charges.

In light of above clear legal position there is no doubt that the franchisee, in your case, which has supplied SIM card to the subscriber, will be in the course of service only and no VAT can apply on the same.

An issue may arise that under MVAT Act, 2002 there is specific Entry C-39 for intangible goods under which SIM card is notified as taxable goods. In our opinion the said entry will be superficial. In other words in spite of above specification under MVAT Act, no tax can be

levied as there is no sale of SIM card, but only providing the same in the course of provision of service. Even in above case of Idea Mobile, the Kerala Sales Tax Department had tried to levy sales tax, but after coming to know correct position has withdrawn their claim. This shows that in spite of specification in sales tax, if there is no sale of such specified goods there is no question of levy of sales tax.

Reference can also be made to the judgment of Hon. Kerala High Court in case of *Malabar Gold Pvt. Ltd. vs. Commercial Tax Officer, Kozhikode (58 VST 191)(Ker).* In this case Hon. High Court has held that there cannot be VAT when Service Tax is applicable.

It can also be noted that the notification specifying SIM card as taxable commodity under MVAT Act was issued in 2005, whereas the above judgment of Supreme Court in Idea Mobile, laying down correct legal position, came on 4-8-2011. Therefore the position is required to be seen in light of correct legal position as available today. If any sales tax is levied on SIM card value, it will be against the law laid down by the Hon. Supreme Court.

Value of Goods in Contract

Q.2 *In December 2013 issue an opinion regarding Rule 58 of MVAT Rules 2005 is published. Rule 58 not only deals with the deductions allowable but it determines the value of taxable sale viz., the value of property presumed to be transferred.*

The Rule states, "Determination of Sale Price" – and then in main sub-Rule (1) says "involved in the execution of works contract may be determined by- "

I feel the word "may" indicates that Rule 58(l) is not at all mandatory and there can be some other reasonable method for determination of sale price.

To cite an example, I have come across a contract between the builder and contractor wherein it is stated that the contractor shall charge cost of materials as paid, cost of labour as paid by him and cost of even administration expenses incurred and then add 5% as his profit.

Now the contractor is collecting VAT only on the materials supplied plus 5% profit thereon and claiming input credit of the taxes paid. I feel since the works contract is divided and since we can easily determine the value of goods transferred, the provisions of the method specified in Rule 58(1) are not at all applicable and Department should assess the contractor on the value of materials supplied and should not waste time on the labour aspect and other expenses like administrative expenses incurred and even the details of labour charges etc., may not be looked into as the value of materials transferred is easily available and one need to waste his/her time on the Labour and other incidental expenses. Kindly express your valued opinion on above issue.

Ans. The issue made in the query can be seen in light of judgment of Hon'ble Supreme Court in case of *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes and others (12 VST 371)(SC).* While dealing with separation of value of goods and services in a works contract. Hon. Supreme court has observed as under:

"31. We have noticed hereinbefore that a legal fiction is created by reason of the said provision. Such a legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean that it should be applied beyond a point which was not contemplated by the Legislature or which would lead to an anomaly or absurdity.

32. The court, while interpreting a statute, must bear in mind that the Legislature was supposed to know law and the legislation enacted is a reasonable one. The court must also bear in mind that where the application of a Parliamentary and a Legislative Act comes up for consideration endeavour shall be made to see that provisions of both the Acts are made applicable.

33. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the

sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct."

In this case, in a works contract, the values of goods and services were shown separately and Hon'ble Supreme Court has held that the respective taxes have to be levied as per the agreement between the parties. In other words if the values of goods and services are bifurcated by the contracting parties, the taxes are to be levied accordingly.

Therefore, as stated in query, Rule 58 cannot be said to be mandatory and can be avoided, if bifurcation as per law laid down by above Supreme Court judgment is available.

However as per the facts given in the query, it is not very clear about administrative charges. How the administrative charges are divided between supply of goods and services, so as to add 5% on same, is not clear. If the administrative expenses are not divided towards goods and services, then an issue may arise as to addition of such portion in the goods portion so as to arrive at cost of goods and then to add 5% G.P. to arrive at taxable value of the goods. This issue be examined.

Ad film whether sale or service

Q.3 Whether contract for production of Advertisement film is taxable under VAT?

Ans. In case of advertisement film, the issue will be about copyright in such film. Though full facts are not available, it appears that as per normal situation since the film will be at the behest of advertiser, the copyright in the same will belong to advertiser right from inception. Therefore, there is no question of sale of copyright by the contract producer. It will be a service contract. The position is covered by judgment of Karnataka High Court in case of *Sasken Communication Technologies Ltd. v. Joint Commissioner of Commercial Taxes (Appeals)-3 Bengaluru (55 VST 89) (Kar.).*

However, if the film is delivered by the contract producer on his own media like CD/Beta Tape then there will be liability as works contract due to judgment of MST Tribunal in case of *M/s. Oberoi Film v. State of Maharashtra (SA Nos. 469 & 470 of 2004 dated 5-1-2008).* If the media is also provided by the advertiser then the transaction will be only for services and no VAT will be attracted.

Further if the producer produces any Ad film as his goods having copyright with him and then transfers the same to the client, it will amount to sale and will be liable to sales tax accordingly.

TDS claim by sub-contractor

Q.4 Whether sub-contractor can claim credit of tax deducted at source by the employer from payment made to main contractor who assigned entire contract to the sub-contractor?

Ans. Yes. The reasoning for the same is that as per section 45(4) of the MVAT Act, 2002, the principal contractor and sub-contractor are treated as principal and agent. If one has paid tax, other is not liable to pay to that extent. When employer has deducted TDS, it is payment of tax by principal contractor. Therefore, when sub-contractor is discharging liability, he cannot be called upon to pay tax which is already paid by the principal contractor i.e. TDS. If required, principal contractor can issue certificate in Form 406 and further certificate that the credit of TDS is not claimed by him and it will not be claimed by him against any other contract.

Quest – Opinion
Sales u/ss. 3(a) & 3(b) in inter-State Works Contract

Vinayak Patkar
Advocate

Query

- Dealer is a private limited company having registered office in Mumbai.
- Dealer is registered under MVAT & CST Acts in the State of Maharashtra.
- They are also registered in the States of Tamil Nadu, Karnataka, West Bengal, Delhi, Haryana and Uttar Pradesh.
- Dealer is mainly in the business of design supply and installation of facade system of all types. It also carries out contract of installing aluminium composite panels [ACP] and installation of windows as well.
- Dealer has factory both at Mumbai and at Haryana.
- No manufacturing activity is carried out at above factory but the said places are used for cutting, slitting of the aluminium profiles, etc.
- Aluminium profiles are not manufactured but either they are imported or procured locally within India. Similarly glasses, ACP are either imported or are procured locally from local vendor.
- Contracts are awarded either by the principal i.e. contractee or are awarded by principal contractor.
- The dealer has been awarded contracts in all those states where they are registered. All contracts are normally for design, supply and installation.
- As far as imported aluminium profiles are concerned they are first imported either at Mumbai or at Haryana in bulk.
- Said goods as mentioned above are then cut to size as per the design of the project and are appropriately packed and are earmarked i.e. place where packed goods will be installed.
- When such goods are procured locally then they are directly dispatched to respective sites.
- There will be minimal local purchases at respective site other than the site in Haryana & Mumbai.
- LOA and PO if any are addressed in the name of Mumbai office.
- With above background please clarify the following
    - o When ready aluminium section duly cut and packed as per the design when sent to site outside the State of Maharashtra whether it is treated as inter-State works contract or stock transfer to branch.
    - o When goods are sourced from other vendors and when such goods are directly dispatched to the site can benefit of the section 6(2) can be availed.
    - o Can invoice be raised from different location if it is inter-State contract
    - o How to come out of a situation where awarder of contract doesn't wish to issue Forms C?

Opinion

1. We have examined the following documents:
   a. LOI of dated 27-6-2012.
   b. Work Order dated 3-9-2013.
   c. Tax Invoice of the querist for supply of Anodised Alu Frame dated 23-12-2013.
   d. A.R. E. Form No. 65/2013-14 dated 23-12-2013.
   e. Bill for Export dated 23-12-2013
   f. Delivery Challan dated 23-12-2013
   g. Export Invoice of the foreign supplier for supply of Anodised Aluminium Sections/Profiles and other related documents.
   h. Tax Invoice of the Indian supplier for supply of Glass, dated 2-4-2013 and Purchase Order relating thereto dated 1st April, 2013.
   i. Invoice of Indian supplier for supply of glazing accessories, dated 4-5-2013 and other related documents like A.R.E. form etc.
2. On examining these documents, we are of the view that the supplies made to the contractee is in the course inter-State trade covered by section 3(a) of the Central Sales tax Act, 1956. In some cases, those are covered by section 3 (b) read with section 6(2) of the said Act. The reasons for this view are stated below :
   i. We have reproduced hereinbelow one specie of the nature of work which was required to be done as per the Work Order :

      "103100000000002-1-0-Y-UNITISED STRUCTURAL GLAZING

      Providing and fixing aluminium unitised vertical Structural glazing system with provision for IG unit (Insulated Glass unit) for vision panel of approved make having main frame of verticals and horizontals made out of specially designed extruded aluminium sections to withstand wind pressure of 200 kg / sq.m at a height of 59 m. and fabricated, fixed at all levels, elevation and heights to the Masonry RC walls with necessary clamps, brackets and anchor fasteners. Hook type floor mounted brackets shall be Mild Steel Hot dip galvanized minimum 80 microns thick and shall conform to IS: 4759-1996. The extruded aluminium section shall be anodised in approved colour with a anodic coating of minimum 20 microns. Extruded section shall be of 6063 T5 or T6 alloy conforming to ASTM B 221. Any other fastening straps, nuts, bolts, rivets, washers, etc. shall be SS 304 grade. All taps shall be double sided open cell of Norton make. All necessary Anchor fasteners shall be of HILTI or Fischer make or approved equivalent and of SS 304 grade."

   ii. On perusal of this and other similar clauses of the work order, it is clear that it is a 'works contract' as defined under clause (ja) of section 2 of the Central Sales Tax Act, 1956.The Scope of Work stated in the LOI dated 27-6-2012 supports this contention.

   iii. The work order has given the specifications of 'Unitised Structural Glazing ' and 'Unitised Structural Glazing Frame'. The anodised alu frames as per specifications, in CKD condition, were consigned from the State of Maharashtra to the employer, in the State of Tamil Nadu. Kindly see the Invoice dated 23-12-2013, the A.R.E. form and the Bill of Export relating thereto. The glass and other glazing accessories have also been moved from other States (A.P. & Maharashtra) in the similar manner. Those were assembled in the State of Tamil Nadu and applied to the work.

iv. Section 2(g)(ii) of the Central Sales Tax Act, 1956 defines the 'Sale' for the purpose of that Act and includes therein a transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract. In the impugned case the goods involved are frames, glass, etc. which were assembled and incorporated in the works in the form of unitised structural glazing, which is some other form of goods. These goods have moved from different States to the State of Tamil Nadu in pursuance to the LOI/Work Order which has given the specifications. No diversion of these goods is possible since those are tailor made goods meant for the work awarded by the contractee. We are therefore of the considered view that the work awarded to the querist and executed by them is squarely covered by Section 3 (a) read with sections 2 (g) (ii) and (ja) of the Central Sales Tax Act, 1956.

v. The view expressed hereinabove is supported by the judgment of the Andhra Pradesh High Court in the case of L & T Ltd. reported in 132 STC 418. The observations of the Hon'ble Court are reproduced below:

"Held, allowing the appeals, (i) that the entire project work had to be completed by the appellant which included installation of machinery and supervision up to certain point of time, that is to say, the contract was composite in nature. By merely supplying material to the contractee, the responsibility arising out of the agreement did not cease, the appellant had to install the machinery and watch the performance for a period of 15 months. Certain goods were manufactured by the appellant on the specification of the contractee at the factory near Mumbai and the representative of the contractee inspected the goods and after being satisfied with the quality of goods clearance was given. 90 per cent of the value of goods was already received by the appellant from the contractee. The movement of goods was occasioned pursuant to the contract. The documents on record would go to show that these goods had reached the destination as per the terms of the contract. Central Sales Tax was paid to the State of Maharashtra under the scheme of the Act. Having regard to the fact that there were two facets of the contract, supply of goods and installation of machinery with the labour of the appellant, the contract was a divisible contract. The transaction was an inter-State transaction and not an intra-State transaction and the turnover arising on this transaction could not be brought under the net of the Andhra Pradesh Act."

The question now remains to be answered is, whether the sale u/s. 6(2) is possible in this transaction. The glasses were purchased from the suppliers from Andhra Pradesh and a second sale was effected in the course of inter-State trade to the contractee. The question is, whether such sale will be allowed as exempt, if the contractee gives the necessary declaration in Form C. It be noted that in the above referred case the Court had also considered the sale u/s 6(2) and decided the issue in favour of the assessee i.e. L & T. Therefore, such sales of glasses will be allowed.

However, there is another approach to the sales u/s 6 (2) *qua* inter-State works contract. The Parliament always intended to encourage inter-State sale and therefore exempted the second sale in the course of such trade. See the Objects and Reasons appended to the Act No. 31 of 1958 which introduced

sub-section (2) in section 6 of the C.S.T. Act, 1956. The definition of sale u/s 2 (g) was amended on 11-5-2002 by Finance Act No. 20 of 2002 so as to include therein the then non sale transactions like works contract. Section 6(2) contemplates the sale by Transfer of Documents of Title to the goods. If the word "sale" used in section 6(2) is read in the defined way then the second sale under that section is impossible since under the works contract transfer of property is always on incorporation. However, considering the legislative intention, the term sale used in that sub-section need not be interpreted in a defined manner but should be understood with reference to context. Section 2 of the C.S.T. Act, 1956 which is the definition section commences with the words, 'Unless the context requires' – indicating that the words defined thereunder should be read in the defined manner only if the context permits. We are therefore of the considered view that in your case the sale of glass u/s 6(2) should be allowed. Kindly see the following judgments :

M/s. Vanguard Fire and General Insurance Co. Ltd., Madras v. M/s. Fraser and Ross, (AIR 1960 SC 971).

"……. The main basis of this contention is the definition of the word "insurer" in S. 2(9) of the Act. It is pointed out that definition begins with the words "insurer means" and is therefore exhaustive. It may be accepted that generally the word "Insurer" has been defined for the purposes of the Act to mean a person or body corporate, etc. which is actually carrying on the business of insurance, i.e., the business of effecting contracts of insurance of whatever kind they might be. But S. 2 begins with the words "In this Act, unless there is anything repugnant in the subject or context" and then come the various definition clauses of which (9) is one. It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to leave a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. Therefore in finding out the meaning of the word "Insurer" in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context to which the word has been used and that will be giving effect to the opening sentence in the definition section namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word "Insurer" as used in the Act would mean a person or body corporate actually carrying on the business of insurance, it may be that in certain sections the word may have carrying on the business of insurance, it may be that in certain sections the word

may have a somewhat different meaning".

*(Emphasis *supplied)*

The principle emerging from the aforestated observations of the Supreme Court has subsequently been followed by the Gujarat High Court in the case of *M/s. Union Medical Agency v. The State of Gujarat (31 STC 396)* in which the term 'Registered Dealer' in the context of a dealer registered under the Central Act and liable to pay tax under Section 4 of the Bombay Act, (as was then applicable to Gujarat State) had fallen for interpretation. Under Section 8(ii) of the Bombay Act, a deduction from the taxable turnover was admissible in respect of 'the resale of goods purchased by the assessee on or after the appointed day from a Registered Dealer'. In other words, the resales were allowable only if the corresponding purchases were effected from a Registered Dealer.

The term 'Registered Dealer' was defined in Section 2(25) of the Bombay Act as to mean 'a dealer registered under Section 22 of the Bombay Act'. The question posed before the Gujarat High Court in a reference under Section 61 of the Bombay Act was as regards whether a dealer liable to pay tax under Section 4 of the Bombay Act but not registered under Section 22 of the Bombay Act could be considered as a 'Registered Dealer' and whether the sales of goods purchased from such a dealer would qualify for the deduction of 'Resale' under Section 8(ii) of the Bombay Act, even though such a dealer is not a 'Registered Dealer' strictly as per the defined meaning of that term in Section 2(25) of the Bombay Act. Having regard to the context, collocation and the object of the expression 'Registered Dealer' in Section 8(ii) and having regard to the policy of the Bombay Act, the High Court held that the said expression would also include a dealer who is not registered under Section 22 of the Bombay Act but who is registered under the Central Act and on whom special liability to pay tax has been imposed under Section 4 of the Bombay Act. In view thereof, the sales of goods purchased from such a dealer would qualify for the deduction as a 'Resale' under Section 8(ii). While holding this view, the High Court drew support from the above-mentioned Supreme Court judgment and observed that –

"It is thus clear that though ordinarily the meaning to be given to an expression found in a provision of a statute is one that is given in the definition clause, there may be cases in which that meaning may have to be departed from having regard to the context, collocation and the object of the statute and it may become necessary to interpret the word differently so as to give effect to the enacting provisions of the Act".

*(Emphasis *supplied)*

Same principle has been followed in another judgment of the Gujarat High Court in the case of the *State of Gujarat v. Wood Polymer Ltd. (50 STC 229).* The term 'Sale' under the Bombay Act fell for interpretation this case and the question there was as regards whether that expression should be given a meaning wider than the defined meaning, having regard to the context, collocation and the object of the set-off rule. In this case, the assessee was a certified manufacturer who had established a new industry and therefore he was entitled to set-off of the tax paid by him on his purchases of raw materials,

processing materials, machinery, etc., provided they were used in manufacture of goods for sale. Thus a 'Sale' of the manufactured goods was a condition for admissibility of the set-off of the tax paid on the purchases of inputs. The term 'Sale' was defined in section 2(28) to mean a sale of goods made within the State for cash or deferred payment or other valuable consideration' (Emphasis *Supplied). In the said Section 2(28), the term 'sale' within the State' was explained to include a sale determined to be inside the State in accordance with the principles formulated in Section 4(2) of the Central Act. Obviously, an inter-State stock-transfer of manufactured goods is not a sale as per the aforesaid defined meaning of the term 'Sale'. The assessee M/s. Wood Polymer Ltd. had sales-depots in various other States, where he transferred his manufactured goods and sold them in those respective States. Holding that the assessee had not 'sold' the manufactured goods to the extent of the inter-State stock-transfers, the Departmental Authorities disallowed the set-off proportionately. This disallowance having been confirmed in the First Appeal was further contested before the Tribunal. It was argued before the Tribunal that having regard to the object of the set-off scheme and the legislative intent of granting concessional incentives to the new industries, the term 'Sale' in the set-off rule should not have been construed as per the defined meaning, but it should be interpreted to mean as 'Sale' in its generic sense. The Tribunal traced the legislative history of the set-off scheme, considered the entire context of the Scheme and accepted the assessee's contention that the term 'Sale' in the set-off rule should not be restricted only to 'a sale within the State.' The Tribunal thus gave a wider meaning to the term 'Sale' in the set-off rule and thus held the assessee as entitled to the set-off even in the context of the inter-State stock transfer of the manufactured goods. At the instance of the department, the matter was referred to the High Court for its decision under Section 61. Before the High Court, it was *inter alia* argued on behalf of the Revenue that the term 'Sale' in the set-off rule cannot be construed *de hors* its legislative dictionary which defines it to mean 'a sale of goods made within the State' and that the Tribunal committed a substantial error of law in upholding the assessee's set-off claim in disregard to the said dictionary meaning by trying to spell out the repugnancy by travelling outside the particular set-off provision. The High Court however rejected this argument by drawing support from the aforesaid Supreme Court judgment in the case of *M/s. Vanguard Fire and General Insurance Co. Ltd. (supra),* as also another Apex Court Judgment in the case of *M/s. Dhandhania Kedia and Co. v. Commissioner of Income Tax, (1959) 35 ITR 400: AIR 1959 SC 219*. The High Court observed that the Court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. So observing, the High Court went through in-depth the entire taxation scheme embodied in the Bombay Act as also the basic object of the set-off provision, and held the assessee was legally entitled to set-off in the context of inter-State stock-transfers of his manufactured goods, by making the following observations –

"We are therefore of the opinion that there is sufficient justification and warrant for departing from the

dictionary meaning of the term 'Sale' and that having regard to the object, purpose, structure and tenor of the rule, it is not necessary that in order to earn set-off, the sale of the manufactured goods by a certified manufacturer should be within the State only. The Tribunal was therefore justified in reaching the conclusion that the assessee was entitled to set-off the whole amount of tax paid on the purchases of raw materials."

*(Emphasis * Supplied)*

In support of the proposition that the definition in a section of a statute should not be always subject to a wooden interpretation, but sometimes it ought to be liberally understood in accordance with the context in which the defined word appears, you may kindly see few other judicial pronouncements. In the Madras High Court case of *M/s. Indian Express (Madurai) Ltd. (29STC 88)* and in the Supreme Court case of *M/s. Printers (Mysore) Ltd (1994) 93 STC 95,* newspapers were held to be 'Goods" for the purposes of Sections 7 and 8 of the Central Act, even though newspapers have been specifically excluded from the definition of 'Goods' in Section 2(d) of the Central Act. It was held that the exclusion of 'newspapers' from the scope of the expression 'Goods' in the definition clause was actuated by the object of exempting the sale of newspapers from the levy of Central Sales Tax. That would however not mean that the newspapers have ceased to be 'Goods' for the purposes of Sections 7 and 8 of the Central Act and therefore a purchase of newsprint for the purpose of use in the manufacture of newspapers would be permissible to be made at a concessional tax-rate against a declaration in Form C. Thus considering the object of the amendment whereby newspapers were excluded from 'Goods', the expression was given a wider meaning and was not confined to the defined meaning. While doing so, the Madras High Court observed that –

No doubt, it is fundamental that the definition clause in a statute is by itself a small dictionary of its own in which it endeavours to define certain words and terms, sometimes arbitrarily. But, invariably it takes the precaution of using a non obstante clause such as unless there is anything repugnant in the subject or context" in the beginning of the section. Thus, if in the course of the statute some words are used in different parts thereof, then it would not be improper to interpret those words differently if the context so requires"

*(Emphasis * Supplied)*

The Supreme Court also observed that "it is well settled that where the context does not permit or where it would lead to absurd or unintended result, the definition of an expression need not be mechanically applied".

*(Emphasis * Supplied)*

vi. You have not endorsed the L.R. or R.R. However, in our opinion it does not make any difference. There are successive transfers to the contractee. Kindly see the Gujarat High Court judgment in Haridas Mulji Thakkar reported in 84 STC 317.

3. The contractee has agreed to give Form C for these transactions. You may please accept the same. If Form C is not received then you will have to pay CST at Full rate.

Tax World

SALES TAX

D.H. Joshi, *Advocate*

Our senior brothers Dr. K. Shivaram and Shri P.C. Joshi entrusted the responsibility to me for writing this column w.e.f. January, 2014. I am grateful to them for giving me this opportunity to serve our brothers on a national scale.

1(A) Assessment – Discount from Sale Price

The Rajasthan High Court, under the Rajasthan Sales Tax Act, 1994 (RST), dismissed the Department's Revision Appln. on the ground that discount allowed on the occasion of festivals like Holi, Diwali, New Year etc. and other occasions to promote sale. Application of two standards by the Department for making assessment clearly demonstrate that the tax was leviable after discount having been allowed by a trader and, therefore, the Tax Board was justified in coming to the conclusion.

CTO, Special Circle v. LG Electronics India Ltd. (2013) NTN (Vol. 53) P. 179.

(B) Appeal – Condition of Deposit

In this case, the petitioner directly filed a Writ Petition before the M.P. High Court, against the First Appeal Order mainly on the ground that all his business premises, accounts, etc. have been seized by the Dept. for recovery of dues, and, therefore, the petitioner is not having any liquidity to deposit the amount required for filing the appeal before Appellate Board. Looking to the peculiar facts of the case, the High Court disposed of the petition with the direction that the petitioner may seek exemption from deposit of the statutory amount for filing second appeal before the appellate board, and the board shall consider the said prayer sympathetically.

SVIL Mines Ltd., Katni v. Commissioner of ST & Ors. (2013) 23 STJ 707 (M.P.)

(C) Assessment – Best Judgment

In this case, AO made the best judgment on grounds : (i) survey of business place, which found the business closed on a particular date, (ii) past history taken into consideration and (iii) Low consumption of diesel, etc. a ground to prove that grinding and processing of spices has not been done which resulted in sale of spices purchased as it is.

The Allahabad High Court held : The best judgment assessment cannot be made in an arbitrary manner simply on the basis of surmises and conjectures unless there is some material to support such an assessment. Revision allowed. The HC placed reliance on *Sri Krishna Steel Works v. Commissioner of Trade Tax, VSTI 2013 (17) B-591.*

Krishna Gram Udyog Samiti v. Commissioner of Trade Tax, U.P. (2013) NTN (Vol. 53) P.202. (All.)

2(A) CST Rules, 1957, Rule 12(1) – Declaration in Form 'H' (Certificate of Export)

In this case, an important issue whether appellant's negligence in submission of declaration in Form 'H' during original or appellate proceedings, whether disentitles him any relief – Held, Yes. Yet, appellant exported goods but could not produce the relevant declaration in Form 'H' before the AO or Tribunal. Tribunal having denied the relief, appellant filed the appeal before the court together with 'H' form. Form 'H' in possession of the appellant clearly evidences a *bona fide*

export transaction. Hence, Punjab & Haryana HC remitted the matter to the Jt. Director (Enf) for its consideration and deciding the appeal on merits.

Raj Trading Co. v. State of Punjab (2013) 46 PHT 541 (P & H)

(B) Section 10(D) – Misuse of 'C' Form – Penalty

In this case, the dealer was doing job work – printing of lottery tickets. For the purpose of levying penalty under Clause 10(d) of the CST Act, according to the Allahabad HC, the relevant consideration is whether the goods purchased against Form 'C' have been used for the purpose for which registration has been granted or not. As noticed the raw materials etc., have been used for the printing of lottery tickets for which the registration was granted, and, therefore, there was no violation of Section 10(d). Accordingly, the penalty levied was quashed. However, in the judgment the quantum of penalty levied is not mentioned.

M/s. Aristo Prints Pvt. Ltd., Ghaziabad & Ors. v. CCT, U.P., Lucknow & Ors (2013) 46 PHT 461 (All.)

(C) CST Act, Section 3(2) – Whether the transaction is a local sale or inter-State sale or inter-State Works Contract?

The issue before the Madras High Court was, whether Lifts manufactured at assessee's Ghaziabad's factory according to the specifications given by the Tamil Nadu customers and thereafter by dismantling the same transported the same to customer's site in Tamil Nadu and erected by the assessee's technicians. Held, that it is only inter-State works contract. The judgment of the Supreme Court in *Kone Elevators (I) Ltd. v. State of A.P. (2005) 140 STC 22 (SC)* was distinguished on facts of the present case.

M/s. ECE Industries Ltd., Chennai v. State of Tamil Nadu 2013-14 (19) TNCTJ (P. 285)

(D) CST Act, 1956 r/w Section 2(B) of the Haryana GST Act, 1973 – Review

In this case, the Respondent-assessee is an insurance Co. by name New India Assurance Co. Ltd., providing service of general insurance to its customers. During the A.Y. 1994-95 to 1996-97, company received unserviceable salvaged goods against claims and sold through the designated auctioneers – AA Authority, Faridabad. The Department treated the Company as a dealer and levied tax on the auctioned goods, which the Tribunal set-aside holding the company as not a dealer. The HC did not find any reasons to review its earlier orders and, hence, the review applications were dismissed.

State of Haryana v. New India Assurance Co. Ltd., New Delhi (2013) 46 PHT 507 HTT (FD)

3(A) Entries to Schedule

'Vibratory Compactor' in the Notification dated 31-3-1993 issued by the Karnataka Govt. was classified as 'Earthmoving Equipment'. However, the said Notification was withdrawn. The Karnataka High Court held that withdrawing of the notification would be of no consequence. It was the stand of the Government in the above Notification that vibratory compactor is earthmoving machine. Therefore, it is untenable for the Revenue to contend that vibratory compactors are not earthmoving machineries. The understanding of the govt. with regard to the said goods and issuing Notification to that effect would be binding on the Government because the Notification has statutory force and now the Revenue cannot argue contrary to the stand taken in the Notification.

Ingersoll Rand (I) Ltd. v. CCT, Bangalore (2013) 23 STJ 725 (Kar.)

(B) The Allahabad High Court while interpreting entries in Schedule was seized of

the question whether 'blade of phawra', 'hull ki nok' and 'tasala' are agricultural implements r/w. Notification dated 30-6-1986 which exempts agricultural implements and parts, accessories and attachments thereof. The High Court relying on the judgment in the case of *CST v. Kaushal Industries (1984 UPTC 921)* held : there is no material on record which could prove that any of the above items are not related to agricultural activities. There is no error in exclusion of the above items from tax liability by treating them to be within agricultural implements or parts, accessories or attachments to the agricultural implements. Hence, the Revision Appln. of the Department is devoid of merits and is dismissed.

Commissioner, Commercial Tax v. Sagar Industries 2013 NTN (Vol. 53 P. 250.

(C) Exemptions to New Units

In this case, arising out of Karnataka Sales Tax Act, 1957, the question that arose for the decision of the High Court was as to whether the appellant-dealer who without any dispute had the benefit of exemption in respect of its sales turnover including inter-State sales turnover in terms of certain concessions given to new industrial establishments as per Industrial Policy 1996 to 2001, could claim the benefit of the effectuating Notification of this policy as per Government Order dated 15-11-1996 in respect of inter-State sales and in situations wherein exemption was claimed without the backup of production of 'C' form and 'D' form as the case may be. The controversy arose in the background of the amendments to the provisions of section 8(5) of the CST Act, 1956 in terms of the amending Act No. 20 of 2002 w.e.f. 11-5-2002. The Karnataka High Court held : "Section 8 of the CST Act is not only a charging section, but it also provides the rate of tax. The requirement of section 8(4) is for the purpose of claiming benefit of lower rate of tax u/s. 8(1) and it cannot in anyway affect or control the exemptions granted u/s. 8(2) of the CST Act. Thus, the amendment cannot have any bearing in respect of exemptions granted to inter-State sales effected in favour of non-registered dealers and other governments"

Adeshwar Granites Pvt. Ltd. v. Addl. Commr. CT, Bangalore & Ors (2013) 23 STJ 710 (Kar.)

4. News from Tamil Nadu

The Tamil Nadu Government introduced L.A. Bill No. 2013 to further amend the Tamil Nadu VAT Act, 2006. In the Statement of Objects and Reasons (SOR), inter-alia, it is mentioned that –

(i) in a manufacturing State like Tamil Nadu, the size and scale of inter-State transactions are consistently on the rise. Over the years, the increased in ITC accumulation on inter-State transactions has resulted in reduced tax collection to the State. Consequently, the gradual reduction of rate of CST from 4% to 2% and also due to increased in the tax rates under the Act from 4% to 5% and from 12.5% to 14.5%. Hence, in order to have certain degree of control over the accumulation of ITC, the govt. have decided to increase the retention rate from 3% to 5% on inter-State transfer of goods otherwise than by way of sale and also to make a new provision for retention of ITC at 3% on inter-State sale to a Registered dealer.

(ii) It is also noticed that vegetable oil intended for inter-State sales are being unloaded and sold in this State itself resulting in evasion of tax and consequential loss to revenue to the Government. So is the case of the commodity iron and steel. In order to prevent evasion of tax, the govt. have decided to include 'vegetable oil' including 'refined vegetable oil' and 'iron & steel' as specified in clause (iv) of section 14 of the CST Act, 1956 in the 6th Schedule to the said Act 32 of 2006.

(T.N.G.G. Extra Part-IV Section 1, No. 312 dated 31-10-2013 / 2013-14 (19) TNCTJ Page 63-67)

5(A) Sale Price – 'Optional Service Charges'

The issue before the Rajasthan High Court arose in respect of a dealer dealing in Refrigerators and where 'optional service charges' at ` 200 per Refrigerator were collected from customers, whether such charges form part of taxable sale price u/s. 2(h) of the Rajasthan ST Act, 1994. Earlier, Tax Board rejected the appeal of the Dept. regarding this point.

On consideration of the entire matter, High Court held that optional service charges as above charged separately for providing after sale service to customers opting for optional scheme would not be part of sale price.

ACTO v. Elecetrolux Kelvinator Ltd. 2013 NTN (Vol. 53) P. 210.

(B) Sale Price – Beer Bottles

The question before the Allahabad High Court was 'whether security deposit for bottles to be included in sale price ?' Held – No. relying upon the decision of the Apex Court in the case of *United Breweries Ltd. v. State of A.P., (1997 NTN Vol. 10)*

(C) Sale – Broken Beer Bottles

The question before the same High Court was 'whether forfeited security, on account of broken beer bottles amount to sale of bottles ?' Held – No. relying upon the case *Digboi Petroleum Ltd. v. Commr. Trade Tax, Lucknow, 2005 UPTC 819.*

Commr. of Trade Tax, U.P. v. Central Distilleries and Brewaries Ltd. 2013 NTN (Vol. 53) P. 194.

Corrigendum

The news reported in the December 2013 Part of the Journal should be read as corrected as under:

Entry Tax

The Karnataka High Court held that the tools like drill bits were parts and accessories of the machinery and was not covered under the category of consumables within the scope entry 52 of Schedule I, appended II, the Karnataka Tax on Entry of Goods Act, 1979 especially because the earlier judgment of the High Court was confirmed by the Supreme Court in *125 STC 212 (SC)* which was binding on the tribunal. The assesse was held to be liable to entry tax and the Tribunal had erred in holding such items to be consumables and therefore not liable to tax.

State of Karnataka v. M/s. R. K. Powergen Pvt Ltd. 2013-14 (18) KCTJ Pg.149

Error in reporting is highly regreted.

INCOME TAX APPELLATE TRIBUNAL

Figures of institution, Disposal and Pendency of Appeals
The position as on 1-1-2014.

Bench	No. of Benches	No. Members	Institution	Disposal	Pendency	SMC Pendency
Mumbai	12	21	745	332	217798	29
Pune	2	04	199	184	4082	34
Nagpur	1	-	51	0	852	20
Panaji	1	02	77	8	376	0
Delhi	9	13	498	270	15359	18
Agra	1	02	27	24	307	0
Bilaspur	1	-	15	0	831	12
Lucknow	2	01	60	95	1436	10
Allahabad	1	-	38	38	979	16
Jabalpur	1	-	40	0	518	20
Kolkata	5	06	215	149	6293	91
Patna	1	-	23	0	718	28
Ranchi (Jharkhand) Circuit Bench	1	-	15	0	167	6
Cuttack	1	02	63	9	792	10
Guwahati	1	-	30	168	654	64
Chennai	4	06	274	103	2496	32
Bengaluru	3	05	227	75	3486	28
Kochi	1	02	67	60	669	8
Ahmedabad	4	08	369	182	10459	162
Indore	1	02	106	36	1093	2
Rajkot	1	02	81	32	1148	53
Hyderabad	2	03	264	159	2384	1
Visakhapatnam	1	-	66	157	1371	0
Chandigarh	2	03	107	94	2214	4
Amritsar	1	02	68	67	812	18
Jaipur	2	01	95	13	2121	8
Jodhpur	1	02	80	48	317	0
Total	**63**		**3900**	**2303**	**83732**	**674**
Last Month Total	**126**	**87**	**3529**	**2351**	**82135**	**714**

Chartered | FEITIAN
WE BUILD SECURITY

www.charteredinfo.com
www.businesssms.co.in
+91 92252 45088

SWITCH TO INDIA'S LARGEST SELLING PKI USB TOKEN.

FIPS VALIDATED 140-2

- Uncompromised Security.
- World Class Product.
- Simplest Middleware.
- Single Driver File.
- FIPS Certified.
- Low Cost.

All ePass Token supports Win XP, Win 7 & Win 8, Linux, MAC.

INDIA'S MOST TRUSTED TAXATION SOFTWARE BRAND.

TaxPro

Works With Your Imagination

- Premium Brand in Taxation Software.
- Largest Client base of Professionals and Corporates.
- Best after Sales Support in the Industry.
- Office Network in all 5 Region of the Country.

INDIA's largest
REGISTRATION AUTHORITY
for Issuance of DSC, under
TATA CONSULTANCY SERVICES
CERTIFYING AUTHORITY

Chartered Information Systems Pvt. Ltd.
"Chartered House" NAGPUR - 440 008
Ph: +91 - 712 - 663 8888 (100 Lines)

Chartered Information Systems Pvt. Ltd.
Andheri - Kurla Road, MUMBAI - 400 072
Ph: + 91 - 22 - 6522 8288, 2850 0103

Chartered Information Systems Pvt. Ltd.
Karol Bagh,NEW DELHI - 110 005
Ph: +91- 11 - 4503 7177, 4502 0850

Chartered Information Systems Pvt. Ltd.
Majestic, BENGALURU - 560 009
Phone: +91 - 80 - 4092 1639, 99729 32213

Chartered Information Systems Pvt. Ltd.
Old China Bazar, KOLKATA - 700 001
Phone: + 91 - 33 - 4007 8356

Posted at the Mumbai Patrika Channel
Sorting Office, Mumbai 400 001.
Date of Posting: 22nd & 23rd Januray, 2014

R. No. MAHENG/1999/5918
Regd. No. MH/MR/South-144/2012-14
Date of Publishing: 20th of every month

Registered with Registrar of Newspaper for India under
R. No. MAHENG/1999/5918
Printed by Karkala Shivaram Kittanna Published by Karkala Shivaram Kittanna on behalf of All India Federation of Tax Practitioners (name of owner) and Printed at Finesse Graphics & Prints Pvt. Ltd. 309, Parvati Industrial Premises, Sun Mill Compound, Lower Parel, Mumbai - 400 013. (name of the printing press with address) and Published at All India Federation of Tax Practitioners, 215 Rewa Chambers, 31, New Marine Lines, Mumbai – 400 020 (full address of the place of publication). Editor: Karkala Shivaram Kittanna.

To

If undelivered, please return to:

ALL INDIA FEDERATION OF TAX PRACTITIONERS
215, Rewa Chambers, 31, New Marine Lines, Mumbai - 400 020