WISHING YOU AND YOUR FAMILY A VERY WONDERFUL, HAPPY AND SAFE DIWALI

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PRIVATE FAMILY TRUST

Contributed by CA Ram Prasad

LEGAL CONCEPT OF TRUSTS

The Indian Trusts Act, 1882 governs the private trusts. This Act doesn't apply to public trusts and private charitable trusts. The distinction between the private and public trusts is that in private trusts, the beneficiaries are defined and ascertained individuals, but in public trusts, interest may be vested in uncertain and fluctuating body of persons.

A private trust comes into existence when the owner of a particular property (the settlor), while intending to transfer the property to a chosen individual/individuals (the beneficiaries) doesn't vest the property with the beneficiaries but with other people (the trustees), who are given the responsibility of making over the benefits of the property to the beneficiaries. For example, a father may be settlor of a trust, make himself and his wife as the trustees and his children as beneficiaries.

While creation of such trusts, the following points should be taken care:

(i) The subject matter of the trust should be certain; the person desired to be benefited must be certain, and the period of trust must be defined directly or indirectly.

(ii) Though the Indian Trust Act doesn't forbid the beneficiary of a trust from being appointed as a trustee, but as a general rule, it is advisable to avoid appointing a beneficiary as a trustee as there may arise a conflict between his interest and his duty. It was held by Orissa High Court in M.C.Mohapatravs.M.C.Mohapatra that the same person may be a trustee and a beneficiary.

(iii) Typically, a trust deed should provide the day on which the corpus be distributed among the beneficiaries. Normally, the settlor should mention the last date by which the trust should be wound up and leave it to the discretion of the trustee to distribute a part of, or the entire corpus earlier. Under the law, however, the life of such a trust cannot exceed twenty five years. In other words, a private trust should be wound up by a date not later than twenty five years from the date of the creation of the trust. In most cases, however, the corpus is distributed after the children attains majority.

(iv) The investments of trust money are governed by section 20 & section 40 of the Indian Trust Act, 1882. These sections give the details of securities in which investments can be made. However, there is a residuary section 20(f), which says that the trustee may invest money in any security expressly authorized by the instrument of trust. The investment clause in the trust deed should be suitably drafted so that full flexibility remains in the hands oftrustees. However, it may be noted that the investment clause is applicable only if the trust has surplus money, which is not immediately required. For fulfilling the objects of the Trust, the investment can be made in any immovable and moveable property.

CREATION OF PRIVATE TRUSTS

A registered document is necessary to set up a trust if immovable property is being transferred to it. However, if only moveable property is settled upon the trust, no formal document or agreement in writing is necessary. It is always advisable to prepare a trust deed on a stamp paper, and have it signed by the settlor and the trustees in presence of a witness, to avoid any subsequent disputes.

TYPES OF PRIVATE TRUSTS

A trust may either a discretionary or non-discretionary trust. A trust is non-discretionary if the shares of the beneficiaries are clearly defined by the settlor. In other words, although the trustees have the powers to administer and manage the trust, and its finances, they do not have the discretion to decide the proportion in which the income or the corpus is to be distributed among the beneficiaries.

A discretionary trust, on the other hand, only specifies the names of the beneficiaries. The trustees have complete discretion to decide the proportion in which the income or the corpus is to be distributed.

Thus, the trustees may distribute the benefits to just a few beneficiaries (and totally exclude the others) or change the proportion each year or even decide not to distribute the income at all in a given year.

In effect, so long as the benefits are passed on to one or more of the beneficiaries named by the settlor, the trustees have the discretion to decide who among the beneficiaries will benefit from the trust.

TAXABILITY

As per Section 2(31) a trust is not a person and hence trust is not an assessee. Trustees and beneficiaries are assessee under the Act. In case of trust the status of trustee is wholly irrelevant. Trust income be taxed in the like manner and same extent of beneficiaries. Under tax law a trustee is taxed as representative assessee.

The taxability of the Trust depends upon the type of the trust. In the case of a non-discretionary trust, all income is taxable in the hands of the beneficiaries. But if the beneficiaries are minors, the income is to be clubbed with that of the parent with the higher income.

On the other hand, in the case of a discretionary trust, in which the shares of the beneficiaries are unknown and indeterminate, it is taxed in the hands of trust at the maximum marginal rate.

Inheritance by will is different from trust. In case of will there is an inheritance. In case of trust it is a receipt of funds or gift or distribution and there is no inheritance.

Section 56(2)(vii) is applicable to discretionary trust. If the donor and all beneficiaries are relatives section 56 has no application.

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SERVICE TAX

APPLICABILITY OF EXCISE DUTY ON WASTE AND SCRAP

Contributed by CA Manindar

Introduction:

Applicability of excise duty on waste and scrap is always been one of the perennial area of litigation under the Central Excise Law. With intent to subject waste and scrap to excise duty, many of the waste and scraps which arises during the process of manufacture of various excisable goods are included in the Central Excise Tariff. The definition of 'Excisable Goods' as appearing under Section 2(d) of the Central Excise Act, 1944 is also amended by inserting an explanation with effect from 10.05.2008 which deems that anything that can be capable of being brought to market and sold are deemed to be marketable and thus excisable. On the other hand, there is several waste and scrap which are subjected to nil rate of duty, thereby Department requiring assessee to reverse CENVAT Credit at 6%/7% of their value under Rule 6 of CENVAT Credit Rules, 2004. Let us abreast ourselves the latest legal position of this issue.

Legislative Background:

Prior to insertion of explanation to Section 2(d),several courts have interpreted that certain waste and scrap are not excisable goods despite mentioning them in Central Excise Tariff on the reason that they are not marketable as they are not known to commerce as marketable commodity. In the case of UOI vs.Indian Aluminum Co. Ltd, 1995(77)E.L.T268(SC) wherein excisability of aluminum dross and skimmings was examined and the Supreme Court has held as follows;

"13.....Dross and skimmings may contain some small percentage of metal. But dross and skimmings are not metal in the same class as waste or scrap. It may be possible to recover some metal from such dross and skimmings. They can, therefore, be sold. But this does not make them a marketable commodity. As learned Single Judge of the Bombay High Court has pointed out, even rubbish can be sold. Everything, however which is sold is not necessarily a marketable commodity as known to commerce and which, it may be worthwhile to trade in. Learned Single Judge of the Bombay High Court, therefore, rightly came to the conclusion that the proviso to Rule 56A was not applicable as aluminium dross and skimmings are not excisable goods."

Explanation inserted in Section 2(d) w.e.f. from 10.05.2008:

In order to overcome the challenge on marketability of waste and scrap, an explanation was inserted in the definition of 'excisable goods' under Section 2(d) of the Central Excise Act, 1944 by Finance Act, 2008 w.e.f 10.05.2008. The same is reproduced as under;

"excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt;

Explanation. - For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.

Consequent to the amendment, Pune Commissionerate released Circular No. 904/24/2009-CX dated 28.10.2009 where in it has been stated that bagasse, aluminum/zinc dross and other such products termed as waste, residue or refuse which arise during the course of manufacture and are capable of being sold for consideration would be excisable goods and chargeable to payment of excise duty. Thus by virtue of the above amendment, Revenue sought to levy excise duty on various types of waste and scrap. Let's see how successful they are!

Process should amount to manufacture apart from goods being excisable:

Excise duty is on the event of manufacture. In order to attract excise duty, apart from goods involved are excisable goods by finding place in Central Excise Tariff, they should also be manufactured. 'Manufacture' as defined under section 2(f) of the Central Excise Act, 1944 provides that it includes

1. any process incidental or ancillary to the completion of a manufactured product. or
2. any process which is specified in relation to any goods in the section or chapter notes of Central Excise tariff. or
3. any process involving labelling, re-labelling, packing or repacking of goods specified in third schedule to Central Excise Act, 1944

Process covered under point no 2 and 3 are deemed manufacture. Immediately upon the insertion of deeming fiction in the definition of 'excisable goods' under Section 2(d) to cover waste and scrap and above mentioned clarificatory circular, the contention came up that are they subject to excise duty even if the process involved in getting such waste and scrap does not amount to manufacture as discussed above.

In the case of Grasim Industries Ltd vs. UOI, 2011(273)E.L.T.10(SC) wherein the issue whether the metal scrap or waste generated while repairing of worn out machineries or parts of cement manufacturing plant amounts to manufacture for levying excise duty? In this case, Revenue proceeded to levy excise duty on the basis of Note 8(a) to Section XV of the Tariff Act which states – 'Metal waste and scrap from the manufacture or metal waste and scrap from mechanical working of metal'.

In this case, the Supreme Court has held that section note has very limited purpose of extending coverage to the particular items to the relevant tariff entry in the schedule for determining the applicable rate of duty and it cannot be readily construed to have any deeming effect in relation to process of manufacture as contemplated by Section 2(f) of the Act, unless expressly mentioned in the said Section Note.

The Supreme Court held that the goods must be produced or manufactured in India in order to be subject to excise duty. Simply because a particular item is mentioned in tariff, it cannot automatically become exigible to excise duty. Vide para 8, it was held as under;

".....In our opinion, the charging section 3 of the Act comes into play only when the goods are excisable goods under section 2(d) of the Act falling under any of the tariff entry in the schedule to the tariff act and are manufactured in terms of Section 2(f) of the Act. Therefore the conditions contemplated under Section 2(d) and Section 2(f) has to be satisfied conjunctively inorder to entail the imposition of excise duty under Section 3 of the Act.....".

Thus even after the insertion of explanation in Section 2(d) for deemed marketability, 'process amounting to manufacture' is still an essential condition to be satisfied in order to levy excise duty on waste and scrap. Thus waste and scrap which can fetch some amount if sold though become excisable goods but subject to excise duty only if the process or processes out of which such waste and scrap arise either amounts to manufacture as conventionally understood i.e. distinct article from raw material emerge having distinctive name, character and usage must emerge or the said process amounts to deemed manufacture as defined under Section 2(f)(ii) and (iii) of the Central Excise Act,1944.

Many of the wastes and scrap arises in the course of manufacture of excisable goods. They arise inevitably but are not intended to be manufactured or produced by manufacturer. Of course, they may fetch some value but in most cases their value would be minimal compared to the final products manufactured and their removal costs would be higher than their value. The process involved in generation of many of the wastes and scraps may not amount to manufacture as defined under Section 2(f). Examples of such wastes and scraps are as follows;

Bagasse upon extraction of juice from sugarcane:

In the process of manufacture of sugar, sugarcane is crushed, its juice is extracted and bagasse emerges as residual waste and scrap of sugarcane. The said bagasse is specified in Central Excise Tariff under tariff item 23032000 and is subjected to Nil rate of duty. The Allahabad High Court in the case of BalrampurChini Mills Ltd vs. UOI, 2014(300)ELT372(All) wherein it was held that bagasse is not a manufactured goods and it is never manufactured, but it only emerges in the process of final product, namely, sugar.

Sludge arising in the course of manufacture:

Sludge emerging from effluent treat plant cannot be avoided in manufacture of final products. The same cannot be said to have manufactured as held in the case of CCE vs. Oxygen Equipment and Engg. Co. P. Ltd, 2002(143)ELTA82(SC).

Aluminum skimmings and dross during manufacture of aluminum sheets:

In the course of manufacture of aluminum sheets out of aluminum ingots, dross and skimmings arise. These are the impurities/foreign matter formed on molten metal for use in manufacture. The Bombay High Court in the case of Hindalco Industries Limited vs. UOI, 2015(315)ELT10(Bom) wherein it was held vide para 24 –"It may be that dross and skimmings may be capable of fetching some sale price, for that matter any rubbish can be sold. But that is not the criterion. It cannot be said that dross and skimmings are the result of treatment, labour or manipulation whereby the end-product is dross and skimmings. They are merely the scum thrown out in the process of manufacture of aluminum sheets. Therefore, it cannot be said that dross and skimmings are transformation resulting in a new and different article with a distinctive name, character or use or that they ordinarily come to the market to be bought and sold and are known to the market. The article or goods manufactured from the aluminum ingots was not dross and skimmings but the aluminum sheets". Therefore no duty is leviable on waste and scrap.

Thus unless the process involving amounts to manufacture or deemed manufacture as the case may be, excisability of waste and scrap do not arise.

Is sale of such waste and scrap requires compliance under Rule 6 of CENVAT Credit Rules, 2004?:

Many of the waste and scrap specified in the Central Excise Tariff are subjected to Nil rate of duty. Revenue treating these wastes and scraps as exempted goods and on the premise that the input material is used both in manufacturing dutiable final products and exempted waste and scrap, are demanding reversal/payment of excise duty at 6%/7% on sale price of waste and scrap in terms of Rule 6 of the CENVAT Credit Rules, 2004. Further, many assessee prepare to pay excise duty on such waste and scrap though not emerged out of manufacturing process as they are under the impression that non-paymentwould requirethem to undertake complex compliance burden under Rule 6 of the CENVAT Credit Rules, 2004.

This rule requires maintenance of separate books of accounts for inputs and input services that are used for manufacture of exempted goods and dutiable goods or for provision of exempted services and taxable services. Credit is allowed only on those inputs and input services that are used for manufacture of dutiable goods or for provision of taxable services. Otherwise an amount equal to six percent of the value of exempted goods or exempted services is required to be paid.

As discussed above bagasse emerges as residual waste and scrap of sugarcane. The said bagasse is specified in Central Excise Tariff under tariff item 23032000 and is subjected to Nil rate of duty. Considering bagasse as exempted good, department demanded duty under Rule 6 of the CENVAT Credit Rules, 2004. In the case of BalarampurChini Mills Ltd vs. UOI, (supra) where in the Allahabad High Court held that for applicability of rule 6, the manufacture of dutiable goods and manufacture of exempted goods are the conditions precedent. Since waste is never manufactured and it only emerges in the process of manufacture of final product and cannot be considered as manufacture of exempted goods, Rule is not applicable to bagasse which is admittedly an inevitable waste emerging from the crushing of sugarcane.

Even assuming they were exempted goods, still reversal is not required under Rule 6 by applying the position laid out by Supreme Court in the case of UOI vs. Hindustan Zinc Ltd, 2014-TIOL-55-SC-CX. The respondent in this case is engaged in manufacture of non-ferrous metals like zinc out of zinc ore. In the process, sulphuric acid is emerged as by-product which is exempted. Department required the respondent to pay an amount equal to 8% (as in force at relevant point of time) of the sale price of exempted goods (Sulphuric acid)under Rule 57CC of erstwhile Central Excise Rules and Rule 6 of the CENVAT Credit Rules, 2004.

The Supreme Court observed in para 20 “Sulphuric acid is indeed a byproduct. It is not as though some quantity of zinc ore concentrate has gone into the production of sulphuric acid, applicability of Rule 57 CC can be attracted. The entire quantity of zinc has indeed been used in the production of zinc and no part can be traced in the sulphuric acid. It is for this reason, the respondents maintained the inventory of zinc concentrate for the production of zinc and there was no necessity and indeed it is impossible, to maintain separate records for zinc concentrate used in the production of sulphuric acid. The mischief of recovery of 8% under Rule 57 CC on exempted sulphuric acid is not attracted”.

Thus even assuming waste and scrap of the nature discussed above are exempted goods, they are just the inevitable by-products which emerge in the course of manufacture of final products and in such circumstances it cannot be assumed that the inputs are used for manufacture of both final products and these wastes and scraps. Accordingly, compliance under Rule 6 of the CENVAT Credit Rules, 2004 is also not warranted.

Conclusion:

To sum up, it is important to give an appropriate treatment to the waste and scrap arising in the factory during manufacture. Mere mentioning of waste and scrap in Central Excise Tariff and the fact that it fetches some price if sold in market is not sufficient to attract excise duty. In addition, the process out of which the waste and scrap emerge should also amount to manufacture.Only then excise duty is attracted. As no manufacture is involved, the same cannot be construed as exempted goods for reversal of CENVAT Credit under Rule 6 of CENVAT Credit Rules, 2004.

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INFORMATION TECHNOLOGY

NOTE ON KEY ASPECTS OF INFORMATION TECHNOLOGY ACT 2000 AND ASSOCIATED PRIVACY ASPECTS

Contributed by Ravindra Reddy

Note is divided into two chapter's i.e. Chapter I covering Law and Chapter II covering the deduction based on the law.

Chapter I

The following are some of the important definitions as per the Information Technology Act 2000.

Section 2 (i) "computer" means any electronic magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network;

Section 2(j) "computer network" means the interconnection of one or more computers through— (i) the use of satellite, microwave, terrestrial line or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers or communication device whether or not the interconnection is continuously maintained;

Section 2(k) "computer resource" means computer, computer system, computer network, data, computer data base or software;

Section 2(l) "computer system" means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions;

Section 2(n) "cyber security" means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorized access, use, disclosure, disruption, modification or destruction.

Section 2 (o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

Section 2 (t) "electronic record" means data, record or data generated, image or sound stored, receivedor sent in an electronic form or micro film or computer generated micro fiche;

Section 2 (v) "information" includes data, text, images, sound, voice, codes, computer programmes,software and databases or micro film or computer generated micro fiche:

Section 2 (w) intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web- hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes;'.

Section 2 (za) "originator" means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;

Section 2 (ze) "secure system" means computer hardware, software, and procedure that—
(a) are reasonably secure from unauthorised access and misuse;
(b) provide a reasonable level of reliability and correct operation;
(c) are reasonably suited to performing the intended functions; and
(d) adhere to generally accepted security procedures;

The following are some of the important sectionsof the Information Technology Act 2000.

Section 43 - Penalty and compensation for damage to computer, computer system, etc

If any person without permission of the owner or any other person who is in charge, of a computer, computer system or computer network,—

(a) accesses or secures access to such computer, computer system or computer network; or computer resource
(b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
(c) introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
(d) damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;
(e) disrupts or causes disruption of any computer, computer system or computer network;
(f) denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;
(g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;
(h) charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,
(i) destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means,
(j) steal, conceal, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage".

"he shall be liable to pay damages by way of compensation to the person so affected"]

Explanation.—For the purposes of this section,—

(i) "computer contaminant" means any set of computer instructions that are designed—
(a) to modify, destroy, record, transmit data or programme residing within a computer, computer system or computer network; or
(b) by any means to usurp the normal operation of the computer, computer system, or computer network;
(ii) "computer database" means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network;
(iii) "computer virus" means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, data or instruction is executed or some other event takes place in that computer resource;
(iv) "damage" means to destroy, alter, delete, add, modify or rearrange any computer resource by any means.
(v) "computer source code" means the listing of programme, computer commands, design and layout and programme analysis of computer resource in any form."

Section 43A - Compensation for failure to protect data

Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

Explanation. -- For the purposes of this section,--

(i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;
(ii) "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit;
(iii) "sensitive personal data or information" means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.

Section 44 - Penalty for failure to furnish information, return, etc

If any person who is required under this Act or any rules or regulations made thereunder to—

(a) furnish any document, return or report to the Controller or the Certifying Authority fails to furnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousand rupees for each such failure;
(b) file any return or furnish any information, books or other documents within the time specified therefor in the regulations fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues;
(c) maintain books of account or records fails to maintain the same, he shall be liable to a penalty not exceeding ten thousand rupees for every day during which the failure continues.

Section 45 - Residuary penalty

Whoever contravenes any rules or regulations made under this Act, for the contravention of which no penalty has been separately provided, shall be liable to pay a compensation not exceeding twenty-five thousand rupees to the person affected by such contravention or a penalty not exceeding twenty-five thousand rupees.

Section 65 - Tampering with computer source documents

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

Explanation.—For the purposes of this section, "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

Section 66 - Computer related offences

If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

Explanation.-- For the purposes of this section,--

(a) the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code;(45 of 1860).
(b) the word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code(45 of 1860).]

Section 67C - Preservation and retention of information by intermediaries

(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine.]

Section 72 - Penalty for Breach of confidentiality and privacy

Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

Section 72A - Punishment for disclosure of information in breach of lawful contract

Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.']

Section 79 - Exemption from liability of intermediary in certain cases

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.
(2) The provisions of sub-section (1) shall apply if-
(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or
(b) the intermediary does not-
(i) initiate the transmission,
(ii) select the receiver of the transmission, and
(iii) select or modify the information contained in the transmission;
(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.-For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

The following are some of the important Rules of Information Technology (Intermediaries guidelines) Rules, 2011

2. Definitions.--

(d) "Cyber security incident" means any real or suspected adverse event in relation to cyber security that violates an explicitly or implicitly applicable security policy resulting in unauthorised access, denial of service or disruption, unauthorised use of a computer resource for processing or storage of information or changes to data, information without authorisation;

(e) "Data" means data as defined in clause (o) of sub-section (1) of section 2 of the Act;

(h) "Information" means information as defined in clause (v) of sub-section (1) of section 2 of the Act;

(i) "Intermediary" means an intermediary as defined in clause (w) of sub-section (1) of section 2 of the Act;

(j) "User" means any person who access or avail any computer resource of intermediary for the purpose of hosting, publishing, sharing, transacting, displaying or uploading information or views and includes other persons jointly participating in using the computer resource of an intermediary.

3. Due diligence to be observed by intermediary.--

The intermediary shall observe following due diligence while discharging his duties, namely : --

(1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource by any person.

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that --

(a) belongs to another person and to which the user does not have any right to;

(b) is grossly harmful, harassing, blasphemous; defamatory, obscene, pornographic, paedophilic,

libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

(c) harm minors in any way;

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force;

(f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(g) impersonate another person;

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

(3) The intermediary shall not knowingly host or publish any information or shall not initiate the transmission, select the receiver of transmission, and select or modify the information contained in the transmission as specified in sub-rule (2):

Provided that the following actions by an intermediary shall not amount to hosting, publishing, editing or storing of any such information as specified in sub-rule (2) --

(a) temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource;

(b) removal of access to any information, data or communication link by an intermediary after such information, data or communication link comes to the actual knowledge of a person authorised by the intermediary pursuant to any order or direction as per the provisions of the Act;

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

(5) The Intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to immediately terminate the access or usage rights of the users to the computer resource of Intermediary and remove non-compliant information.

(6) The intermediary shall strictly follow the provisions of the Act or any other laws for the time being in force.

(7) When required by lawful order, the intermediary shall provide information or any such assistance to Government Agencies who are lawfully authorised for investigative, protective, cyber security activity. The information or any such assistance shall be provided for the purpose of verification of identity, or for prevention, detection, investigation, prosecution, cyber security incidents and punishment of offences under any law for the time being in force, on a request in writing stating clearly the purpose of seeking such information or any such assistance.

(8) The intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable security practices and procedures and sensitive personal information) Rules, 2011.

(9) The intermediary shall report cyber security incidents and also share cyber security incidents related information with the Indian Computer Emergency Response Team.

(10) The intermediary shall not knowingly deploy or install or modify the technical configuration of computer resource or become party to any such act which may change or has the potential to change the normal course of operation of the computer resource than what it is supposed to perform thereby circumventing any law for the time being in force:

Provided that the intermediary may develop, produce, distribute or employ technological means for the sole purpose of performing the acts of securing the computer resource and information contained therein.

(11) The intermediary shall publish on its website the name of the Grievance Officer and his contact details as well as mechanism by which users or any victim who suffers as a result of access or usage of computer resource by any person in violation of rule 3 can notify their complaints against such access or usage of computer resource of the intermediary or other matters pertaining to the computer resources made available by it. The Grievance Officer shall redress the complaints within one month from the date of receipt of complaint.

<u>The following are some of the important Rules of Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011</u>

2. Definitions.--

(b) 'Biometrics" means the technologies that measure and analyse human body characteristics, such as 'fingerprints', 'eye retinas and irises', 'voice patterns', 'facial patterns', 'hand measurements' and 'DNA' for authentication purposes;

(c) "Body corporate" means the body corporate as defined in clause (i) of explanation to section 43A of the Act;

(d) "Cyber incidents" means any real or suspected adverse event in relation to cyber security that violates an explicitly or implicitly applicable security policy resulting in unauthorised access, denial of service or disruption, unauthorised use of a computer resource for processing or storage of information or changes to data, information without authorisation;

(e) "Data" means data as defined in clause (o) of sub-section (1) of section 2 of the Act;

(f) "Information" means information as defined in clause (v) of sub-section (1) of section 2 of the Act;

(g) "Intermediary" means an intermediary as defined in clause (w) of sub-section (1) of section 2 of the Act;

(h) "Password" means a secret word or phrase or code or passphrase or secret key, or encryption or decryption keys that one uses to gain admittance or access to information;

(i) "Personal information" means any information that relates to a natural person which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.

3. Sensitive personal data or information.--

Sensitive personal data or information of a person means such personal information which consists of information relating to;--

(i) password;
(ii) financial information such as Bank account or credit card or debit card or other payment instrument details;
(iii) physical, physiological and mental health condition;
(iv) sexual orientation;
(v) medical records and history;
(vi) Biometric information;
(vii) any detail relating to the above clauses as provided to body corporate for providing service; and
(viii) any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract or otherwise:

provided that any information that is freely available or accessible in public domain or furnished under the Right to Information Act, 2005 or any other law for the time being in force shall not be regarded as sensitive personal data or information for the purposes of these rules.

4. Body corporate to provide policy for privacy and disclosure of information.--

The body corporate or any person who on behalf of body corporate collects, receives, posses, stores, deals or handle information of provider of information, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and ensure that the same are available for view by such providers of information who has provided such information under lawful contract. Such policy shall be published on website of body corporate or any person on its behalf and shall provide for-

(I) clear and easily accessible statements of its practices and policies;
(ii) type of personal or sensitive personal data or information collected under rule 3;
(iii) purpose of collection and usage of such information;
(iv) disclosure of information including sensitive personal data or information as provided in rule 6;
(v) reasonable security practices and procedures as provided under rule 8.

5. Collection of information.--

(1) Body corporate or any person on its behalf shall obtain consent in writing through letter or fax or email from the provider of the sensitive personal data or information regarding purpose of usage before collection of such information.

(2) Body corporate or any person on its behalf shall not collect sensitive personal data or information unless --

(a) the information is collected for a lawful purpose connected with a function or activity of the body corporate or any person on its behalf; and
(b) the collection of the sensitive personal data or information is considered necessary for that purpose.

(3) While collecting information directly from the person concerned, the body corporate or any person on its behalf shall take such steps as are, in the circumstances, reasonable to ensure that the person concerned is having the knowledge of --

(a) the fact that the information is being collected;
(b) the purpose for which the information is being collected;
(c) the intended recipients of the information; and
(d) the name and address of --
(i) the agency that is collecting the information; and (ii) the agency that will retain the information.

(4) Body corporate or any person on its behalf holding sensitive personal data or information shall not retain that information for longer than is required for the purposes for which the information may lawfully be used or is otherwise required under any other law for the time being in force.

(5) The information collected shall be used for the purpose for which it has been collected.

(6) Body corporate or any person on its behalf shall permit the providers of information, as and when requested by them, to review the information they had provided and ensure that any personal information or sensitive personal data or information found to be inaccurate or deficient shall be corrected or amended as feasible:

provided that a body corporate shall not be responsible for the authenticity of the personal information or sensitive personal data or information supplied by the provider of information to such body corporate or any other person acting on behalf of such body corporate.

(7) Body corporate or any person on its behalf shall, prior to the collection of information including sensitive personal data or information, provide an option to the provider of the information to not to provide the data or information sought to be collected. The provider of information shall, at any time while availing the services or otherwise; also have an option to withdraw its consent given earlier to the body corporate. Such withdrawal of the consent shall be sent in writing to the body corporate. In the case of provider of information not providing or later on withdrawing his consent, the body corporate shall have the option not to provide goods or services for which the said information was sought.

(8) Body corporate or any person on its behalf shall keep the information secure as provided in rule 8.

(9) Body corporate shall address any discrepancies and grievances of their provider of the information with respect to processing of information in a time bound manner. For this purpose, the body corporate shall designate a Grievance Officer and publish his name and contact details on its website. The Grievance Officer shall redress the grievances of provider of information expeditiously but within one month from the date of receipt of grievance.

6. Disclosure of information.--

(1) Disclosure of sensitive personal data or information by body corporate to any third party shall require prior permission from the provider of such information, who has provided such information under lawful contract or otherwise, unless such disclosure has been agreed to in the contract between the body corporate and provider of information, or where the disclosure is necessary for compliance of a legal obligation:

Provided that the information shall be shared, without obtaining prior consent from provider of information, with Government agencies mandated under the law to obtain information including sensitive personal data or information for the purpose of verification of identity, or for prevention, detection, investigation including cyber incidents, prosecution, and punishment of offences. The Government agency shall send a request in writing to the body corporate possessing the sensitive personal data or information stating clearly the purpose of seeking such information. The Government agency shall also state that the information so obtained shall not be published or shared with any other person.

(2) Notwithstanding anything contained in sub-rule (1), any sensitive personal data or Information shall be disclosed to any third party by an order under the law for the time being in force.

(3) The body corporate or any person on its behalf shall not publish the sensitive personal data or information.

(4) The third party receiving the sensitive personal data or information from body corporate or any person on its behalf under sub-rule (1) shall not disclose it further.

7. Transfer of information.--

A body corporate or any person on its behalf may transfer sensitive personal data or information

including any information, to any other body corporate or a person in India, or located in any other country, that ensures the same level of data protection that is adhered to by the body corporate as provided for under these Rules. The transfer may be allowed only if it is necessary for the performance of the lawful contract between the body corporate or any person on its behalf and provider of information or where such person has consented to data transfer.

8. Reasonable Security Practices and Procedures.--

(1) A body corporate or a person on its behalf shall be considered to have complied with reasonable security practices and procedures, if they have implemented such security practices and standards and have a comprehensive documented information security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of business. In the event of an information security breach, the body corporate or a person on its behalf shall be required to demonstrate, as and when called upon to do so by the agency mandated/under the law, that they have implemented security control measures as per their documented information security programme and information security policies.

(2) The international Standard IS/ISO/IEC 27001 on "Information Technology -Security Techniques - Information Security Management System - Requirements" is one such standard referred to in sub-rule (1).

(3) Any industry association or an entity formed by such an association, whose members are self-regulating by following other than IS/ISO/IEC codes of best practices for data protection as per sub-rule(1), shall get its codes of best practices duly approved and notified by the Central Government for effective implementation.

(4) The body corporate or a person on its behalf who have implemented either IS/ISO/IEC 27001 standard or the codes of best practices for data protection as approved and notified under sub-rule (3) shall be deemed to have complied with reasonable security practices and procedures provided that such standard or the codes of best practices have been certified or audited on a regular basis by entities through independent auditor, duly approved by the Central Government. The audit of reasonable security practices and procedures shall be carried cut by an auditor at least once a year or as and when the body corporate or a person on its behalf undertake significant upgradation of its process and computer resource.

Chapter II

Deduction Based On Law

The information technology Act 2000, though Section 2 (w) outlines “intermediary", to include telecom service providers, network service providers, internet service providers, web- hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.

Further section 43 (A) Explanation (i) enumerates that "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities.

Thus as per the above the proposed entity is a body corporate and falls within the meaning of intermediary.

Section 43 (A) imposes penalty by way of damages on body corporate if it fails to protect confidential information / sensitive personal data by not adhering to instil reasonable security practices and procedures.

Section 72 A imposes punishment with imprisonment for a term which may extend to 3 years or with fine which may extend to 5 lakhs rupees or with both if any person including an intermediary discloses material containing personal information with an intent to cause or knowingly that he is likely to cause wrongful loss or wrongful gain to any third person in breach of a lawful contract entered between intermediary on the originator. In the present scenario, if the personal information of the user who has availed the services from the proposed entity under a contract, comes out in the public, then the proposed entity will be held liable for such breach of confidentiality.

However as a saving grace section 79 lays down certain exemptions which an intermediary and claim as immunity.

The Information Technology (Intermediaries guidelines) Rules, 2011 govern the operations of Intermediaries which is enumerated though rule 3 therein, which also provides the nature and scope of the privacy policy of the Intermediaries.

The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 are the key to the operations of the proposed entity (considering the nature of services that it wants to offer).

Rule 3 outlays the Sensitive personal data or information of a person as following :-

(i) password;
(ii) financial information such as Bank account or credit card or debit card or other payment instrument details;
(iii) physical, physiological and mental health condition;
(iv) sexual orientation;
(v) medical records and history;
(vi) Biometric information;
(vii) any detail relating to the above clauses as provided to body corporate for providing service; and
(viii) any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract or otherwise:

Rule 4 provides for the mature and scope of the privacy policy and Rule 5 provides for the system through which the Sensitive personal data is obtained.

Rule 8 lays down the standards for reasonable security practices and procedures to be employed while obtaining the Sensitive personal data and more particularly states that the international Standard IS/ISO/IEC 27001 on "Information Technology -Security Techniques - Information Security Management System – Requirements should be in place.

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COST ACCOUNTING

SIGNIFICANCE OF MAINTENANCE OF COST ACCOUNTING RECORDS AND COST AUDIT

Contributed by CMA Vajralingam C

Significance of Maintenance of Cost Accounting Records:

Most of the companies in present day business scenario may be maintaining the cost records only for internal purpose or to comply with the statutory requirements. But maintaining the cost records in formal and systemic manner helps the companies to cater various other needs.

These cost records help operations management team, promoters, government in making very important decision relating business. Many times, management need cost data to make decisions such as CAPEX, pricing, inventory valuation, cost control etc. Government need costing data to decide on product pricing for critical and important products in the economy, levy anti dumping duties, provide assistance in the form of subsidy etc. Cost data apart from financial data assists regulatory and tax authorities in their departmental audits.

In this article, we have taken two case studies to analyze the role the cost records play in making right decision.

Case Study-1:

A sand manufacturing company, had challenge in meeting customer demands despite having huge installed capacity. In order tounderstand the inability to meet the customer demands, the management has called for cost records maintained at the plant. On a study of cost records, it was understood that the area that required attention was the machine breakdown hours.

There were many machine breakdown hours and on a detailed inquiry as to why the machine breakdown was happening, it was revealed that, most of the times crusher was struck because of oversize boulders supplied by the mining contractor. It was happening several times in a day and each time boulder is stuck in the crusher, several people required to remove oversize boulder and plant was idle for 30 minutes to several hours.

After studying the said costing data, management identified that, mining contractor whose responsibility to excavate and transfer the boulder from quarry to plant is culprit in plant breakdowns. The management decided to give incentive if contractor provides supply without oversize boulder. The Contractor deployed an additional person to check the boulder size before loading on to tipper. Then oversize boulder issues were resolved and plant started running more efficiently.

From the above case study, it is evident that the problem was rightly identified and addressed due to the analysis of machine breakdown hours. If the machine breakdown hours were not captured as a part of maintenance of cost records, then it would be very tough for the management to address the problem in the right time. Hence, the cost records play a vital role and it is the need of the hour to maintain the same in systematic and formal manner.

Case Study-2:

A cement industry, had challenge in setting the budget for their plant and machinery maintenance cost because of uneven expenditure spent month on month. There were couple of issues namely the cash flow management and plant performance management.

The company approached a cost accountant to setup the maintenance budget for the plant and machinery. The Consultant has gathered all the cost data relating to plant and machinery such as machine capacity, normal workings hours of each machine and other relevant data to meet the total budgeted quantity output of the company.

Then the consultant has identified all major spares, wear parts of the each machine, gathered data relating to useful life of each component, last change data and number of hours used after last change date etc.

Based on above cost data, consultant has prepared the maintenance budget with more accurate cash flows required each month. It also helped the client to identify more efficient suppliers to procure each component and vendor rating.

The consultant was able to provide such budget sheet with accurate cash flows because of the maintenance of cost records in formal and systematic manner.

From the above case studies, we could understand that maintenance of cost records in formal and systematic manner provides for a ready solution to the various day to day issues. Now, let us understand what forms part of the cost records. The maintenance of cost records would require the following:

a. Capturing of Information for Once;
b. Capturing of Information on Regular basis.

<u>Records forming part of Capturing of Information for Once:</u>

1. Product wise process sequence chart.
2. Process of Manufacture – Description and flow chart.
3. A list of machinery – production, utilities, services.
4. Production area – blue print with various machine locations.
5. A List of cost – centers – production and service.
6. Machine wise data –
   a. Speed, production rate
   b. Power H.P. (Installed)
   c. Electric motor load factor
   d. Book value and depreciation
7. Product wise process sequence chart.
8. Cost centre wise / machine wise workers strength (standard) Category wise.
9. Dept. wise staff strength (Std.) – grade wise, with pay scale details.
10. Fringe benefits details – separate for workers and staff.

11. Marketing:
    a. product –wise sale price,
    b. brokerage and commission,
    c. discount etc.
12. Technical parameters: product – wise / process – wise / cost centre – wise.
    a. Steam Consumption
    b. Water Consumption
    c. Compressed Air Consumption
    d. Air Conditioning
    e. Other Utilities (Utility – wise)
13. Raw material requirements: product – wise standard with Waste / Scrap percentages.
    a. Product – wise standard recipe (in quantity)
    b. Colour & Chemicals
    c. Process materials
    d. Packing materials
14. Export products: separate information, in case, any variation in cost parameters as compared with inland sale products.
15. Export Incentives – details
16. Interest cost details: type of loan facilities (Term loan, working capital loan etc.) loan amount, rate of interest, purpose of loan.
17. Item – wise Budgeted Overhead analysis into –
    - Factory
    - Administration
    - Selling, and
    - Distribution

<u>Records forming part of Capturing of Information on Regular Basis:</u>

1. Production Related Records
    a. Raw material Consumption Records
    b. Production Report
    c. Rejection/Scrap/Wastage Report
    d. Report on stoppage of machine with reasons
    e. Idle time of labour report with reasons
    f. Machine utilization report
    g. Production hours, labour hours and machine hours
2. Utilities – such as power, water, steam, air conditioning, humidification, ETP etc)
    a. Inputs and outputs Records
    b. Cost centre–wise allocation of outputs and cost
3. Work – in – progress and finished goods
    a. In Process stock record, cost centre– wise & product– wise
    b. Finished goods stock record, product – wise, pack–wise, type–wise etc
4. Repairs & maintenance
    a. Works order record/card showing material and spares consumed and labour utilized for repair jobs.
    b. In case of workshop, additional records as described under (i) above

5. Other Service Cost Centers– QC, QA, R & D etc.
   a. No. of tests carried out, No. of products developed etc.
   b. Basis of cost apportionment and justification for the same
6. Raw materials, process materials, colour and chemicals, consumable stores and spare parts.
   a. Goods received record.
   b. Bin cards.
   c. Materials/stores ledgers in quantity and value.
   d. Product wise material consumption reports in quantity and value.
   e. Physical stock verification and shortage / excess statement, and reasons for differences.
7. Wages & Salaries
   a. Attendance record and leave records.
   b. Wages/salary sheets.
   c. Leave wages, bonus gratuity payments and other fringe benefits.
   d. Overtime, idle time etc. records.
   e. Details of VRS, Retrenchment compensation, lay off payment.
8. Overheads
   a. Overheads analysis record, cost centre–wise.
9. Sales
   a. Sales analysis by products. (Quality, size, variety –wise) in terms of quantity and value.
   b. Export Sales, product – wise, country wise.
   c. Product – wise analysis of export incentives and benefits.
   d. Analysis of sales to related parties
10. Records of inter–company and related party transactions, information about normal price.
11. Cost accounts/records/statements.
    a. Cost center – wise assets record.
    b. Finished Product– wise moment record.(Quantity reconciliation)
    c. Factory–wise, Product – wise, Pack–wise, Size–wise etc. Cost Statements.
    d. Annexure as per Cost Accounting Records Rules and Cost Audit Report Rules.
    e. Reconciliation of profit/loss as per cost records and financial accounts

Significance of Cost Audit:

1. Ensure that costing system determines the correct and realistic cost of production;
2. Provide Production Related information to management;
3. Identify the undue wastage or losses;
4. Provide economic method of operation to management;
5. Reduce cost of operations;
6. Control costs through various management techniques such as budgetary control systems;
7. Provide value engineering methods to management for cost reduction;
8. Provide cost information to government, which will enable them to take decision such as regulated product pricing such pharmaceutical products, power sugar etc. granting subsidies such as fertilizers, levying anti dumping duties etc.

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TRANSFER PRICING

AMENDMENT TO INDIAN TP RULES ALLOWING USE OF MULTIPLE YEAR DATA AND RANGE RULES

Contributed by CA Mithilesh

Amendment to Indian TP Rules allowing use of Multiple Year data and Range Rules: (Vide Notification no: 83/2015 dated 19 October 2015 w.e.f 01.04.2014):

The amended rules allow the use of "multiple year data" and "range concept" for determination of ALP for undertaking a transfer pricing comparability analysis.

1. Multiple Year Data

As a general principle the amended rules require use of current year data while undertaking transfer pricing analysis. Data relating to the current year which may be available subsequently at the time of a transfer pricing audit can be used in the audit proceedings. Use of a multiple year data is permitted in certain Circumstances.

- Earlier provision:

Rule 10B (4) of the Rules provides that the data to be used in analysing the comparability of an uncontrolled transaction with an International Transaction shall be the data relating to the financial year in which the International Transaction has been entered into. However, data relating to a period not being more than two years prior to such financial year may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared.

- Amendment:

As per amended Rule 10B(4) the earlier provision shall not apply while analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction, entered into on or after the 1st day of April, 2014 ("Current Year" being replaced by Financial year in the above said provision).

Rule 10B (5) provides that, where the RPM, CPM and TNMM has been used for determination of the arm's length price of an international transaction/ SDT, entered into on or after the 1st day of April, 2014, then, notwithstanding anything contained in sub-rule (4), the data to be used for analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction shall be:

- The data relating to the current year; or

- The data relating to the financial year immediately preceding the current, if the data relating to the current year is not available at the time of furnishing the return of income by the assessee, for the assessment year relevant to the current year.

Further, if current year data is available at the time of transfer pricing assessment, then such data must be used.

2. Range Concept:

➢ Earlier provision:

Section 92C(2) provides that in a case where more than one price is determined by the most appropriate method, the ALP shall be taken to be the arithmetical mean of such prices.

Further, if the variation between the ALP and the price at which International Transaction/SDT is undertaken, does not exceed such percentage as notified by the Central Government (not exceeding 3%), of the price of International Transaction/SDT, then the transfer price shall be deemed to be the ALP. The Central Government has notified[1] one percent for wholesale traders and three percent in all other cases as the tolerable range.

➢ Amendment:

Rule 10 CA - Computation of ALP in certain cases:

(1) Where in respect of an international transaction or a specified domestic transaction, the application of the most appropriate method referred to in Sec 92C(1) results in determination of more than one price, then the arm's length price in respect of such international transaction or specified domestic transaction shall be computed in accordance with the provisions of this rule.

(2) A dataset shall be constructed by placing the prices as mentioned above in an ascending order and the arm's length price shall be determined on the basis of the dataset so constructed:

Particulars	MAM used to determine the ALP	Weighted average of prices of
Provided, where CUT of current year and either or both of the two financial years immediately preceding current year is being used	CUT of current year shall be applied for the preceding years of current year.	CUT in the current year and aforesaid preceding periods
Provided, where CUT is not available for current year and data pertaining to two financial years immediately preceding current year is being used	CUT of financial years immediately preceding the current year.	CUT in the aforesaid two preceding years

Provided further, if the data for current year is available at the time of transfer pricing assessment proceedings and fails qualitative or quantitative filters, then such comparable cannot used for benchmarking purpose irrespective of the fact that data of previous year remains to be comparable.

(3) Where an enterprise has undertaken comparable uncontrolled transactions in more than one financial year, then for the purposes of sub-rule (2) the weighted average of the prices of such transactions shall be computed in the following manner, namely:—

Method	Weighted average of the prices shall be
In cases where RPM is being used	Weights being assigned to the quantum of sales
In cases where CPM is being used	Weights being assigned to the quantum of costs
In cases where the TNMM is being used,	Weights being assigned to the quantum of costs incurred or sales effected or assets employed or to be employed, or as the case may be, any other base

3. Range:

- Rule 10CA(4) provides that in a case where more than one price is determined by the most appropriate method and where the ALP has been determined as per TNMM, RPM, TNMM and CUP method and has minimum of 6 comparables, the arm's length range will start from 35th percentile and end at 65th percentile of the weighted average margins of comparables.

- Rule 10CA(5) provides that If the transfer price is within the arm's length range, then the Transfer shall be deemed to be the arm's length price.

- Rule 10CA(6) provides that if the transfer price is outside the arm's length range referred, the arm's length price shall be taken to be the median of the dataset.

- Rule 10CA(7) provides that If the method used for determining the ALP is other than the methods specified above or the number of comparable companies is less than 6, the arm's length price shall be the arithmetical mean of all the values included in the dataset.

  Further, if the variation between the ALP and the Transfer price, does not exceed such percentage as notified by the Central Government (not exceeding 3%), of the price of International Transaction/SDT, then the transfer price shall be deemed to be the ALP.

- In a case where the provisions of sub-rule (4) are not applicable,

  Further, if the variation between the ALP and the Transfer Price does not exceed such percentage as notified by the Central Government (not exceeding 3%), of the Transfer Price, then the transfer price shall be deemed to be the ALP.

[1]CBDT Notification No. 45/2014 dated 23 September 2014 on the applicable range for AY 2014-15

For the purpose of this rule, computation of range Rule 10CA (8), shall be as under:

- Thirty-fifth percentile and Sixty-fifth percentile of a dataset is defined as having values arranged in an ascending order, shall be the lowest value in the dataset such that at least thirty five percent and sixth-fifth percent of the values included in the dataset are equal to or less than such value respectively.

- Median of the dataset is defined as having values arranged in an ascending order, shall be the lowest value in the dataset such that at least fifty percent. of the values included in the dataset are equal to or less than such value.

Particulars	Computation
If the 35 or 65 percentile, Median is a whole number	Arithmetic mean of such value and value immediately succeeding it in dataset shall be considered
If the 35 or 65 percentile, Median is a not a whole number	Value immediately succeeding, the said value in dataset shall be considered

Illustration 1 Provided in Rule 10CA(4)—The data for the current year of the comparable uncontrolled transactions or the entities undertaking such transactions is available at the time of furnishing return of income by the assessee and based on the same, seven enterprises have been identified to have undertaken the comparable uncontrolled transaction in the current year. All the identified comparable enterprises have also undertaken comparable uncontrolled transactions in a period of two years preceding the current year. The Profit level Indicator (PLI) used in applying the most appropriate method is operating profit as compared to operating cost (OP/OC). The weighted average shall be based upon the weight of OC as computed below :

Sl.No.	Name	Year 1	Year 2	Year 3 [Current Year]	Aggregation of OC and OP	Weighted Average
1	2	3	4	5	6	7
1	A	OC = 100 OP = 12	OC = 150 OP = 10	OC = 225 OP = 35	Total OC = 475 Total OP = 57	OP/OC = 12%
2	B	OC = 80 OP = 10	OC = 125 OP = 5	OC = 100 OP = 10	Total OC = 305 Total OP = 25	OP/OC = 8.2%
3	C	OC = 250 OP = 22	OC = 230 OP = 26	OC = 250 OP = 18	Total OC = 730 Total OP = 66	OP/OC = 9%
4	D	OC = 180 OP = (-)9	OC = 220 OP = 22	OC = 150 OP = 20	Total OC = 550 Total OP = 33	OP/OC = 6%
5	E	OC = 140 OP = 21	OC = 100 OP = (-)8	OC = 125 OP = (-)5	Total OC = 365 Total OP = 8	OP/OC = 2.2%
6	F	OC = 160 OP = 21	OC = 120 OP = 14	OC = 140 OP = 15	Total OC = 420 Total OP = 50	OP/OC = 11.9%
7	G	OC = 150 OP = 21	OC = 130 OP = 12	OC = 155 OP = 13	Total OC = 435 Total OP = 46	OP/OC = 10.57%

From the above, the dataset will be constructed as follows :

Sl. No.	1	2	3	4	5	6	7
Values	2.2%	6%	8.2%	9%	10.57%	11.9%	12%

For construction of the arm's length range the data place of thirty-fifth and sixty-fifth percentile shall be computed in the following manner, namely:

Total no. of data points in dataset *(35/100)
Total no. of data points in dataset *(65/100)

Thus, the data place of the thirty-fifth percentile = 7*0.35=2.45.

Since this is not a whole number, the next higher data place, i.e. the value at the third place would have at least thirty five per cent of the values below it. The thirty-fifth percentile is therefore value at the third place, i.e. 8.2%.

The data place of the sixty-fifth percentile is = 7*0.65=4.55.

Since this is not a whole number, the next higher data place, i.e. the value at the fifth place would have at least sixty five per cent of the values below it. The sixty-fifth percentile is therefore value at fifth place, i.e. 10.57%.

The arm's length range will be beginning at 8.2% and ending at 10.57%.

Therefore, if the transaction price of the international transaction or the specified domestic transaction has OP/OC percentage which is equal to or more than 8.2% and less than or equal to 10.57%, it is within the range. The transaction price in such cases will be deemed to be the arm's length price and no adjustment shall be required. However, if the transaction price is outside the arm's length range, say 6.2%, then for the purpose of determining the arm's length price the median of the dataset shall be first determined in the following manner:

The data place of median is calculated by first computing the total number of data point in the dataset * (50/100). In this case it is 7*0.5=3.5.

Since this is not a whole number, the next higher data place, i.e. the value at the fourth place would have at least fifty per cent of the values below it (median).

The median is the value at fourth place, i.e., 9%. Therefore, the arm's length price shall be considered as 9% and adjustment shall accordingly be made.

This article is contributed by CA Mithilesh. The author can be reached at mithileshs@sbsandco.com

TECHNICAL SESSIONS:

S.No.	Event	Date	Speaker	Venue
1	Analysis Of Recent Supreme Court Judgement In Case Of L&T-Interstate Sales	13/11/2015	CA Ram	SBS - Hyd
2	Preparation Of Activity Based Budgeting	20/11/2015	CMA Vajralingam	SBS - Hyd
3	Over View On Sexual Harassment At Work Place	27/11/2015	Syslex Law Firm	SBS - Hyd
4	Impact Of Income Tax On Property Development	04/12/2015	CA P Samba Murthy Samba Murthy&Co, Hyderabad	SBS - Hyd
5	Audit Of Internal Financial Controls Over Financial Reporting	11/12/2015	CA Aruna	SBS - Hyd

Note:

The timings for the above events shall be from 17:30 hrs to 19:30 hrs. We request the recipients of "SBS Wiki" who are interested to attend the above events to send confirmation of your participation 2 days in advance to make appropriate arrangements and sharing of the relevant material, if any.

Preparation of Director's Report & Annual Return - Companies Act, 2013 - CS Phanindra DVK

SAP Business One ERP for Small and Medium Enterprise - Madhu Sudhan Reddy (Vestrics Solutions-Director)

Hyderabad: 6-3-900/6-9, #103 & 104, Veeru Castle, Durganagar Colony, Panjagutta, Hyderabad, Telangana
Kurnool: No. 302, 3rd Floor, V V Complex, 40/838, R.S. Road, Near SBI Main Branch, Kurnool, Andhra Pradesh
Nellore: 16-6-259, 1st Floor, Near Santi Sweets Opp: SBI ATM, Vijayamahal Centre, SPSR Nellore, Andhra Pradesh
Tada: 8-3-425/2, Flat No. 202, 2nd Floor, Bigsun Avenue, Near SRICITY, TADA, SPSR Nellore Dist, Andhra Pradesh
Visakhapatnam: # 39-20-40/6, Flat No.7, Sai Yasoda Apartments, Madhavadhara,Visakhapatnam (Urban),Vizag, Andhra Pradesh
Bangaluru: B104,RIRCO, Santosh Apartments, Wind Tunnel Road, Murugeshpalya, Old Airport Road, Bangalore – 560017, Karnataka.

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