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By

SBS and Company LLP
Chartered Accountants

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INTERNATIONAL TAXATION

TRANSFER PRICING - DEEMED INTERNATIONAL TRANSACTIONS

Contributed by CA Suresh Babu S

As taxpayers prepare for FY 2015-16 (AY 2016-17) transfer pricing compliance requirements, it is important to consider the change in the meaning of 'deemed international transaction' brought about by the amendments to Section 92B (2) of the Income-tax Act, 1961 ('the Act').

Section 92B (2) of the Act has been on the statute from Finance Act 2001, bringing transactions between two unrelated parties (e.g. Company A and Company B) within the ambit of Indian TP regulations, if there exists a prior arrangement between an AE of Company A and Company B; or the terms of the transaction are determined in substance between an AE of Company A and Company B.

Disputes have arisen on the applicability of Section 92B (2) on transactions between two domestic enterprises and Tribunalshave held that a transaction will not constitute a 'deemed international transaction' under such circumstances.

With a view to clarify the intention of the legislature, the Finance (No.2) Act, 2014 made specific amendments in Section 92B (2), applicable from FY 2014-15, to include a transaction of a taxpayer with an independent party as a 'deemed international transaction', if following conditions are satisfied:

- **There should be (i) an enterprise, (ii) an AE of the enterprise (either or both of them could be nonesident) and (iii) an unrelated party (resident or non-resident);**
- **There should be a transaction between (i) an enterprise and (ii) an unrelated party;**
- **There should exist (i) a prior agreement in relation to the relevant transaction; or (ii) terms of the relevant transaction should be determined in substance between such unrelated party and the AE of the enterprise.**

The amendments to Section 92B (2) significantly expands the universe of transactions that may potentially come under the purview of Indian transfer pricing regulations, perhaps far beyond what may have been intended / visualized by the legislature. The amended Section 92B (2) inter-alia casts onerous obligations on the taxpayer for documentation and reporting.

'Deemed International Tax provisions' – Pre and post Finance Act 2014 amendment:

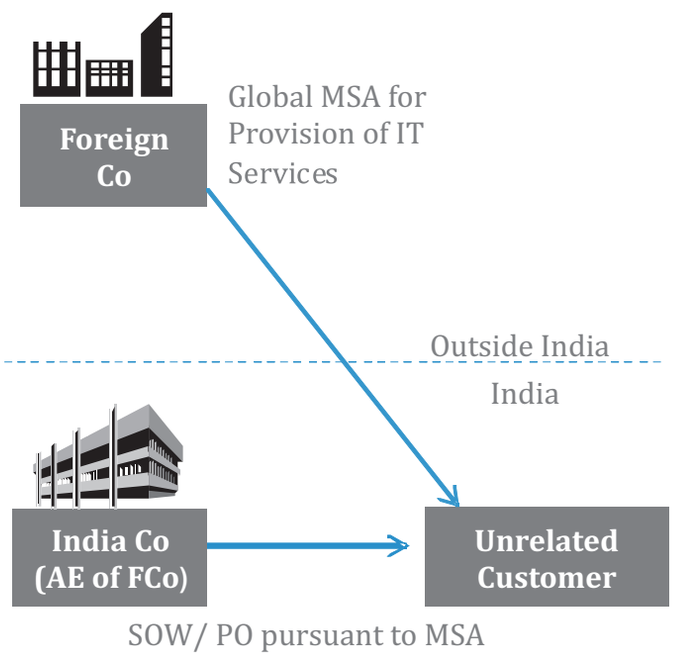
- Subsection (2) to Section 92B of the Act is a deeming fiction which broadens the ambit of 'international transaction' as defined under Section 92B(1) of the Act. As per section 92B(2) of the Act, 'for the purpose of subsection (1)', a transaction entered between the Indian taxpayer with a person other than AE ('unrelated third party') shall be deemed to be an international transaction if there exists:

  (a) a prior agreement between AE of the Indian taxpayer and such unrelated third party in relation to transaction under consideration; or

  (b) terms of the relevant transaction are determined in substance between AE of India taxpayer and such unrelated third party.

- However, unlike Section 92B(1) which clearly states that at least one of the transacting entity should be non-resident, Section 92B(2) did not provide any such clarification as to whether unrelated third party with whom Indian taxpayer transacts is required to be non-resident or not.

- Finance Act, 2014 amended Section 92B(2) of the Act - prospectively with effect from 1 April 2015 - to clarify that transaction between the Indian taxpayer and unrelated third party would be **deemed to be an international transactionirrespective of the fact** whether such **unrelated third party** is **non-resident in India or not** - subject to satisfaction of either of the two conditions provided in the section (as mentioned above). Hence, from FY 2014-15 and onwards, even transactions between two resident entities are brought under the ambit of 'international transaction'.



Litigation surrounding deemed international transaction provisions:

Indian taxpayers always contended that since both the transacting entities are 'resident' in India, 'deemed international transaction' provisions cannot be applied to such transaction. In various decisions including **Swarnandhra IJMII Integrated Township Development Co. P. Ltd vs. DCIT – Hyderabad Tribunal judgement and Vodafone India Services P Ltd v UOI (262 CTR 133) (Bom HC)**, judicial authorities have upheld the view that deemed international transaction provisions cannot be applied in cases where both transacting entities are resident in India.

- Similar view was expressed by Hon'ble Mumbai Tribunal in case of **Kodak India Private Limited Vs Addl. Commissioner of IT act.** Aggrieved by the order of Tribunal, tax department had filed appeal before the Bombay HC which was recently dismissed by Bombay HC.

- Bombay HC noted that Revenue authorities have accepted the observations of the Tribunal on two counts - (1) terms of sale of business were independently determined by Indian entities without any influence by global agreement and (2) Assessee had reasonably determined the arm's length price, while Revenue Authorities had not used one of the prescribed methods and hence, matter cannot be remanded back for determination of arm's length price. Based on these factual aspects, Bombay HC

held that appeal under consideration is academic in nature since there would not be any adjustment on Kodak India even if question is answered in favour of tax department and hence, Bombay HC dismissed the appeal filed by tax department without providing any ruling on the question of law. However, while concluding, Bombay HC has provided an interesting observation that 'question of law raised in the appeal is left open for consideration in an appropriate case'.

Amendment to Section 92B(2) by Finance Act 2014 was inserted only way of abundant precaution. It is made with a view to clarify the position that by entering into series of transactions with third parties who are not associated enterprises or non-residents, one cannot claim that TP regulations were not applicable, if in reality and in substance transactions were with related parties - one or both of whom might be non-residents.

- In principle, Tribunal held that even in Pre-Finance Act 2014 scenario, transaction undertaken between Indian taxpayer, its non-resident AE and unrelated third party in India which could be regarded as 'action in concert' or 'arrangement' (though with a view to avoid applicability of Section 92B(2) transaction) should be evaluated from tripartite perspective wherein one of the party becomes non-resident (i.e. AE of Indian taxpayer) and provisions of Section 92B(2) could be applied in such case to evaluate tax base erosion in India as a result of such arrangement.

Points to ponder and practical Examples to be evaluated:

Payment to employees seconded / deputed from AEs: Secondment of employees is a fairly common practice in multinational enterprises (MNEs) operating in India, wherein employees from overseas group entities come to the payroll of Indian affiliates for a fixed tenure. During the period of secondment, these employees work under the direction, control and supervision of the Indian company and receive their salary etc. from the Indian company. However, since the definition of the term 'enterprise' is wide enough to cover even individuals, it would be imperative to analyze the contractual arrangement and terms of the secondment as between the AE, the Indian company and the employee to evaluate the applicability of Section 92B(2).

Thus transactions involving payments such as salary or other expenses by Indian company to employees depurated by AE in India (who are registered on the payroll of India entity) could also trigger 'deemed international transaction' provisions and may warrant compliance.

Payment to group preferred vendors: To maintain consistency in quality of services or products and also to benefit from economies of scale, it is not uncommon to see global agreement being entered into by the parent / regional headquarter company of the MNE group with third party vendors or service providers on behalf of group affiliates. Local entities thereafter may enter into local contracts with the local vendor / service provider in line with the global framework agreement. In such situations, it may be necessary to evaluate the applicability of Section 92B (2), inter-alia, taking into consideration factors such as (i) ability of the Indian company to negotiate pricing / contractual terms; (ii) ability of the Indian company to engage an alternate product / service provider.

Income earned by Indian Enterprise from global key accounts or global clients: Global key accounts are typically multinational customers / clients of the MNE group, who have an expectation of being supplied and serviced worldwide in a consistent and coordinated manner. At times, pricing and contractual terms for global clients may be determined at the parent level. In such cases, where income is earned by an Indian enterprise from the local affiliates of global customers, factual exercise would have to be conducted to analyze the applicability of Section 92B (2).

Restructuring transactions: Transactions between two domestic enterprises involving asset / business transfers are often entered into as a result of a global restructuring / reorganization wherein e.g. a particular business unit / division is hived off or sold to a third party MNE group. In such situations, while the terms / pricing may be determined locally between the two domestic enterprises, it is imperative to analyze the linkages with the global arrangement and influence thereof on the local transaction in order to determine whether the provisions of Section 92B(2) get attracted.

Triangular arrangement: Plain and strict reading of Section 92B(2) of the Act covers situations of prior agreement or determination of terms in substance in 'triangular arrangement'. However, careful analysis needs to be undertaken even in cases where more than three parties are involved. Such kind of more than three party arrangements are very common in case of IT/ ITeS companies wherein centralised departments are set-up for procurement of laptops, servers, storage devices etc, global contracts for system maintenance etc.

(iii) Cases wherein Indian company renders services to another unrelated Indian company pursuant to global arrangement between overseas holding companies could also need evaluation for existence of deemed international transaction.

(iv) Certain other global arrangements which could need evaluation for existence of deemed international transactions are logistics services agreement, global advertisement arrangements, agreements with recruitment agencies etc.

(C) Concluding remarks:

It is very important to consider the penalty provisions and the resulting litigation for non-reporting of these transactions, as well as the limited guidance in terms of judicial precedent on reporting of deemed international transactions, it is imperative for taxpayers to undertake this factual exercise to evaluate any additional reporting and documentation obligations for FY 2015-16(AY 2016- 17) well before the November 30th deadline.

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FEMA

FDI INTO ECOMMERCE

Contributed by CA Murali Krishna G

Over the last two decades, rising internet and mobile phone penetration has changed the way we communicate and do business. E-commerce is relatively a novel concept. It is, at present, heavily leaning on the internet and mobile phone revolution to fundamentally alter the way businesses reach their customers.

While in countries such as the US and China, e-commerce has taken significant strides to achieve sales of over 150 billion USD in revenue, the industry in India is, still at its infancy. However over the past few years, the sector has grown by almost 35% CAGR from 3.8 billion USD in 2009 to an estimated 12.6 billion USD in 2013[1]

Industry studies by IAMA[2] Indicate that online travel dominates the e-commerce industry with an estimated 70% of the market share. However, e-retail in both its forms; online retail and market place, has become the fastest-growing segment, increasing its share from 10% in 2009 toan estimated 18% in 2013[3] . Calculations based on industry benchmarks estimate that the number of parcel check-outs in e-commerce portals exceeded 100 million in 2013. However, this share represents a miniscule proportion (less than 1%) of India's total retail market, but is poised for continued growth in the coming years. If this robust growth continues over the next few years, the size of the e-retail industry is poised to be 10 to 20 billion USD by 2017-2020. This growth is expected to be led by increased consumer-led purchases in durables and electronics, apparels and accessories, besides traditional products such as books and audio-visuals.

Now India is getting ready for introduction of Goods and Service Tax law (GST), it can further fuel the growth of e-commerce

With the above background the author has made an attempt to bring the extant FEMA - Foreign Direct Investment Regulations for e-commerce industry

Brief Background:

Before 2006	FDI was prohibited into Retail Business
10thFebruary, 2006	FDI in cash-and-carry (wholesale) brought under automatic route. Earlier, it was allowed under approval route. 51% FDI was permitted under Government approval into SBRT
April, 2010	Cash and Carry Whole Sale Trade is permitted subject to 25% intra group entities sales restriction

[1]Source: Internet and Mobile Association of India research report
[2]Source: IAMAI report titled 'e-Commerce Rhetoric, Reality and Opportunity'
[3]Source: PwC analysis

July, 2010	DIPP has issued second Discussion Paper FDI into MBRT
7th December, 2011	Union Cabinet Proposes 51% FDI in Multi-Brand Retail Trade
10th January, 2012	FDI into Single Brand Retail increased to 100% under Government route subject to stipulated Conditions
14th September, 2012	The Government opens FDI into Multi-Brand Retail Trade (MBRT) upto 51% subject to stipulated conditions
20th September, 2012	The Government clarifies the position that company having FDI cannot enter into e-commerce in both SBRT and MBRT
January, 2014	DIPP Releases a discussion paper on "E-Commerce in India, highlighting pros and cons of allowing FDI in the Sector"
29th March, 2016	DIPP has issued Press Note No. 3/2016, whereby the definition of E-Commerce has been divided into Inventory based Model and Market based model.
24th June, 2016	DIPP has issued Press Note No. 5/2016 for relaxing local sourcing norms for SBRT

Extant FDI Regulations for FDI into E-Commerce:

A. Relevant Definitions:

(i) **E-commerce-** E-commerce means buying and selling of goods and services including digital products over digital & electronic network.

(ii) **E-commerce entity-** E-commerce entity means a company incorporated under the Companies Act, 1956 or the Companies Act, 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2(v)(iii) of FEMA 1999, owned or controlled by a person resident outside India and conducting the e-commerce business.

(iii) **Inventory based model of e-commerce-** Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.

(iv) **Marketplace based model of e-commerce-** Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

B. Guidelines for Foreign Direct Investment on e-commerce sector:

(i) 100% FDI under automatic route is permitted in marketplace model of e-commerce.
(ii) FDI is not permitted in inventory based model of e-commerce.

C. Other Conditions:

(I) Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.

(ii) Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.

(iii) E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services.

(iv) E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.

(v) An e-commerce entity will not permit more than 25% of the sales affected through its marketplace from one vendor or their group companies.

(vi) In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.

(vii) In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.

(viii) In marketplace model, any warrantee/guarantee of goods and services sold will be responsibility of the seller.

(ix) E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.

(x) Guidelines on cash and carry wholesale trading as given in para 5.2.15.1.2 of the Consolidated FDI Policy dated 7th June, 2016 will apply on B2B e-commerce.

D. Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditionalties, sale of services through e-commerce will be under automatic route.

Currently, eTravel comprises close to 70% of the total eCommerce market. eTailing, which comprises of online retail and online marketplaces, has become the fastest-growing segment in the larger market having grown at a CAGR of around 56% over 2009-2014. The size of the eTail market is pegged at 6 billion USD in 2015. Books, apparel and accessories and electronics are the largest selling products through eTailing, constituting around 80% of product distribution. [4]

The increasing use of smartphones, tablets and internet broadband and 3G/4G has led to developing a strong consumer base likely to increase further. This, combined with a larger number of homegrown eTail companies with their innovative business models has led to a robust eTail market in India rearing to expand at high speed.

The ecommerce business may further give impetus once the GST Mechanism is put in place and the echo system is tuned to the new law.

[4]Source: PWC Analysis titled 'eCommerce in India Accelerating Growth'1

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AUDIT

STANDARD OPERATING PROCEDURES

Contributed by CA Sandeep Das

Back to Basics -

Standard Operating Procedures

1. INTRODUCTION:

What is SOP

A Standard Operating Procedure (SOP) is a set of written instructions that document a routine or repetitive activity followed by an organisation. The development and use of SOP's are an integral part of a successful quality system as it provides individuals with the information to perform a job properly, and facilitates consistency in the quality and integrity of a product or end – result.

2. Purpose

SOP's details theregularly recurring work processes that are to be conducted or followed within an organisation. SOP's document the way activities are to be performed to facilitate consistent conformance to technical and quality system requirements and to support data quality.

SOP's are intended to be specific to the organisation or facility whose activities are described and assist that organisation to maintain their quality control and assurance processes and ensure compliance with various regulations.

3. Advantages of SOP

The development and use of SOP's minimizes variation and promotes quality through consistent implementation of a process or procedure within the organisation even if there are temporary or permanent personnel changes.

SOP's can include compliance with organizational and departmental requirements and can be used as a part of personnel training program since they provide detailed work instructions. SOP's minimizes opportunities for any miscommunications.

SOP's are often used as checklists by the auditors; ultimately, the benefits of a valid SOP are reduced work effort, along with improved comparability, credibility and legal defensibility.

4. Writing SOP's

SOP's should be written in a concise, easy to read and step by step format. Information provided in the SOP document should be simple and unambiguous. The active voice and present verb tense should be used. The document should not be wordy, redundant, or overly lengthy. Idea is to keep it simple and short.

5. SOP Process

5.1 SOP preparation

The organisation should have a procedure in place for determining what procedures or process needs to be documented. Those SOP's should be written by individuals knowledgeable with the activity and the organisations internal structure. These individuals are essentially the process owners who actually perform the work or use the process. In a large and complex environmenta team approach can be followed, where the experiences of a number of individuals are critical.

SOP's should be written with sufficient detail so that someone with limited experience with or knowledge of the procedure, but with a basic understanding, can successfully reproduce the procedure when unsupervised.

5.2 SOP Review and Approval

SOP's should be reviewed by one or more individuals with appropriate training and experience with the process. It's advisable if draft SOP's are actually reviewed by individuals other than the original author before the SOP's are finalized. The finalized SOP's should be approved by the authorised personnel. Signature approval indicates that an SOP has both reviewed and approved by management.

5.3 Frequency of reviews and revisions

SOP's needs to remain current to be useful. Therefore, whenever procedures are changed, ensure that the policies and procedures remain current and appropriate, or to determine whether the SOP's are even needed. The review date should be indicated to each SOP that has been reviewed. The frequency of review should be indicated by management and should also indicate the personnel responsible for ensuring that SOP's are current.

5.4 Checklists

Many activities use checklists to ensure that steps are followed in order. Any checklists or forms included as part of an activity should be referenced at the points in the procedure where they are to be used and then attached to the SOP. In some cases, detailed checklists are prepared specifically for a given activity. In those cases, the SOP should describe, at least generally, how the checklist is to be prepared, or on what it is to be based.

5.5 Document control

Each organisation should develop a numbering system to systematically identify and label their SOP's and the document control should be described in its Quality Management Plan. Generally, each page of the SOP should have control document notation, short title and Identification (ID) number. The revision number and date are very useful in identifying the SOP in use when reviewing historical data and is critical when the need for evidentiary records is involved and when the activity is being reviewed.

5.6 SOP document tracking and archival

The organisation should maintain a master list of all SOP's. This file or database should indicate the SOP number, version number, date of issuance, title, author, status, organisation division / department and any historical information regarding past versions.

6. SOP General format

SOP's should be organized to ensure ease and efficiency in use and to be specific to the organisation which develops it. There is no specific format for SOP's; internal formatting will vary with each organisation and with the type of SOP being written. A generalized format shall have:

Title Page:

The first page or cover page of each SOP should contain the following information: a title that clearly identifies the activity of procedure, SOP identification (ID) number, date of issue and / or revision and the signatures, signature dates of those individuals who prepared and approved SOP. Electronic signatures are acceptable for SOP's maintained ona computerized database.

Table of contents:

A table of contents may be needed for quick reference, especially if the SOP is long, for locating information and to denote changes or revisions made only to certain section of an SOP.

Writing SOP

Well drafted SOP should describe the purpose of the work or process, including any regulatory information or standards that are appropriate to the SOP process, and the scope to indicate what is covered.

SOP's should be clearly worded so as to be readily be understandable by a person knowledgeable with the general concept of the procedure, and the procedures should be written in a format that clearly describes the steps in order. Use of diagrams and flow charts help to break down long sections of text and to briefly summarize a series of steps for the reader.

This article is contributed by CA Sandeep Das, Partner of SBS and Company LLP, Chartered Accountants. The author can be reached at sandeepd@sbsandco.com

INCOME TAX

RATIONALISATION OF PENALTY PROVISIONS

Contributed by CA Ramprasad

The Finance Bill, 2016 proposed to insert a new section – section 270A on imposition of penalty to replace the existing section 271of the Income-tax Act, 1961 ("Act") which has been matter of litigation throughout. This section shall come into effect from April 1, 2017 i.e., Assessment Year ("AY") 2017-18.

The reasons for bringing in a new section, as stated in the Memorandum explaining the Finance Billis - "Under the existing provisions, penalty on account of concealment of particulars of income or furnishing inaccurate particulars of income is leviable under section 271(1)(c) of the Income-tax Act. ***In order to rationalize and bring objectivity, certainty and clarity in the penalty provisions,*** *it is proposed that section 271 shall not apply to and in relation to any assessment for the assessment year commencing on or after the 1stday of April, 2017 and subsequent assessment years and penalty be levied under the newly inserted section 270A with effect from 1stApril, 2017. The new section 270A provides for levy of penalty in cases of under reporting and misreporting of income".*

Purpose for bringing a new section:

The existing provisions of Section 271of the Act is for levy of penalty in case of concealment of income or furnishing of inaccurate particulars of income which can range from **100 percent to 300 percent of the amount of tax sought to be evaded** by an assessee. The levy of penalty under this section has always attracted huge litigation. The discretion regarding the quantum of penalty that can be imposed lies in the hands of Assessing Officer which also led to corruption. Major litigation under this section has been on the following issues:

- The interpretation of the term – **'tax sought to be evaded';**
- The tax authorities considered any addition or disallowance made in the course of assessment would attract the levy of penalty under section 271(1)(c);
- The rate of penalty has always been upto the discretion of the tax authority etc.

To overcome all the shortcomings of this section and to reduce litigation to some extent, the Finance Bill, 2016 proposed the insertion of Sections 270A and 270AA in the Act which will replace the existing provisions of section 271.

Section 270A:

The section 270A of the Act imposes **penalty for under reporting and misreporting of income**. It states that:

- The Assessing Officer / Commissioner (Appeals) / Principal Commissioner or the Commissioner may
- During the course of any proceedings under the Act
- Direct that any person
- **Who has under-reported his income**
- **Shall be liable to pay penalty in addition to tax, if any, on the under reported income**

In a nutshell, the concept of 'concealment of income or furnishing of inaccurate particulars of income' mentioned in section 271(1)(c) has been replaced by **under reporting and misreporting of income** which has been clearly defined in the section.

What constitutes under-reporting of income?

Sub-section (2) of section 270A lists the cases wherein a person is said to have under reported his income which are mentioned below:

a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;
b) the income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished;
c) the income reassessed is greater than the income assessed or reassessed immediately before such re-assessment;
d) the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;
e) the amount of deemed total income assessed as per the provisions of section 115JB or 115JC is greater than the maximum amount not chargeable to tax, where no return of income has been filed;
f) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

The most important point to be noted here is that in case of the assessee who has reported a loss in his return of income, penalty will be charged on the amount of tax on the under reported income inspite of the assessee still having a loss after including the under reported income. Due to this provision, any income which is being under reported by the assessee will fall within the purview of penalty (excluding certain circumstances mentioned below) even if the assessee has an overall loss.

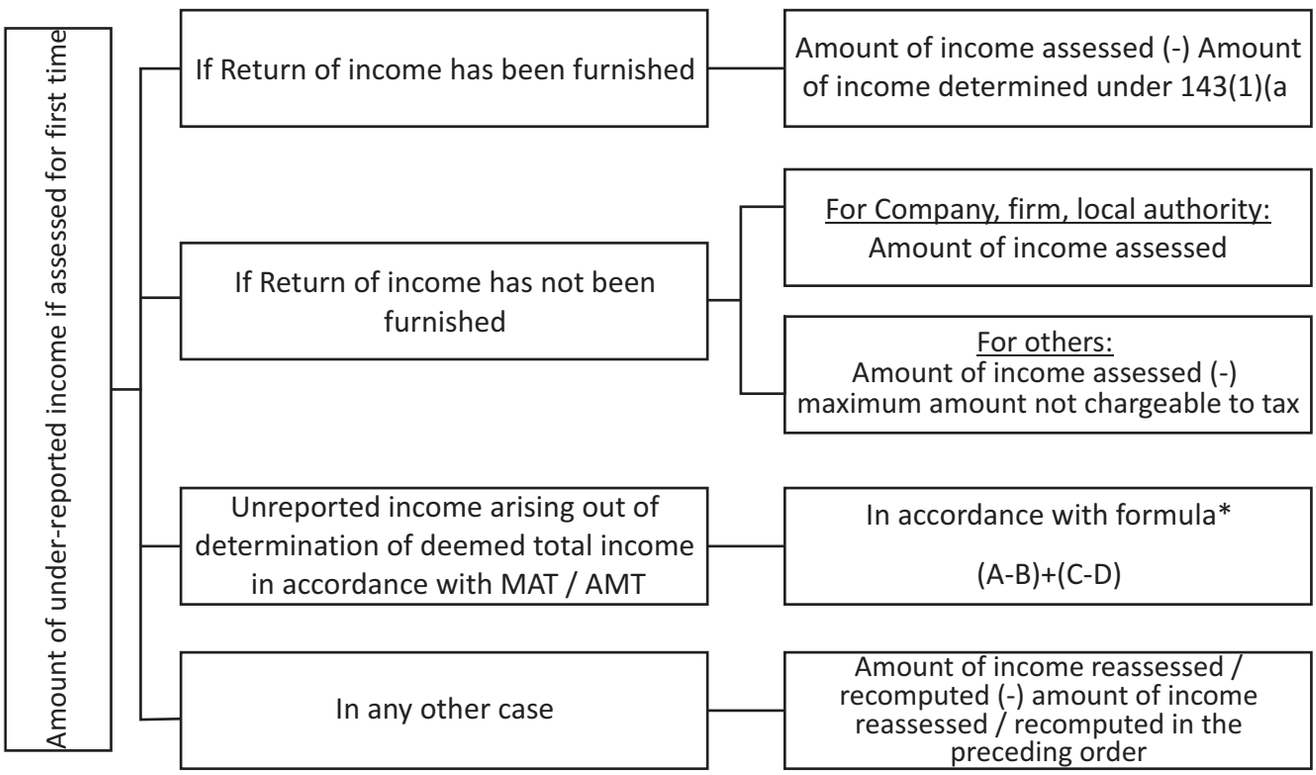
What constitutes misreporting of income?

Income is said to be misreported in the following cases:

a) misrepresentation or suppression of facts;
b) failure to record investments in the books of accounts;
c) claim of expenditure nor substantiated by any evidence;
d) recording of any false entry in the books of account;
e) failure to record any receipt in books of account having a bearing on total income and
f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction to which the provisions of Chapter X(Special provisions relating to avoidance of double taxation) applies

Amount forming under reported income:

In case a person's case falls under any of the above 6 clauses, the amount of under reported income shall be:



*where,

A = Total income, **including the under reported income**, as per the normal provisions of the Act
B = Total income, **excluding the under reported income,** as per the normal provisions of the Act
C = Total income, **including the under reported income**, as per the provisions of section 115JB / 115JC, i.e., MAT / AMT
D = Total income, **excluding the under reported income**, as per the provisions of section 115JB / 115JC, i.e., MAT / AMT

In case, the amount of under reported income on any issue has been considered under the normal provisions of the Act and as per provisions of section 115JB / 115JC, then for the purpose of computing the amount under **D**, such amount, considered under both, will not be excluded.

Amounts that would not form part of under reported income

Section 270A lays lists down certain amounts that would not form a part of under reported income to not cause undue hardship to Assessees. These are listed below:

- The amount of income for which the assessee offers an explanation which is satisfactory to the AO/CIT(A)/CIT/PCIT of it being bonafide and the Assessee has disclosed all material facts to substantiate the explanation

- The amount of under reported income determined on the basis of an estimate wherein the accounts are correct and complete to the satisfaction of the AO/CIT(A)/CIT/PCIT but the method employed cannot compute the income satisfactorily

- The amount of under reported income has been determined on the basis of an estimate, wherein the assessee on his own, has estimated a lower amount of addition or disallowance on the same issue andhas included such amount in the computation of income and has disclosed all material facts relating to such addition and disallowance

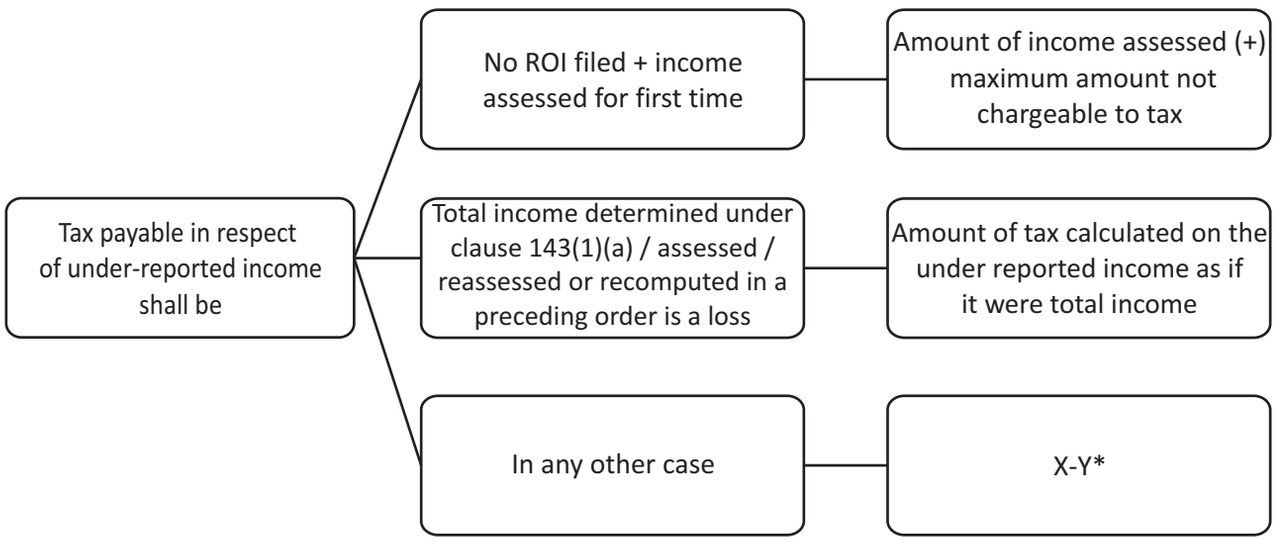
- The amount of under reported income which is on account of any addition made in accordance with the arm's length price as determined by the Transfer Pricing Officer and proper documentation has been maintained by the Assessee as prescribed under section 92D. Further, the assessee should also have declared the international transactions under Chapter – X and disclosed all material facts relating to the same

- Amount of undisclosed income referred to in section 271AAB (penalty where search has been initiated)

Amount of penalty

The amount of penalty would be **equal to 50% of the amount of tax payable on under reported income.** In case the under reported income is on account of misreporting then the penalty would be **equal to 200%of the amountof tax payable on under reported income.** T*he AO/ CIT(A) / CIT / PCIT should issue an order in writing to impose penalty under this section.*

Amount of tax payable on under reported income

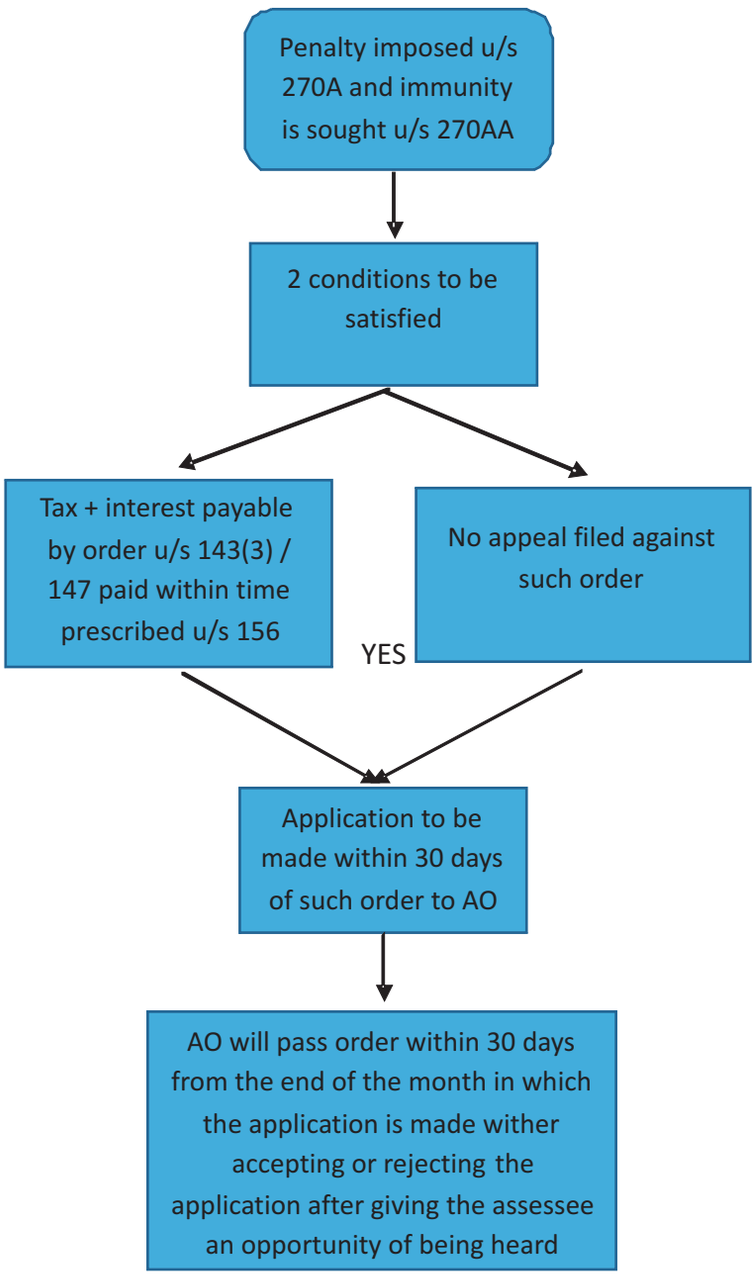


***X = Amount of tax calculated on the total income, including the under reported income**

Y = Amount of tax calculated on the total income, excluding the under reported income

Penalty shall not be imposed if any disallowance or addition has formed the basis of imposition of penalty in the case of the person for the same or any other assessment year.

Immunity from imposition of penalty and prosecution – section 270AA



Section 270AA has been inserted w.e.f April 1, 2017 from AY 2017-18 to provide immunity to assessees from imposition of penalty u/s 270A and initiation of proceedings u/s 276C (wilful attempt to evade tax, etc) or section 276CC (failure to furnish returns of income) if the following 2 conditions are satisfied:

- The amount of tax and interest payable as per the order issued under section 143(3) or 147 of the Act, as the case may be, has been paid within the period specified within the time limit specified in the Notice of Demand, and

- No appeal has been filed against such order issued under section 143(3) or 147 of the Act

Process for obtaining immunity

An assessee should make an application within one month from the end of the month in which the order u/s 143(3) and 147 has been received. The form and manner in which the application is to be made is yet to be notified by CBDT.

In case the AO is satisfied that all conditions mentioned above have been fulfilled by the Assessee, he may grant an order accepting such application to grant immunity u/s 270AA. The order shall be passed after the expiry of the period available to file appeal against the above mentioned orders.

The order has to be passed by the AO within one month from the end of the month in which the application has been made by the assessee. Before passing any order, the assessee is to be given an opportunity of being heard.

In case the penalty under section 270A has been imposed on account of **misreporting, no immunity is available for the assessee under this section.**

It is important to note that where the application has been accepted by the AO and an order has been issued for the same, no appeal can be filed with the CIT(A) nor an application for revision can be made under section 264 against the order received u/s 143(3) or 147 of the Act.

With the insertion of section 270A and section 270AA in the Act, the complexities in the imposition of penalty have been reduced to certain extent along with the quantum of penalty thus being beneficiary for all assessee.

This article is contributed by CA Ram Prasad, Partner of SBS and Company LLP, Chartered Accountants. The author can be reached at caram@sbsandco.com

COMPANIES ACT, 2013

COMPANIES AMENDMENT BILL-2016-(part-4)

Contributed by CS D V K Phanindra

Sl. No.	Section(s) under the CA, 2013, amended	Clause No. in the Amendment Bill	Proposed amendment relating to	Remarks/Comments/Penalty
63	Section - 196 – Appointment of Managing Director,	64	Amendment to Section (4) of Section 196 of the Act, to provide that approval of Central Government shall be required on matters specified in "Part I of Schedule V".	**Welcome amendment. The scope of approval of Central Government is proposed to be restricted to Part-I of the Schedule-V only.**
64	Section - 197 – Overall Maximum Managerial Remuneration and Managerial Remuneration in Case of Absence or Inadequacy of Profits	65	Amendment to the 1st proviso to Sub-section (1) section 197 of the Act, to remove the requirement of obtaining approval of Central Government, for payment of remuneration and amendment to 2nd proviso to sub-section (1) of Section 197, to include the requirement of special resolution for payment of managerial remuneration in respect of the payment of limits for the limits prescribed therein. Further to include a new proviso after the 2nd proviso to sub-section (1) of Section 197, relating to obtaining of priorapproval of bank or public financial institution, in case of any term loan is subsisting or the company is defaulted in payment of dues to non-convertible debenture holder or secured creditor, before obtaining the approval of shareholders, for payment of remuneration to the Directors. Amendment to Sub-section (3) of Section 197, for deleting the requirement as to obtaining of Central Government approval, in case the Company is not able to comply with the provisions of Schedule-V, in case of payment of remuneration due to lack of profits or inadequate profits.	**Welcome Amendment, and ease of operations.** **Welcome Amendment in the interest of all the stakeholders.** **Welcome Amendment, and ease of operations.**

Sl. No.	Section(s) under the CA, 2013, amended	Clause No. in the Amendment Bill	Proposed amendment relating to	Remarks/Comments/Penalty
			Substitution of a new sub-section (9) in place of the existing sub-section, there providing time frame, within which the director has top refund the unauthorised remuneration drawn by him from the Company.	
			Amendment of sub-section (10) of Section 197, relating to the authority for waiver of the refund of unauthorised remuneration drawn by the Director. The earlier authority of Central Government, is proposed to replaced with the Shareholders of the Company, who will have to pass a special resolution within two years from the date the sum becomes refundable; and to include a proviso to the sub-section that in cases where any term loan of any bank or public financial institution is subsisting or the company has defaulted in payment of dues to non-convertible debenture holders or any other secured creditor, their prior approval is required before the obtaining the approval of the members.	**Welcome Amendment, and ease of operations.**
			Amendment of sub-section (11) of Section 197, the requirement as to obtaining of Central Government approval, in case the Company is not able to comply with the provisions of Schedule-V, for any increase of remuneration payable to the Directors.	**Welcome Amendment, and ease of operations.**
			Insertion of two new sub-section (16) & (17) to Section 197, firstly sub-section (16) to provide that the Auditors in their report, to report on the remuneration drawn by the directors and whether the same are within the limits or not. Secondly, sub-section (17) relating to the fate of applications pending with the Central Government for want of approval, for payment of remuneration to the Director, other than in accordance with the provisions of the Schedule.	**Welcome Amendment, to have better transparency and better Corporate Governance.** **Insertion to give clarity.**

Sl. No.	Section(s) under the CA, 2013, amended	Clause No. in the Amendment Bill	Proposed amendment relating to	Remarks/Comments/Penalty
65	Section - 198 - Calculation of Profits	66	Amendment to Clause (a) of Sub-section (3) of Section 198 of the Act to exclude Investment Companies [As per the Explanation given in Section 186] from the requirement of not giving credit for profits on sale of shares or debentures for calculation of profit. Amendment to Clause (l) of sub-section (4) of Section 198 of the Act, to omit the words "which begins at or after the commencement of this Act".	**Amendment to remove ambiguity.** **Amendment to remove ambiguity.**
66	Section - 200 - Central Government or Company to Fix Limit with Regard to Remuneration	67	Amendment to Section 200 of the Act to omit the words "Central Government or", since the requirement of obtaining the approval from Central Government under Section 196(except for appointment of MD/WTD/Manager in variation with the provisions of Part-I of Schedule-V)& 197, is omitted. Accordingly, the Company alone can fix the limit with regard to the remuneration payable to the Directors.	**Amendment in tune with the amendments made to Section 196 & 197**
67	Section - 201 – Forms of, and Procedure in Relation to, Certain Applications	68	Amendment to Section 201 of the Act as a consequential change to amendment made section 196, thereby limiting the purpose of making application in **MR-2**, for the purpose of appointment of MD/WTD/Manager in variation with the provisions of Part-I of Schedule-V.	**Amendment in tune with the amendments made to Section 196**
68	Section - 216 – Investigation of Ownership of Company	69	Amendment to sub-section (1) Section 216 of the Act to insert a clause (c) to provide for Central Government to appoint inspectors for determining true persons who have or had beneficiali nterest in shares of a company or who are or have been beneficial owners or significant beneficial owner of the company.	**Amendment for better transparency in the company management.**

Sl. No.	Section(s) under the CA, 2013, amended	Clause No. in the Amendment Bill	Proposed amendment relating to	Remarks/Comments/Penalty
69	Section – 223 – Inspector's Report	70	Amendment to Sub-section (3) of Section 223 of the Act so as to include, as to provide that the members, creditors or any other person whose interest is likely to be affected, can apply for copy of inspectors report.	**Welcome Amendment to remove ambiguity, as to there was no provision in the principal act, as to who can apply for a copy of the Inspector's Report.**
70	Section – 236 – Purchase of Minority Shareholding **(Section not yet notified)**	71	Amendment to Sub-section (4), (5) & (6) of section 236 of the Act to substitute the words 'transferor company' with the words 'company whose shares are being transferred' for providing clarity	**Amendment to provide clarity.**
71	Section – 247 - Valuation by Registered Valuers. **(Section not yet notified)**	72	Amendment to Clause (d) of sub-section (2) of Section 247 of the Act to provide that a registered valuer shall not undertake valuation of any asset in which he has direct or indirect interest three years before appointment as valuer or three years after valuation of assets.	**Amendment to provide ambiguity, as in the principal act, there was no limit or period provided for the disqualification for valuing the assets.**
72	Section–366– Companies Capable of Being Registered	73	Amendment to Sub-Section (2) of Section 366of the Act reducing the general requirement of number of members for conversions of partnership firms, etc. into companies from seven or more to two or more members. Insertion of a new clause (vi) to the proviso to Sub-section (2) of Section 366, to provide that where the number of members are less than seven members the conversion would be into a private company	**Welcome Amendment for ease of operations. Lot of small partnership firms with 2 partners can be directly converted in to private limited company, without the requirement re-constitution of the firm for admission of new partners.**

Sl. No.	Section(s) under the CA, 2013, amended	Clause No. in the Amendment Bill	Proposed amendment relating to	Remarks/Comments/Penalty
73	Section –379 - Application of Act to Foreign Companies.	74	Amendment to Section 379 of the Act, thereby re-numbering the existing section as Sub-section (2) and inserting a sub-section (1 to provide that the provisions of Section 380 to 386 and sections 392 and 393 of the Act, shall apply to all foreign companies, and a proviso giving power to the Central Government, to except certain companies from the applicability of the provisions by way of an order, and copy of every such order shall, as soon as may be after it is made, be laid before both Houses of Parliament.	**Amendment to provide clarity.**

This article is contributed by CS D V K Phanindra, Associate of SBS and Company LLP, Chartered Accountants.
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AUDIT

IMPORTANCE OF INTERNAL AUDIT FOR INVESTORS

Contributed by CA MHS Bhyrav

1.1 Introduction:

Profit potentiality, limited liability, tax benefits, free transferability would make investment in equity preferable, however there is other side to the coin in terms of high risk, market fluctuations which prudent investor should always consider.

Normal tendency of investors while making investments is to look at the track record of the Board of Directors, CEO and management team along with company performance and risks adherent to such company and industry. In spite of those measures, history revealed so many scandals, Inspite of impressive track record of the Board of Directors and CEO,investors lost their money, Enron scandal would be prompt evident supported by ZZZZ Best Inc, Centennial Technologies Inc, Bre-X Minerals, Worldcom and many other scams.

It is evident that, apart from the mentioned measures, an investor should also consider how risks are managed in the company, strength of its control environment and its effectivegovernance to make better decisions.

What shall an investor consider can know easily, but **how**? is a million-dollar dividend question.

Through this article I made an endeavour, how an Internal Audit system is relevant for investors while making investment decisions.

2.1 Relevance of Effective Internal Audit

Though internal audit doesn't assure any commercial success, effective internal audit in an organisation assures good governance. It provides the management and stakeholders with an independent view on organisation's risk and control environment.

Many stock exchanges across the world recognised the importance of internal audit, they made mandatory for the listed companies to have internal audit in place. In India as per the clause 49 of listing agreement, every listed company should possess internal audit mechanism, same requirement is also there in Companies Act,2013. As per section 138 of Indian Companies Act 2013 read with Rule 13 of Companies (Accounts) Rules, 2014, appointment of internal auditor is mandatory for every listed company in India.

One of the surveys conducted by ACCA (the Association of Chartered Certified Accountants) found that more than 85% of respondents felt that the provisionof non-financial information (such as corporate governance practices and corporate social responsibility issues) would serve their (investment) decision making purposes and audit brought value for their decision making.

As described by IIA, *"Internal audit is a key pillar of good governance. It provides the board of directors, the audit committee, the chief executive officer, senior executives and stakeholders with an independent view on whether the organisation has an appropriate risk and control environment, whilst also acting as a catalyst for a strong risk and compliance culture within an organisation".*

Presence of effective internal audit system will always provide better insight into the company's governance and risk mitigation, on the other way we may not.

2.2 Internal Audit Importance:

2.2.1 Introduction of internal audit standards, risk assessment procedures by internal auditors improved reliability on internal audit for external auditors to the notable extent. There were instances where internal audit analysis reports made external auditors to qualify their Audit Report.

"Well-controlled, well-managed organizations cost less to audit,""Internal audit is a key part of a well-controlled, well-managed organization. Our coordination with internal audit is very helpful in making sure that the work we do is efficient."

-Greg Weaver, chairman and chief executive officer at Deloitte &Touche.

2.2.2 Internal Audit can improve management and accountability, both financial and non–financial.Internal audit can be a pivotal activity to provide assurance to the board of directors, the audit committee, and the chief executive officer, and stakeholders that the organisation is governed effectively by

- Providing independent, unbiased assessment of the operations of the organisation.
- Providing management with information on the effectiveness of risk management, control and governance processes.
- Acting as a catalyst for improvement in risk management, control and governance processes.
- Informing management what it needs to know, when it needs to know it.

3.0 Conclusion:

While making investment, apart from company growth, industry risk, management capabilities, Insight into the organisation's risk mitigation, governance and ethical culture etch will always bring value advantage to investment decisions.

Though internal audit doesnot assure any commercial success, effective internal audit in an organisation assures good governance, provides insight into the organisation's both financial and nonfinancial aspects which a prudent investor should always consider.

This article is contributed by CA MHS Bhyrav, Associate of SBS and Company LLP, Chartered Accountants. The author can be reached at bhyravm@sbsandco.com

DIRECT TAX

JUDGEMENTS - INCOME TAX UPDATES

RAYALA CORPORATION PVT. LTD VS ASST. CIT ***(SUPREME COURT)***

Issue: - Income of the Company engaged in the business of leasing out its property is chargeable under the head "House Property" or "Income from Business"?

Facts: - A Private Limited Company engaged in the business of renting of properties. As per the Memorandum of Association of the company its business is to deal into real estate and also to earn income by way of rent by leasing or renting of properties belonging to the company.

Assessee Contention: - It is in the business of renting its properties and is receiving rent as its business income and the said income should be taxed under the head "Profits and Gains from Business or Profession".

Revenue Contention: - Leasing and letting out shops and properties is not the main business of the Assessee as per Memorandum of Association and therefore, the income earned by the Assessee should be treated as income earned by the Assessee should be treated as income from house property. Rent should be the main source of income or the purpose for which the company is incorporated should be to earn income from rent so as to make the rental income be income taxable under the head "Profits and Gains from Business or Profession"

Supreme Court Judgment- Relying on Supreme Court Judgment in *Chennai Properties and Investment Ltd* the High Court was not correct while deciding that the income of the Assessee should be treated income from house property.

Supreme Court in case of *Chennai Properties* held that if Assessee is having his house property and by way of business he is giving the property on rent and if he is receiving rent from the said property as business income, the said amount, even if it is the nature of rent, should be treated as "Business Income" because the Assessee is having a business of renting his property and the rent which he receives is in the nature of his business income.

CIT VS KNIGHT FRANK (INDIA) P. Ltd ***(DELHI HIGH COURT)***

Issue: - Whether Service Tax billed for rendering services part of trading receipts? Whether Unpaid Service Tax liability is disallowed U/S 43B?

Facts: - Assessee engaged in the business of real estate consultancy and property management services. Assessing Officer included service tax billed by the Assessee as a part of trading receipts by invoking the provisions of section 145A[1] and also invoked provisions of section 43B in respect of the unpaid service tax liability though the Assessee has not claimed deduction of the same while determining its income.

Assessee Contention: - The Section 145A has no application as service tax was not mentioned therein.

Since the Assessee has not claimed deduction on account of service tax payable to the Government section 43B of the Act would not have any application.

[1]Valuation of purchase and sale of goods and inventory for the purpose of determining income chargeable under head "PGBP"

Revenue Contention: Section 145A would apply as it is not restricted only to manufacturing and trading companies.

Service tax stands on the same footing as excise duties, sales tax and other taxes which are collected to be paid over to the Government and hence section 43B is applicable.

High Court Judgment: - It is very clear that Section 145A(a)(ii) covers cases where the amount of tax, duty etch is actually paid or incurred by the assesse to bring the goods to the place of its location and condition as on the date of valuation. In this the respondent is rendering services. The section it is self-evident that the same would not apply to the service tax billed on rendering of services. Service tax billed has no relation to any goods nor does it have anything to do with bringing the goods to a particular location.

Further, it is to be noted that Service Tax was first introduced in India by Finance Act, 1994. Section 145A of the Act was first introduced into the Act only by Finance (No.2) Act, 1998 w.e.f. 1st April, 1999. It was thereafter substituted by Finance (No.2) Act, 2009 which is identical, except for addition of clause (b), dealing with interest. However, the Parliament did not while substituting it; deem it fit to explicitly include the valuation of Services therein. Thus, it is clear that the legislature never intended to restrict the applicability of Section 145A of the Act only to goods and not extend it to Services.

Since Assessee had not claimed any deduction on the account of service tax payable there can be no occasion to invoke section 43B of the Act.

ITO VS DR. VANDANA BHULCHANDANI ***(ITAT MUMBAI)***

Issue: - Whether in case of Joint Ownership capital gain on sale of property need to be disclosed and offered to tax by owners to the extent of their respective share where the funds for investment has in fact flown only from one party to the transaction?

Facts:- Assessee is a medical professional and has not disclosed sale of the property which was owned by her along with her husband. During the course of proceedings of assessment Assessee submitted that though the property were in the joint names the property was purchased out of funds from her husband account and the same was shown in his balance sheet. Her husband has disclosed the capital gains arising from transfer of property in his return of income.

Assessee Contention: - In the past(AY 2005-06) the AO had accepted the fact that though the Assessee name appeared as a co-owner the entire investment in the acquisition thereof was made by her husband. The action of the AO (AY 2009-10) to bring tax of 50% of the STCG in the Assessee hand is erroneous as the same had undisputedly been disclosed by her husband in his return of income.

Revenue Contention: -The whole arrangement surrounding the transaction in respect of the property was worked out to avoid legitimate tax and defraud the revenue as the profit on sale of the property was set off against short term capital gain on sale of shares.

Since Assessee was shown as first holder of the property she liable to pay tax for 50% of short term capital arising on sale of the said property.

Tribunal Judgment:- AO has disputed the fact that the Assessee has not purchased the said property but rather the same was purchased by the Assessee husband out of his own funds.

Assessee husband reflected the said property in his balance sheet from AY 2005-06 till its sale. In this factual matrix of the case we concur with the finding that the STCG arising on sale of the said property is to be assessed in the hands of Assessee husband.

IMPORTANT UPDATES: -

1. **Circular 30/2016-** CBDT has issued a Circular streamlining the assessment of foreign shipping company's U/S 172. CBDT lays down procedure for issuing voyage NOC in case where the entire cargo belongs to single foreign shipping company belonging to a country with full DTAA relief and where the cargo belongs to number of foreign shipping companies each belonging to a country with full DTAA relief. It also provides that Master of the ship shall obtain voyage NOC from AO having jurisdiction over the port in cases not covered by above.

2. **Notification of Protocol-** The Protocol for amendment of the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains between India and Mauritius was signed by both countries on 10th May, 2016. After completion of internal procedures by both countries, the Protocol entered into force in India on 19th July, 2016 and has been notified in the Official Gazette on 11th August, 2016.

3. **FAQ (IDS)-**

- Period of holding of asset declared under the scheme shall be based on actual date of acquisition of asset (evidenced by registered deed with any authority of the State Government). However, the benefit of indexation is available from 01/06/2016 only (in case of future sale of the same).

- Amendment to IDS Rules provides that where acquisition of an immovable property is evidenced by registered deed, an option is available to the declarant to declare the FMV of such property by applying of CII to the stamp duty value of the property.

- Registration U/S 12A shall not be cancelled solely on the basis of the information furnished in the declaration filed under the scheme.

- Where the Assessee has claimed accelerated deduction (> 100%) on account of bogus donation has to declare the amount of deduction claimed under the scheme.

- Where fictitious amount of loans, creditors, advances, share capital, payable etch are shown in the audited balance sheet but are fictitious in nature such fictitious amount of liabilities can be disclosed under the scheme provided they are not directly linked to acquisition of a particular asset in the balance sheet. However, if there is a direct link between the liability and the asset acquired then that the amount to be declared shall be FMV of the acquired property as on 01/06/2016.

- Declarant can revise the fair market value of immovable property declared in the declaration already filed on account of the amended provisions of the Income Declaration Scheme Rules, 2016 even in a case where such revision may result in downward revision of the declared amount in respect of the immovable property.

These updates are contributed by Direct Tax Team of SBS and Company LLP, Chartered Accountants. For any queries, please reach at caram@sbsandco.com

INDIRECT TAX

INDIRECT TAX UPDATES

CARLSBERG INDIA PVT LTD VS UNION OF INDIA AND ORS: DELHI HIGH COURT 2016-TIOL-1646-HC-DEL-ST:

The manufacture of alcoholic beverage for human consumption on contract basis has to be viewed as service rendered by one party to another (Job Worker) and therefore amenable to service tax. The High court applied the 'Pith and Substance doctrine' as well as 'aspect doctrine' and concludes that Parliament is competent to legislate,with reference to Entry 97 of List I, service tax on such activity.

FACTS:

1. Kool Breweries Limited (for brevity 'KBL') merged with Carlsberg India Pvt. Ltd. (for brevity 'CIPL'), who were into the business of manufacturing and sale of beer under brand name of 'Kingfisher' for UBL. The Petitioner (CIPL/KBL) was responsible for complete value of chain right from procurement of raw material to distribution of beer on behalf of UBL. The Director General of Central Excise Intelligence initiated investigation and issued SCN stating that the assessee (petitioner) is rendering'Business Auxiliary Service 'and thereby claimed service tax with appropriate interest and penalty.

2. The Petitioner challenged the constitutional validity of Section 66B read with section 65B (40) and section 66D of Finance Act,1994 as amended by Finance Act 2015, which levies service tax w.e.f 01.06.2015 on persons who manufacture alcoholic liquor for human consumption on job work basis.

    a. The Petitioner states that Parliament lacks the legislative competence to enact the said amendments since the activity of manufacturing lies exclusively within the State legislative under Entry 51 of List II of Schedule VII of the Constitution.

    b. Also, challenged the section 113 (A)(1) of FA 2009 by which section 65(19) of FA 1994 was amended. Hence the Petitioner claimed that service tax should not be levied in such activity since it is beyond the legislation of Central Government.

HELD:

1. The Honourable High Court opined that service tax is not levied on the manufacture of alcohol but on the service aspect of the contract of manufacturing of alcohol on behalf of the principal manufacturer/brand owner.

2. The Honourable High Court was satisfied that the taxable event is the manufacture and it is amenable to states excise duty. However, when it comes to manufacture for another, in pith and substance, it is a service performed by one for another and cannot therefore fall within the ambit of Entry 51 of List II. Service tax on contract manufacturing of alcoholic beverages for human consumption can be legislated validly by the Parliament with respect to Entry 97 in List I.

3. It was held that activity of manufacture undertaken by one for another is a service and for this reason the definition of 'Business Auxiliary Service' was amended and included the activity of manufacture of alcoholic liquor for human consumption by FA 2009, which is valid. So, the challenge posed by the petitioner on this was struck down.

4. Further, the court negatives the challenge to the validity of section 66B by substituting the relevant clause in section 65B and 66D w.e.f 01.06.2015. Due to this, the manufacture of alcoholic liquor for human consumption on job-work / contract basis is made taxable under service tax.

The Honourable HC knocks down the challenges posed by Petitioner and the petition was dismissed.

FEDERATION OF HOTELS AND RESTAURANTS ASSOCIATION OF INDIA AND ORS VS UNION OF INDIA AND ORS: DELHI HIGH COURT 2016-TIOL-1730-HC-DEL-ST:

ST Provision of short term accommodation in hotels etc. envisaged in FA, 1994 is a taxable event that is entirely covered by the term 'luxuries' in the State List and, therefore, outside the legislative competence of Parliament: High Court

FACTS:

3. The Petitioners challenged the constitutional validity of levy of service tax on service portion on supply of food or any drink in hotel or restaurant, taking stand that after Constitution (Forty Sixth Amendment) Act, 1982 enabling states to levy tax on supply of food or drink as part of service as tax on "supply of sale or purchase of goods", all aspects of transaction of sale of food and beverages would fall under levy of sales tax of State (VAT).

4. They also challenged the constitutional validity of levy of service tax on short term accommodation in hotels, stating that luxury tax is levied by the State on provision of accommodation by hotels, taking power from Entry 62 of List II (State List) and thus, is exclusive matter of state list.

HELD:

1. With respect to levy of service tax on service portion involved in supply of food or beverages in restaurant/hotel, the Honourable High Court opined that the legislative carving out of the service portion of the composite contract of supply of food and drinks has sound constitutional basis, even if this is viewed as Parliament deploying a legal fiction, it is legally permissible and with the machinery provision for the levy and determination of service tax on the service portion clearly being spelt out in the Rules (Rule 2C of ST Valuation Rules 2006) themselves, the High Court upholds the constitutional validity of service tax levy on service involved in food supply.

2. With respect to service tax levy on provision of short term accommodation in hotels, the Honourable High Court observed that Delhi Tax Luxuries Act (for brevity "DTL") providing for levy of luxury tax on provision of the service of accommodation in a hotel etc. is traceable to Entry 62 of List II and the State is therefore competent to levy and collect luxury tax on such taxable event. The High Court opined that since the very same taxable event of providing service by way of accommodation in a hotel etc. is the subject matter of both levies viz., luxury tax under the DTL Act and service tax under the Finance Act, the service tax levy on accommodation service by hotels fails the foremost test of constitutionality of a Union tax. The court also observed absence of any machinery provision/rule for levy and collection of tax on accommodation as compared to levy and collection of service tax on restaurant service. Thus, the court, being satisfied that that the provision of short term accommodation in hotels etc. envisaged in Section 65 (105) (zzzzw) of the FA read with Section 65 (44) of the FA is a taxable event that is entirely covered by the term 'luxuries' in Entry 62 of List II of the Seventh Schedule to the Constitution and, therefore, held out by the High Court, to be outside the legislative competence of Parliament.

These updates are contributed by Indirect Tax Team of SBS and Company LLP, Chartered Accountants. For any queries, please reach at manindar@sbsandco.com

COMPANIES ACT, 2013

RULES, CIRCULARS AND NOTIFICATIONS ISSUED DURING THE MONTH OF AUGUST, 2016

Rules

- **The Companies (Share Capital and Debentures) Fourth Amendment Rules, 2016, Dt:12.08.2016:**

  Vide the above amendment rules, a new sub-rule (11) has been inserted in Rule 18 resulting in non-applicability of provisions of such rule to rupee denominated bonds issued exclusively to overseas investors in terms of RBI Circular/guidelines. Click the following link for the complete rules. **http://www.mca.gov.in/Ministry/pdf/CompaniesFourthAmendmentRules_17082016.pdf**

- **Investor Education and Protection Fund Authority (Appointment of Chairperson and Members, holding of meetings and Provision for offices and officers)Amendment Rules, 2016, Dt:05.09.2016:**

  Vide the above amendment rules, a new Rule 3-A, has been inserted, designating the nature of the Authority as prescribed in Rule-3 of the Principal rules. As per the amendment rules, the Authority under Rule-3, shall be a Body Corporate. Click the following link for the complete rules. **http://mca.gov.in/Ministry/pdf/Rules_06092016_1.pdf**

- **Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016, Dt: 05.09.2016, [effective from 07.09.2016].**

  Vide the above rules, the ministry has come with a set of rules/procedural aspects, relating to Accounting, Audit and Transfer and refund of the Investor Education and Protection Fund. Click the following link for the complete rules. **http://mca.gov.in/Ministry/pdf/Rules_06092016.pdf**

Notifications

- **Designation of Special Court for trial of offences under the Act:**

  Vide above notification, the Ministry has designated certain courts as the Special Courts for some states, to provide speedy trial of offences punishable with imprisonment of two or more years under Companies Act, 2013. Click the following link for the complete notification. **http://www.mca.gov.in/Ministry/pdf/Notification_05092016.pdf**

- **Commencement Notification as to certain provisions of Section 124& 125 of the Companies Act, 2013:**

  The Central Government has notified that the provisions of Section 124 (1) to (4) & (6) and Section 125 (8) to (11), shall come in to effect from 07.09.2016. Click the following link for the complete notification. **http://mca.gov.in/Ministry/pdf/Notification_06092016.pdf**

Circulars

- **General Circular 09/2016, Dt:03/08/2016 - Issuance of Rupee denominated Bonds to overseas investors by Indian Companies:**

  Vide the above circular, MCA has clarified the provisions of Chapter III of the Companies Act, 2013 and Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014 shall not be applicable to issue of rupee denominated bonds by Indian companies, exclusively to persons resident outside India. Click the following link for the Circular.
  http://mca.gov.in/Ministry/pdf/GeneralCircular09_03082016.pdf

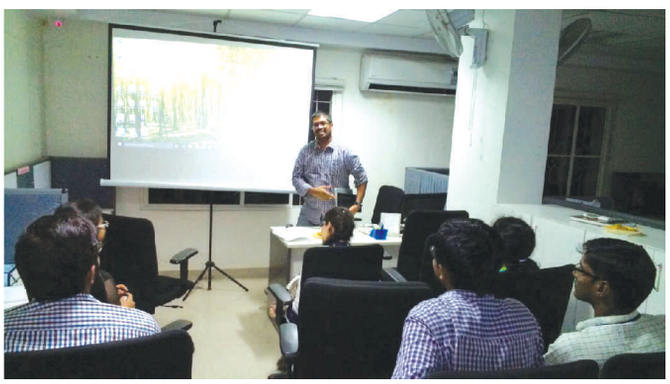
TECHNICAL SESSIONS:

S.No.	Event	Date	Speaker	Venue
1	Special issues in Audit pertaining to Hotel Industry	09/09/2016	CA MHS Bhyrav	SBS - Hyd
2	Evolution of Alternative Investment Funds in India and latest developments	16/09/2016	CA Rajesh	SBS - Hyd
3	Companies Amendment Bill (Part 3)	23/09/2016	CS Phanindra	SBS - Hyd
4	Pivot Tables - Beyond MS Excel	30/09/2016	CA Saran Kumar	SBS - Hyd
5	Understanding 'Supply' in GST	07/10/2016	CA Manindar	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 two days in advance to make appropriate arrangements. The relevant material will be hosted at slideshare shortly after the session. The link to download is *http://www.slideshare.net/Team-SBS*

Companies Amendment Bill 2016 (Part-2) - CS D V K Phanindra



IDT vis-a-vis Statutory Audit - CA Sri Harsha K

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
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