ALL GUJARAT FEDERATION OF TAX CONSULTANTS

2012-13

“TAX GURJARI”

Room No.114,Income Tax Office,1st Floor,Narayan Chambers,Nr.Nehru Bridge,Ashram Road,Ahmedabad-380 009

Chairman's Message

This is the completion of 21st glorious year since our esteemed Federation was born and took the pace amongst the tax professionals. Today we have more than 1100 members of the Federation. The main aim of the Federation is to reach to the grass root and at the mofussil areas to impart best possible knowledge through more and more educative programs.

As a step in achieving this objective of the Federation, a publication – "Tax Gurjari" is sent to the members at least once in a year. This journal would contain articles and materials of experts in their respective fields, which would ultimately be useful to the members in their day to day practice. This year also we have continued the tradition of printing one issue of Tax Gurjari during the year. I am sure the topic covered under this issue, such as stay of demand, deemed dividend, taxability on waiver of term loan, Voluntary Compliance Encouragement Scheme under the Service Tax Act, and Corporate Governance will be of utmost importance for the members in their routine practice.

I am sure this small endeavor of serving the Federation will be appreciated by the members. Wish you a knowledgeable year ahead.

Thank You,

CA. Ajit C Shah
Chairman, Tax Gurjari Committee

President's Message

Dear Members, seniors in the profession and friends,

This would be my last communication to all of you as a President. At the outset I would apologize for sending the Tax Gurjari publication late. I hope you all must be free from the return filing pressure of 31st July.

It was my privilege and honor to be the 20th President of this esteemed Federation. During my this journey of 12 months the support and guidance which I received from my well wishers has helped me in completing my tenure smoothly. I would rather say that, my tenure of 12 months was not enough to dedicatedly serve our profession.

The Federation has object to create awareness among the members of different areas of Gujarat by updating the developments that takes place in direct tax law as well as allied laws which are extremely helpful in day to day practice. Keeping this objective in mind since last 20 year, every president during his tenure would strive to publish at least one publication of Tax Gurjari. Tax Gurjari consist of articles and useful materials written by the members which can be useful to the members in their routine professional dealings. This year also we published articles of seniors and experts like Shri Upendra Bhatt on the subject of "Decisions, Circulars, Instructions with regards to grant of stay, CA. Sunil H Talati on the subject of "Deemed Dividend", CA.K.P.Shah on the subject of "Taxability of waiver of term loan under IT Act", CA. Amish Khandhar on the subject of "Voluntary Compliance Encouragement Scheme under Service Tax Act", CA. Hersh Jani on the subject of "Corporate Governance" and Open House Minutes. I would like to thank all the article writers for accepting my request and sparing this valuable time for the profession. The subject chosen by all the experts are of utmost importance in our day to day practice.

I am also happy to announce that, during my tenure I have conducted 6 half day conventions, 1 mofussil program, 2 National Conferences at Diu and Tirupati, 2 International RRC, 1 Domestic RRC and 1 Budget Meeting.

I have enjoyed my tenure as a President and if fortunate will always be ready to serve the profession through one or the other position.

Thank You,

Shailesh C Desai

President

WAIVER OF TERM LOAN / WORKING CAPITAL LOAN

TAXABILITY UNDER INCOME TAX ACT, 1961

By CA K. P. SHAH
Ahmedabad

With globalization, business in India has expanded manifold. While existing units have expanded their footprint, new entities have entered the booming Indian business arena by availing of various types of finances such as term loans and working capital loans from Public Institutions, Banks, Private parties etc. Due to various reasons such as stiff global competition, new inventions and global recession, among others, the financial position of many units has deteriorated and, as a result, their accounts with the financial institutions or banks have become non – performing assets (NPA). Such units enter into one-time settlement with the banks or financial institutions by paying a stipulated amount against the loan amount, while the balance amount is waived off.

Question arises as regards to the taxability under the Income tax Act, 1961 of the sum waived of Term Loan and Working Capital Loan by the banks, financial institutions or depositors.

The latest decision of Hon'ble Delhi High Court in the case of LOGITRONICS PVT. LTD. V/s. CIT [333 ITR 386 (Delhi)] has given totally a new dimension to this issue and has therefore tempted me to write this article. The facts of the case (I.T.A. No. 1623 of 2010) before the Delhi Court were as under: (on page 389)

"The issue in this case relates to the treatment which is to be given to the extent of amount of loan and interest waived by the financing institutions from where the loan was taken. The appellant is the assessee- company, which engaged in the business of manufacturing of electronic products. It was enjoying loan facility from State Bank of India (SBI). As the appellant could not discharge its liability for specific time, keeping in view the guidelines / directions of SBI, the SBI categorized this loan due to the bank was Rs. 4,76,92,213 and the outstanding interest was Rs. 1,90,42,295. Issue of recovery of loan was referred to Debt Recovery Tribunal in the year 2000. During the pendency of these proceedings, the assessee had settled the matter with the SBI. Pursuant to one-time settlement with the bank, on payment of Rs. 1,85,00,000 against the loan of Rs. 4,76,92,213 (principal amount), the remaining sum of Rs. 1,90,42,295 was waived. In the tax return filed by the assessee, it showed interest waived as income but not the amount of loan waived by SBI, though the amount of interest written off, i.e., Rs. 1,90,42,295 was credited to the profit and loss account and was offered for taxation. However, relying upon the decision of this court in the case of CIT V/s. Tosha International Ltd. [2011] 331 ITR 440 (Delhi) [2009] 176 Taxman 187, the principal amount written off i.e. Rs. 2,91,42,213 that was directly taken to the balance – sheet under the head capital reserve, was not offered for taxation".

The Assessing Officer, on the following ground, held that even the waiver of the principal amount of loan was also taxable:

"Income was taxable under the head Profit and Gains of Business or Profession because the loan was taken for the purpose of business and one-time settlement was an integral part of the business."

In the first appeal, the commissioner of Income Tax (Appeals) deleted the addition holding that the provisions of sections 2(24), 28(i), 28(iv) and 41(1) of the Act were not applicable and as such the Assessing Officer was not justified in making addition being the waiver of the principal amount of loan.

On second appeal filed by the Revenue, the Income Tax Appellant Tribunal reversed the order of the CIT (Appeals).

Against the order of the Tribunal, the following substantial questions of law were before the Hon'ble High Court for consideration :

(1) Whether the Tribunal was right in law in holding that taxability of waiver of loan would be governed by the purpose for which the loan was taken, as much as, though waiver of loan taken / utilized for acquiring capital asset does not constitute income, however, waiver of loan taken for the purpose of business / trading activity gives rise to income taxable under the Act ?

(2) Whether waiver of loan, a subsequent event has the effect of changing the nature and character of loan, a capital receipt into a trading receipt and therefore, the ratio of the judgment of the Hon'ble Supreme Court in CIT V/s. T. V. Sundaram Iyengar and Sons Ltd. [1996] 222 ITR 344, wherein, unclaimed deposits received in the course of trading transaction were held to be taxable is applicable to waiver of loan ?"

Hon'ble High Court considered the findings brought on record by the Tribunal that the assessee had obtained the loan or credit facility by way of hypothecation of finished goods, semi-finished goods, raw material, book-debts, receivable claims, securities and rights by way of first charge, which indicated that the assessee had obtained the loan facility for its business activity or trading operations.

On page 402, vide para 23 Hon'ble High Court has laid down as under :
"In the context of waiver of loan amount, what follows from the reading of the aforesaid judgment is that the answer would depend upon the purpose for which said loan was taken. If the loan was taken for acquiring the capital asset, waiver thereof would not amount to any income eligible to tax. On the other hand, if this loan was for trading purpose and was treated as such from the very beginning in the books of account, as per T.V. Sundaram Iyengar and Sons Ltd. [1996] 222 ITR 344 (SC), the waiver thereof may result in the income more so when it was transferred to the profit and loss account."

With due respect to the Hon'ble High Court, we may now proceed to analyse and understand whether the view taken by the Hon'ble High Court is plausible or not with respect to the prevalent legal precedencies and the provisions of the Income Tax Act, 1961 and therefore let us analyse the statutory provisions laid down under section 2(24), 28(iv), and 41(1) of the Act.

(A) APPLICABILITY OF SECTION 28(i)

Section 28 The following income shall be chargeable to income tax under the head "Profits and gains of business or profession",-

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year;

(a) As per section 28(i) only the profits and gains arising from carrying on the business by the assessee is chargeable to tax. In Universal Radiatiors v/s CIT (201 ITR 800), the Hon'ble Supreme Court observed that for being taxable, the income should have accrued out of the business carried on by the assessee. Hon'ble Supreme Court has laid down that the word "from" according to dictionary means "out of". The income thus should have accrued out of the business carried on by the assessee. An income directly or ancillary to the business may be an income from business, but any income to an assessee carrying on business does not become an income from business unless the necessary relationship between the two is established.

(b) The observation of Hon'ble Madras High Court in the case of ISKRAEMECO Regent Ltd. v/s CIT, 331 ITR 317 (Mad.), as regards to the nature of bank loan in the business are worth nothing. Hon'ble High Court has laid down as under: (on page 335, vide para 24)

"It is a well established principle of law that, every deposit of money would not constitute a trading receipt. Broadly speaking even though a receipt may be in connection with the business, it cannot be said that every such receipt is a trading receipt. Therefore, the amount referable to the loans obtained by the assessee towards the purchase of its capital asset would not constitute a trading receipt. The said issue has been fortified by the judgment of this court in CIT v/s A.V.M. Ltd. [1984] 146 ITR 355. "

The Hon'ble High Court has further held as under: (on page 334, vide para 22)

"In the present case on hand, admittedly the assessee was not trading in money transactions. A grant of loan by a bank cannot be termed as a trading transaction and it cannot also be construed in the course of business. Indisputably, the assessee obtained the loan for the purpose of investing in its capital assets. A part of this loan amount alongwith this interest was waived by way of an agreement between the parties. Therefore, the facts involved in the present case are totally different in the facts involved in CIT v/s T.V. Sundaram Iyengar and Sons Ltd. [1996] 222 ITR 344 (SC). In the said case, admittedly there was a trading transaction whereas, in the present case it is not so. What has been done in the present case is a mere waiver of loan. It is only a mere waiver which has been effected by the bank in favour of the assessee. There is no change of character with regard to the original receipt which was capital in nature into that of a trading transaction. It is further seen that there is a marked difference between a loan and a security deposit." (emphasis supplied)

In the above referred case, the High Court was concerned with the waiver of term loan utilized for purchase of capital assets. In my opinion, what applies to term loan equally applies to the working capital loan also. Ultimately term loan and working capital loan both are on capital account. As per the accounting principles also loan is always considered as a capital receipt and the waiver of the same would also be on capital account, hence, the character of the loan remains the same at the time of receipt and at the time of the waiver of loan.

(c) As far as waiver of Term Loan is concerned the High Court as mentioned below unanimously agreed that waiver of term loan utilised for the purchase of capital asset is not chargeable to tax u/s 28(i).

(i) Iskraemeco Regent Ltd. v CIT 331 ITR 317 (Mad.)
(ii) Mahindra & Mahindra Ltd. v CIT 261 ITR 501 (Bom.)
(iii) Logitronics Pvt. Ltd. v CIT 333 ITR 386 (Delhi)

However Delhi High Court in the case of Logitronics Pvt. Ltd. (supra) and Bombay High Court in the case of Solid Containers Ltd. v Deputy CIT 308 ITR 417, by applying the decision of CIT v/s T.V. Sunaram Iyengar and Sons Ltd. 222 ITR 344 (SC), held that in the case of Bank loan used as working capital for trading purpose and waived by the bank; the loan waived which has been transferred to the profit and loss account shall be assessed as business income.

Both the above referred High courts have decided on the basis of the purpose for which the bank loan is utilised. The court held that if the loan was utilised for acquiring capital asset, waiver thereof would not amount to any income exigible to tax. However, if the loan was

utilized for trading purpose, relying on T.V. Sundaram's case (supra), the waiver thereof shall be charged to tax as trading receipt. In my opinion, the purpose for which the loan is obtained is irrelevant consideration for deciding the character of the receipt either as capital or revenue.(60 ITR 52)(SC).

(d) For ages the principle that has been well settled in this regard is that the quality and nature of a receipt for income-tax purposes is fixed once and for all when the subject receipt is received and no subsequent operation could change the nature of the receipt. It means that the taxability of a receipt is fixed with reference to its character at the moment it was received and merely because the recipient subsequently treats the receipt as his own that does not become income character. Thus, if a receipt is of capital nature it does not become income merely because subsequently the receipt is treated as his own money by the recipient due to various reasons. The mother decision for this theory has an early English decision in Morley (Inspector of Taxes) v. Tattersall (1939) 7 ITR 315 (CA), which has been followed in India also by the courts and the Tribunal in numerous cases in a variety of contexts, more prominently in the context of forfeiture of loans, forfeiture of security deposits from customers, etc. For example, one may see CIT v/s Motor & General Finance Ltd. (1974) 94 ITR 582 (Delhi) and CIT v/s A.V.M. Ltd. (1984) 146 ITR 355 (Mad.)

However, an exception to the principal was carved out by the Supreme Court in the decision of CIT v/s T.V. Sundaram Iyengar & Sons Ltd. (222 ITR 344).On the basis of this decision one is required to find out whether waiver of working capital loan is an event which would convert the capital receipt into income taxable under the Act ?

Now, the above decision of the Supreme Court does not lay down a universal principle that in every case a capital receipt when appropriated by an assessee to himself necessarily becomes income; it would again depend on the facts and circumstances of each case. The point to be noted is that this Supreme Court decision dealt with a situation where the amounts of deposits were received from the customers during the course of trading transactions and they were adjusted against the sale price of goods receivable from the customers; and, therefore, this decision is to be understood and confined in its application in the light of the specific facts obtaining in this case. This is established and illustrated by a later decision of the Supreme Court in Travancore Rubber & Tea Company Ltd. v/s CIT (2000) 243 ITR 158. In this case, the assessee was in the business of growing rubber and tea. It entered into an agreement with a purchaser to sell its old and unyielding rubber trees and received a certain amount as earnest money and advance. But, subsequently, the purchaser failed to pay up the balance money. Thereupon, the assessee cancelled the agreement and forfeited the amount of earnest money/advance paid by the purchaser. The question was whether the amount so forfeited by the assessee was its income liable to tax. The assessee contended that the quality and nature of receipt for income tax purpose were fixed once and for all when the subject receipt was received and that no subsequent operation could change the nature of the receipt. The assessee had relied on the decision of the Morley (Inspector of Taxes) v/s Tattersall (1939) 7 ITR 315 (CA). As against this, the Department had relied on the Supreme Court decision of Karam Chand Thappar (222 ITR 212). However, the Supreme Court held that the amount of advance money paid by the purchaser was a capital receipt in the hands of the assessee since the assessee was not carrying on the business of selling trees which constituted capital assets of the assessee, and that the amount forfeited related directly to capital assets of the assessee. The Supreme Court categorically observed that the cancellation of the sale of capital assets would not be such a subsequent event as to change the nature of the receipt of the forfeited amount. The decision of the Supreme Court (243 ITR 158) is followed in number of

decisions where the amount received is not during the course of business but in the capital filed. For example, Deputy CIT v/s Lotus Finance and Investment (P.) Ltd. (2004) 82 TTJ (Asr) 559.

On the basis of the above referred analysis, it can be argued that waiver of working capital loan cannot be termed as a trading transaction and it cannot also be construed to be flowing out the income (revenue) stream of transactions during the course of business. Hence, the waiver of working capital loan by bank cannot be taxed u/s 28(i) of the Income Tax Act, 1961.

One may also rely on the following decisions to strengthen the argument that waiver of working capital loan is not a trading receipt :

(i) Hon'ble Tribunal in the case of Comfund Financial Services (I) Ltd. v/s Dy. CIT (67 ITD 304) (Bom.), has held that loan transaction between the assessee and bank is on capital account and remission of loan by bank could not be considered to constitute a revenue income in the hands of the assessee. The loans from credits stand completely on a different footing from the transaction in which the assessee indulged by utilizing such loan.

(ii) Hon'ble Supreme Court in the case of CIT v/s Kerala Estate Mooriad Chalapuram (166 ITR 155) has held, " what was returned to the assessee has nothing to do with the activities of the assessee, it does not arise from business nor does it arise from agricultural operation when the assessee is an agriculturist."

(iii) The company had issued NCDs for raising capital for setting up of cement business and the amounts received were initially shown as loan liability. NCDs were forfeited for non-payment of call money. Hon'ble Tribunal held that since the NCDs were issued in order to borrow the funds to raise the capital, the amount received is lien thereof has assumed the character of capital receipt if at all not treated to be a loan liability, is as much as issuance of NCDs was not a business of the assessee. [Prism Cement Ltd. v/s JCIT 103 TTJ63 (Mum.)].

(iv) As per the facts of the case before Hon'ble Tribunal in the case of Comfund Financial Services (I) Ltd. v/s Dy. CIT 37 ITD 304 (Bom.) the assessee was dealing in shares and securities making payment of shares out of its overdraft account. The assessee had incurred heavy losses hence, the bank loan was waived by the bank. The Tribunal held that the loan transaction between the assessee and the bank were on the capital account and the remission of loan by the bank could not be considered to constitute a revenue income in the hands of the assessee.

(v) The fact that there is a difference between an amount received in the course of a trading transaction and other deposit or loan is evident from the decision of the Apex Court in the case of K.M.S. Lakshmanier & Sons V/s CIT 23 ITR 202(SC), where trade advances were not treated as loans, whereas security deposits were treated as loans.

(vi) The company had received a loan under order of BIFR as a measure of restructuring its business. The loan was renounced by the lender and the amount was transferred to profit and loss account. Hon'ble Tribunal in the case of APR Ltd. v/s Dy. CIT 87 ITD 618 (Hyd.) held that the loan does not lose its capital nature even where it is renounced by the lender and becomes the money of the assessee. It was further held that the amount received by the company is a capital receipt and does not become chargeable revenue receipt by such fact of transfer to profit and loss account. The Hon'ble Tribunal had relied on the decision of Apex Court K.M.S. Lakshmanier & Sons v/s CIT (supra). [Also refer: Helios Food Improvers (P) Ltd. v/s Dy. CIT, 14 SOT 546 (Mum.) & Smartalk (P) Ltd. v ITO, 122 TTJ 782 (Mum.)]

(vii) As regards to forfeitures of shares held by the shareholder for non payment of calls, the Lahore High Court categorically held that such sum was neither a revenue receipt nor profit on the working of the company but in the nature of a capital receipt and not assessable to income tax at all. (Multan Electric Supply Company Ltd., In re (1945) 13 ITR 457)

(viii) Hon'ble Tribunal in the case of Deepak Fertlisers and Petrochemicals Corporation Ltd. v/s Deputy CIT (2008) 304 ITR (AT) 167 (Mum.) has held that the amount of debenture application money forfeited by the company on non payment of call money by the debentureholders constituted a capital receipt and could not be taxed.

(B) APPLICABILITY OF SECTION 28(iv)

Section 28(iv)

"The value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession."

It provides that the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession, is changeable as part of the profits under the head of "Profits and Gains of business or profession" and it is deemed to be income under sec. 2(24).

Hon'ble Gujarat High Court in the case of CIT. V/s Alchemic Pvt. Ltd. (130 ITR 168) has held that amount received by way of cash or money cannot be brought to tax under sec. 28(iv) as any benefit or perquisite, as the section applies only to non-monetary benefit or perquisite. It is submitted that the judgment of Gujarat High Court has been approved by the Hon'ble Apex Court in CIT V/s Mafatlal Gangabhai & Co. Pvt. Ltd. (219 ITR 644)

As regards to the waiver of the principal amount of loan, the Division Bench of the Bombay High Court in the case of Mahindra & Mahindra Ltd. V/s CIT (261 ITR 501) has held that section 28(iv) does not apply to benefits in cash or money. Hence, the waiver of loan amount would not constitute business income u/s 28(iv).

The decision of the Alchemic Pvt. Ltd. has been followed in the case of Dy. CIT v/s Garden Silk Mills Ltd. [320 ITR 720 (Guj.)]

As regards the waiver of Bank loan, Hon'ble Madras High Court in the case of Iskraemeco Regent Ltd. V/s CIT (331 ITR 386) and Hon'ble Delhi Court in the case of Logitronics Pvt. Ltd. v/s CIT (333 ITR 386) has held that the same is not taxable u/s 28(iv).

(C) APPLICABILITY OF SECTION 41(1)

Section 41(1)

(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,—

(a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

(b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

[Explanation 1] ----------
[Explanation 2] ----------

(i) Section 41(1) enacts adjustment provisions whereby the Revenue taken back what it has already allowed, " Section 41(1) creates a fiction. What is not income in the ordinary sense of the term is deemed to be the income under this provision." CIT V/s Sahney Steel Pvt. Ltd. [152 ITR 39 (AP)]

(ii) "From the very opening part of the provision, it is apparent that it applies to a case where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequent thereto during any previous year, if the assessee obtains any amount in respect of such loss or expenditure or some benefit in respects of such trading liability by way of remission or cessation thereof, the same is to be deemed to be profits and gains of business or profession and accordingly chargeable to income - tax as the income of that previous year. The sine qua non of invoking section 41 is that in any earlier assessment year the allowance or deduction ought to have been made in computing the income chargeable under the tax. It obviously concerns the computation of taxable income made in accordance with the provisions of the Income-tax Act in the assessment and not merely on the basis of treatment of such amount in the books of account"

[CIT V Bhawan Va Path Nirman(Bohra) & Co. (No.2)258 ITR 444 (Raj)]

[C.I.T. V. Chetan Chemicals Pvt.Ltd. 188 CTR 572 (Guj)]

(iii) Conditions precedent of for applicability of sub-section (1) of section 41 are:-
(a) an allowance or deduction had been made, in the computation of profits and gains of a business or profession in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and

(b) subsequently during any previous year the assessee had obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof.

(iv) By keeping in mind the above referred statutory provisions of section 41(1), let us decide whether waiver of Term loan or Working Capital loan by the bank or financial institution or waiver of private loans by the private parties is chargeable to tax u/s 41(1)?

All the courts have unanimously decided that whether it is term loan or working capital or private deposits the amount waived is not taxable u/s 41(1).

Madras High Court in the case of Iskraemeco Regent Ltd. v/s CIT (331 ITR 316) has held that sec. 41(1) is inapplicable and the following reasons were given in support of it (page 338):

"Similarly, in so far as the applicability of section 41(1)(a) of the Income tax Act is concerned, the same also cannot have any application inasmuch as the said provision would be applicable only to a trading liability. Accordingly, it was held that a loan received for the purpose of capital asset would not constitute a trading liability and hence section 41(1) has no application. The said issue has also been considered in Mahindra & Mahindra Ltd. v/s CIT [2003] 261 ITR 501(Bom), wherein it has been held as follows (page 510):

"Alternatively, it was argued on behalf of the Department that in this case waiver constituted remission of trading liability and, therefore, section 41(1) stood attracted. We do not find any merit in this argument. Firstly, in the present case, the prerequisite of section 41(1) is not applicable. In order to apply section 41(1), an assessee should have obtained a deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. In this case, the assessee has not obtained such allowance or deduction in respect of expenditure or trading liability. It is not disputed that the assessee has paid interest at 6% over a period of ten years to KJC Rs. 57,74,064. In respect of that interest, the assessee never got deduction u/s 36(1)(iii) or section 37. In the circumstances, section 41(1) of the Act was not applicable. Secondly, even assuming for the sake of argument that the assessee had got deduction on allowance even then section 41(1) was not applicable because such deduction was not in respect of loss, expenditure or trading liability. In order to get over this alternative argument, it was argued by the Department that the loan was used to buy toolings on which the assessee got depreciation allowance of Rs. 27,29,858 and therefore, the amount of Rs. 27,29,585 should be set off against Rs. 57,74,064. We do not find any merit in this argument. The Department's case is that the assessee got remission of Rs. 57,74,064. Remission for depreciation is not in issue before us. The only argument of the Department throughout bas been that the waiver constituted remission of Rs. 57,74,064. In the circumstances, we cannot direct set off of Rs. 27,29,585 against Rs. 57,74,064. It is important to bear in mind that, before section 41(1) came to be enacted, various judgments as reported in Mohsin Rehman Penkar v/s CIT (1948) 16 ITR 183 (Bom) and Orient Corporation v/s CIT (1950) 18 ITR 28 (Bom) had laid down that remission was not income and in order to get over those judgments section 41(1) came to be enacted. In the case of CIT v/s Phoolchand Jiwan Ram (1981) 131 ITR 37 (Delhi), the assessee-firm had purchased goods. They had also obtained loans from a party, accounts were settled and the balance was credited to the partner's account. It was held by the Delhi High Court that the amount referable to loans was not a trading liability. That, only amounts allowed as deduction in earlier years could be treated as trading liability. In other words, unless the amounts have been allowed as deduction in earlier years they cannot be treated as trading liability. In the circumstances, section 41(1) was not applicable. This case applies to the facts of our case also. In the case of CIT v/s A.V.M. Ltd. (1948) 146 ITR 355 (Mad), it has been held by the Madras High Court that every deposit money does not constitute trading receipt. That, although such a receipt may be in connection with business, it could not be dealt with by the assessee as a receipt of its trade.

Therefore, the amounts referable to loans received for purchase of capital assets would not constitute a trading liability and accordingly section 41(1) was not attracted."

Hon'ble Madras High Court has also relied on the decision of the Division Bench of the honorable Gujarat High Court in CIT V/s Chetan Chemicals (P.) Ltd. 267 ITR 770 which has been discussed in detail vide para 31 (on page 340 to 342).

(D) DISALLOWANCE OF DEPRECIATION U/S 41(1)

Disallowance of depreciation u/s 41(1), with reference to capital assets against which bank has waived Term loan :

(i) In the case of Mahindra & Mahindra Ltd. (Supra); with reference to the waiver of principal amount of loan the Department had taken alternative argument that the loan was used to buy capital asset on which assessee had got depreciation allowance of Rs. 27,29,585 and, therefore, the depreciation allowance shall be taxed u/s 41(1). Hon'ble High Court held that we do not find any merit in this argument. The Department's case is that the assessee got remission of depreciation allowance. However, remission for depreciation is not in issue before us. In short, the High court did not consider this issue and no decision was given on the same.

(ii) In the case of Nectar Beverages Pvt. Ltd. v/s Dy. CIT [267 ITR 385 (Bom.)] held that "expenditure" in section 41(1) includes depreciation. Hence, the assets in respect of which depreciation had been granted and on sale of the asset as scrap, amount received shall be taxable u/s 41(1).

However, Hon'ble Supreme Court has reversed the decision of the Bombay High Court [Nectar Beverage Pvt. Ltd. v Dy. CIT (314 ITR 314)].

Hon'ble Supreme Court has held that prior to April 1,1988, both sub-section(1) and sub- section(2) of section 41existed in the statue book. Section 41(2) specifically brought to tax the balancing charge as a deemed income under the Act. The necessity to keep section 41(2) as provision in addition to section 41(1) arose from the fact that in its very nature depreciation is neither a loss, nor an expenditure, nor a trading liability referred to in section 41(1).

On the basis of the above referred decision of the Supreme Court, one can easily argue that there cannot be disallowance of depreciation u/s 41(1), with reference to capital assets against which there is a waiver of loan by banks, financial institutions or private parties.

From the discussion in the preceding paras, it can be submitted that waiver of working capital loan cannot be taxed u/s 28(i), 28(iv) and 41(1) of the Income Tax Act, 1961. Before concluding let us also analyse the applicability of sec. 2(24) to the facts of the case of Logistronics Pvt. Ltd. (supra):

Applicability of Section 2(24) :

The word income is formidably wide and vague in its scope. It is word of elastic import. Unless otherwise the context requires, the word "Income" should be given its ordinary natural meaning. The apex court held so in the case of CIT v/s G.R. Kartikeyan (reported in 201 ITR 866). The court also held that a receipt not falling within the ambit of any specific clause may yet be income. In such cases though the various conditions like capital vs. revenue etc. still needs to be passed through to call a particular receipt as income. Another aspect of the definition of "income" is that the definition incorporated some of the specific incomes within the ambit of the purview of the term "income". Such incomes are to be understood as

incomes because of the deeming fictions prescribed by the law. In other words, even if such deeming receipt may not fall within the ambit of any of the clauses mentioned in section 2(24), or may not be of the nature of income in general, it may still be income. As far as the case of waiver of working capital loan is concerned, the nature of loan as a capital receipt remains intact even after the waiver of the loan and it does not partakes the nature of income. And if it is neither in the nature of income in general nor fictionally provided in the act to be income then in that case it would be outside the scope of charging section 4 of the I.T. Act, 1961. Wherever legislature wanted to treat any item which is not in the nature of income, the same is artificially treated as income by adding to the definition of section 2(24) of the I.T. Act, 1961. e.g. sec. 2(24)(vi) provides that income includes " any capital gains chargeable under section 45",and, thus, it is clear that a capital receipt simplicitor cannot be taken as income. [Kushal K. Bangia v/s ITO (2012) 18 taxmann.com 31 (Mum. Tribunal)]

From the discussion in the above para, it can be submitted that waiver of working capital loan may not be treated as income as per sec. 2(24) of the Act and therefore in view thereof the issue partakes an important dimension in the wholesome issue in this regard.

(Source : Chartered Accountant Journal, The Institute of Chartered Accountants of India)

TABLE OF CONGRATULATION TO BE DELETED FROM HERE AND TO BE INCLUDED IN TAX GURJARI

1. Heartiest Congratulations to Shri Praful C Shah, on being nominated as a member of "Regional Direct Taxes Advisory Committee, Ahmedabad" by Government of India.
2. Congratulation to the newly elected members of the Ahmedabad Branch of WIRC of ICAI for the term 2013-16 who are also member of our Federation.
   1. CA. Purshottam Khandelwal - Chairman of the Ahmedabad Branch of WIRC
   2. CA. Hersh S Jani - Managing Committee Member
   3. CA. Satyendra Jha - Managing Committee Member
   4. CA. Hiren D Shah - Managing Committee Member

VOLUNTARY COMPLIANCE ENCOURAGEMENT SCHEME, 2013 (VCES-2013)

CA. AMISH KHANDHAR

Sr. No.	Particulars	Criteria
1	Effective Date	10-05-2013
2	Period covered under VCES	01-10-2007 to 31-12-2012
3	Eligibility	Defaulters of Service Tax who have not made payment of Service Tax liability for the above period
4	Disqualification from VCES	- Show Cause Notice or Order issued before 1st March, 2013. - Inquiry/Investigation/Audit is initiated and it is pending as on 1st March, 2013. - Filed Service Tax Returns but not paid tax as disclosed in the return. - Notice or order is issued on any issue for any period shall not be eligible for making declaration on that issue for any subsequent period.
5	How can an Inquiry / Audit / Investigation is said to be pending as on 01-03-2013	- If any search has been conducted u/s 82 - If summons has been issued u/s 14 of Central Excise Act - If any Accounts/Documents/other Details have been called for by the Department - An Audit has already been initiated
6	Immunity	- Immunity from Penalty, Interest and any other proceeding under the Act. - Any matter relating to the period covered by the declaration will not be opened subsequently by any authority or court. - No Show Cause Notice (SCN) can be issued after expiry of one year from the date of Declaration.
7	Time Limit for filing declaration	31-12-2013

8	Declaration to be filed with whom	To be filed with Assistant Commissioner (AC) or any officer above the rank of AC
10	How to discharge Service Tax Liability	- Minimum 50% of declared Tax dues on or before 31-12-2013 - Remaining 50% of declared tax dues on or before 30-06-2014. - If tax dues are not paid as above, then same can be paid till 31-12-2014 with interest (to be calculated from 01-07-2014) - Service Tax Dues declared cannot be discharged by utilizing CENVAT Credit Balance
11	Procedure	- If registration is not obtained, then Service Tax Registration number is to be obtained. - Make declaration in Form VCES-1 on or before 31-12-2013. - Department to acknowledge receipt of application in Form VCES-2 within 7 days. - Payment to be done as per point no. 8 above - On submission of payment of Tax, department shall issue acknowledgement in Form VCES-3 within 7 days.
12	Minimum Amount of Declaration	Not specified, hence any amount can be declared
13	Refusal from accepting Declaration	Commissioner can do so if he feels that the declaration is substantially false. Moreover, Commissioner can issue SCN for the recovery of Service Tax Dues.
14	Non-payment of tax dues after declaration	The department will recover the tax dues as per provisions of Section 87 of the Finance Act, 1994. No show cause notice is required to be issued thereafter.
15	Refund of Service Tax paid under the scheme	Any amount paid under this scheme will not be refundable under any circumstances

IS HIGH PITCHED ASSESSMENT MADE IN THE CASE OF YOUR CLIENT ? IS HUGE DEMAND RAISED ON THE BASIS OF HIGH PITCHED ASSESSMENT ? SOME IMPORTANT DECISIONS, CIRCULARS, INSTRUCTIONS WITH REGARD TO GRANT OF STAY

UPENDRA J BHATT
Advocate

1. Preamble

It is our practical experience in our day to day practice that high pitched assessments are made in many cases and huge demands are raised against the assesses. It is also experienced that on the basis of such high pitched assessments, the Assessing officers/Additional CITs/CITs take recourse for collection of such arbitrary demands.

Stay applications by assesses are rejected without passing a speaking order. Stays are granted if 50% of such disputed demands are paid and for the remaining 50% demand, installments are granted.

Due to policy of CBDT of fixing hearing of high demand cases, certain cases are not heard and thus at one end there is pressure of recovery from the I T Authorities and on other hand the appeals are not heard by CIT(A). This puts the assesses into helpless position.

CIT(A) are working under CBDT. Thus they cannot function independently. CBDT fixes certain quota for disposal of cases and issuing guidelines for taking certain cases of high demands on priority, on account of this, justice is delayed.

2. Section 220 (6)

As per section 220(6), even the powers are given to the assessing officers not to treat the assessee in default for not making payment of disputed tax even though the time for payment of tax has expired till the appeals are disposed of. As per this section, the assessing officer may impose such conditions as he may think fit looking to the facts and circumstances of the case.

3. Important instructions/circulars. Difference between Instruction and circulars

a. Instruction no.96 / F.No.116/69-ITCC dated 21/08/69

This instruction is very helpful to assesses. It has been considered in number of cases by various courts.

Instruction : One of the points that came up for consideration at the 8th meeting of the Informal Consultative Committee was that income tax assessments were arbitrarily pitched at high figures and that the collection of disputed demands as a result thereof was also not stayed in spite of the specific provision in the matter in section 220 (6) of the Income Tax Act, 1961.

The then Deputy Prime Minister has observed as under :
"…Where the income determined on assessment was substantially higher than the returned income, say, **twice the latter amount or more, the collection of the tax in dispute should be held in abeyance** till the decision on the appeals, provided there were no lapse on the part of the assessee."

The Board desire that the above observations may be brought to the notice of all the Income Tax Officers working under you and the powers of stay of recovery in such cases up to the stage of first

appeal may be exercised by the Inspecting Assistant Commissioner / Commissioner of Income Tax.

Instruction no. 96 is clear in such cases, where the assessed income is more than double of the returned income, the assessee should not be treated as assessee in default for not making payment of such disputed tax.

b. Instruction no.977 dated 13/07/96 (XXII/I/54)

As per this instruction, it was directed not to treat the assessee in default till the first appeal was decided if there were no lapses on the part of the assessee in the appellate proceedings.

c. Instruction no.1914 dated 02/12/93

This instruction is relied by the I T department, as according to the view of department, it is in suppression of all previous instructions.

In this instruction it was directed that in the following cases, the demand should not be recovered when

i. The demand is yet not due
ii. The demand is stayed by any Court, Tribunal, Settlement commission
iii. The demand which is referred to CBDT for write off
iv. The certificates are issued to TRO's in such cases TRO's will recover the demand
v. Stay application to be disposed of within 2 weeks and the assesses to be informed
vi. When the stay application is filed to Deputy CIT/CIT/Chief Commissioner, they should dispose of such stay application within maximum 2 weeks under intimation to the assessee and assessing officer.
vii. Generally the stay applications are to be disposed of by assessing officer. Only in exceptional cases, higher authorities should interfere when they feel that the assessment order is not properly framed and the assessee will face problems on account of such orders.

d. Specific directions were given in this instruction as under

i. If there is no reasonable cause to grant stay to the assessee, simply because an appeal is filed, the stay should not be granted
ii. If the issue on which addition is made by the assessing officer is decided in favour of the assessee by appellate authority, in such case, stay should be granted.
iii. The issue involved in the case of the assessee, if there are different judgments of different courts but not from the jurisdictional High court under which the assessee falls and on the basis of some judgment the addition is made in the case of the assessee, the stay should be granted to the assessee
iv. If the issue involved in the case of the assessee is decided in favour of the assessee by jurisdictional High court but the same is not accepted by the I T department, in such case stay should be granted.
v. The assessing officer can impose certain conditions at the time of granting stay like taking security from the assessee, giving installments, taking assurance from the assessee that he will co-operate in early disposal of appeal, to adjust future refunds against outstanding demand etc.
vi. Maximum 18 installments to be granted to the assessee for recovery of disputed tax
viii. Stay application should be decided by passing a speaking order
ix. When the stay is granted by ITAT, such matters should be heard out of turn and for that, departmental representative to make necessary efforts
x. On receipt of appeal order, appeal effect to be given within 2 weeks

e. Instruction no.96 V/s. Instruction no.1914

On 01/12/2009 CBDT issued letter bearing no. 404/10/2009-ITCC to clear the controversy regarding the above two instructions.

In this letter, instructions issued for grant of stay i.e.
Instruction no.635 dated 12/11/1973
Instruction no.1067 dated 21/06/1977
Instruction no.1158 dated 27/03/1978
Instruction no.1222 dated 04/10/1979
Instruction no.1362 dated 15/10/1980
Instruction no.1914 dated 02/12/1993
were discussed and further it was stated in this instruction that instruction no.1914 was issued in suppression of all the earlier instructions and thus instruction no.96 was no more in existence.

- This instruction has no validity. Instruction no.96 was issued in relation to assurance given by Deputy Prime Minister from the floor of the parliament in respect of question asked by the member of parliament in relation to high pitched assessments. Thus the assurance from the parliament has more weightage than the letter of Board. Even different high courts have held in favour of the assesses after considering the above two instructions which are discussed in this paper.

f. Circulars issued by CBDT to grant stay

i. Circular no.530 dated 06/03/89 reported in 176 ITR 240 Statute
The assessing officers were directed by this circular that when the appeal is filed by the assessee against the assessment order, stay of disputed tax should be granted by the assessing officer looking to the facts of the case and by imposing certain conditions till the appeal is decided. It was directed in this circular to grant stay in the following circumstances.
- The issue on which addition is made, there are different views by different high courts or
- The issue is decided in favour of the assessee by jurisdictional high court but the same is not accepted by the department or
- The issue on which addition is made, the same is decided in favour of the assessee by appellate authority or court

ii. Circular no.589 dated 16/01/91 reported in 187 ITR 79 Statute
In this circular it was directed to consider the above circular as well as it was further directed to grant stay to the assessee by passing a speaking order. At the time of granting stay, whether the assessee is capable enough to make the payment of disputed tax is not to be taken into consideration.

4. Important land mark decisions of Supreme Courts

(1) 71 ITR 815 SC Rel. Page 819
INCOME TAX OFFICER vs. M.K. MOHAMMED KUNHI

In this case it was held that, ITAT has identical powers of an appellate court under civil procedure code in dealing with the appeals. It was further held that ITAT has power to grant stay as incidental or ancillary to its appellate jurisdiction. It was further held that power of stay not to be exercised in a routine way. It can be exercised only when a strong prima facie case is made out. Stay shall be granted in deserving and appropriate cases so that the entire purpose of the appeal is not frustrated if recovery proceedings are allowed to be continued.

(2) 154 ITR 172 SC

ASSISTANT COLLECTOR OF CENTRAL EXCISE vs. DUNLOP INDIA LTD. & ORS.

It was held in this case that stay by high court should be granted in exceptional circumstances. While granting stay, it is to be seen that no prejudice is caused to the tax payer in case they ultimately succeed at the conclusion of the proceedings. On the other hand, the court cannot be unmindful of the need to protect the authority levy the tax for, at that stage, the court has to proceed on hypothesis that the challenge may or may not succeed.

In this judgment there was observation that, "Governments are not run on mere bank guarantees. Some courts act as if furnishing a bank guarantee would meet the end of justice. Liquid cash is necessary for running of Government."

This was simply a passing remark by the court but while rejecting the stay application, the above para is referred by I T Authorities and without passing a speaking order, the stays are rejected. This observation is not part of judgment.

(3) 234 ITR 188 S.C.

TRO v/s. Gangadhar Vishvanath Ranade

This judgment has been relied in the latest decision in the case of Smt.Darshana Agarwal v/s. TRO reported in 302 ITR, 82 (HP). "Recovery of Tax-Attachment and sale of property-Scope of Section 222-Power of TRO limited to property in the name of defaulter-Property in name of wife of defaulter-Attachment of property on ground that it actually belonged to defaulter-Not valid-I.T. Act, section 222."

(4) 247 ITR 165 S.C.

Dena Bank V/s. Bhikhabhai Prabhudas Parekh And Co. and Others

Recovery of tax. Priority. Sales tax law providing for recovery of arrears of sales tax, penalty or other amount in the same manner as arrears of land revenue. Effect. State acquires precedence over secured creditors.

(5) 301 ITR 337 S.C.

Janatha Textiles Vs Tax Recovery Officer

Recovery of tax. Sale by auction of property of defaulter. Independent Bonafide purchase in auction. Right to be protected by court.

5. Important land mark decisions of High Courts

I Reasons to be given for rejection of stay / speaking order/ Opportunity of hearing/Judicious view/To act fairly

(1) 43 ITR 562 Asam

HARDEODAS JAGANNATH vs. INCOME TAX OFFICER

This judgment was given in relation to section 45 of the 1922 Income Tax Act. As per this section, the assessing officer was empowered not to treat the assessee in default till the appeal is decided. In this case, the stay application was rejected without giving reasons at all. The court held that an opportunity to the assessee was required to be given. In this case, the discretion was not exercised by the assessing officer or he exceeded his jurisdiction. Thus the high court can interfere when the writ is filed by the assessee. There may be cases were the exercise of discretion by the Income Tax officer is so arbitrary and capricious that no reasonable man would have acted like wise. This is no exercise of jurisdiction.

- Even in this case it was the view of the court that the stay application should be consider in the light of the facts of the case and if the assessing officer is not satisfied with the reasons stated in the stay application, the order of rejection of stay application should be passed by a speaking order.

(2) 139 ITR 900 MP
SETH GOPALDAS PALIWAL vs. WEALTH TAX OFFICER & ANR.
This case was pertaining to wealth tax recovery. Application of stay by the assessee was dismissed by the wealth tax officer without giving reasons and opportunity of hearing. It was held that it was no proper exercise of discretion by WTO. Order of WTO was quashed. WTO was directed to consider application of assessee afresh.

(3) 175 ITR 428 Madras
Sri Balaji Trading Co. v. CTO (Deputy)
M.C. and Co. v. Appellate Assistant Commissioner
Thangaraj (S.M.) v. State of Tamil Nadu
Saravana Oil Mills v. Appellate Assistant Commissioner
New Steel Industries v. Appellate Assistant Commissioner
Rajagopal (G.) v. State of Tamil Nadu
Gurunathan (T.) v. Collector of Customs (Addl)
In this case it was held that while deciding stay of collection of disputed tax, it is discretion of appellate authority to grant or not to grant stay. All the factors and facts to be considered while deciding stay application. Appellate authority must exercise discretion judiciously and pass speaking order.

(4) 183 ITR 532 Calcutta
DUNLOP INDIA LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX & ORS.
In this case the issue was with regard to Recovery of tax. It is the discretion of Income-tax Officer to treat assessee as not being in default. This discretion must be exercised in reasonable manner. Reasons for exercising discretion must be given. Relevant factors must be taken into consideration. The matter was sent back to the assessing officer for reconsideration.

(5) 204 ITR 480 P&H
Aggarwal Rice and General Mills v. Commissioner of Income-tax
In this case application for stay of recovery proceedings was filed till the appeal was decided. The stay application was rejected without affording applicant opportunity to be heard and without giving reasons.

It was held by the court that the Income Tax officer was required to pass a speaking order. As this was not done the order of the assessing officer was quashed and recovery proceedings were stayed till the matter was decided by assessing officer.

(6) 213 ITR 299 Allahabad
Shiv Shakti Rubber and Chemicals Works v. Income-tax Appellate Tribunal
In this case it was held that normally, the high court does not interfere in matters decided by judicial authority in a pending judicial proceeding but the reasons recorded by the judicial authority to judicial canons, the high court will interfere so that the authority will act in a judicial manner and to prevent injustice to the litigants.

(7) 230 ITR 705 Delhi
Teletube Electronics Ltd. Vs. Commissioner of Income-tax
In this case the contentions for grant of tax of disputed amount was not disposed of by a speaking order. The matter was sent back to the assessing officer with a direction to afford the petitioner an opportunity of being heard and to dispose of its application by a speaking order.

(8) 266 ITR 62 Allahabad
Shivangi Steels (P.) Ltd. V/S. ACIT and Another
In this case the stay application by ACIT was rejected without giving any reason. The discretion given to

the assessing officer was not judiciously exercised. It was directed by the court to decide the stay application in accordance with law and the discretion which has been conferred on the I T authority has to be exercised judiciously by giving reasons.

(9) 301 ITR 233 Karnataka
M. Shivanna and another V/S. DCIT
Recovery of stay. Application for stay of demand. Rejection of application without giving reasons. Not Valid.

(10) 351 ITR 160 Bombay
Deloitte Consulting India Pvt Ltd V/s. ACIT
In this case expenses of Rs.103.04 crore towards software development was rejected. The quantum appeal was rejected by CIT(A) and ITAT. Penalty u/s.271(1)(C) was levied and the order was passed by the commissioner to deposit the entire amount of penalty. It was held by the court that assessee to pay Rs. 50 Lacs in two installments and the remaining amount to be stayed till appeal was decided by CIT(A).

By this court : It was mentioned by the court in this judgment that the stay application cannot be decided in a casual manner. By writing, "Looking to the facts and circumstances of the case, no case has been made out. This is no proper exercise of discretion given by the I T Authority. The assessing officers are required to act fairly while deciding the stay application u/s/220(6).

(11) 237 CTR 153 Mumbai
PARAMOUNT HEALTH SERVICES (TPA) (P) LTD. & ORS. vs. ASSISTANT COMMISSIONER OF INCOME TAX & ORS.
In this case no valid reasons were given by the assessing officer for rejecting stay application. While rejecting stay application, it was only mentioned that, "Stay application of the assessee cannot be accepted and to recover the outstanding tax immediately from the assessee."

It was directed by Bombay High Court that the stay application was rejected without considering the parameters prescribed by this court in the case of KEC International Ltd. V/s. B.R. Balkrishnan and Others reported in 251 ITR 158 Mumbai. The court directed to dispose of stay application and till it is disposed of, no recovery proceedings should be carried out.

(12) 249 CTR 190 Bombay
UTI Mutual Fund vs. INCOME TAX OFFICER and Ors.
Recovery of tax from member of AOP u/s. 177 (3) being jointly and severally liable in respect of tax demand against the AOP. Revenue made unfortunate and hasty attempt to make a recovery of demand against the petitioner without enabling it to take reasonable recourse to the remedies available in law. Stay application rejected without hearing the assessee, considering the submission, revenue directed not to take any coercive steps, pending disposal of appeal and for six weeks thereafter.

(13) UTI Mutual Fund V/s. ITO (Bombay)
www.itatonline.org
Writ was filed against direction of CBDT Chairman's letter dated 07/02/12 promising with good posting in case of substantial recovery.

It was held in this case that, guidelines laid down in the case of KEC International Ltd. V/s. B.R. Balkrishnan and Others reported in 251 ITR 158 Mumbai as to how stay application should be dealt with. Recovery cannot be made without following due process of law.

When bank a/c. is attached without giving reasonable prior notice, amount should not be withdraw from the a/c.

It was further held that, Financial crises is not only the ground to grant stay to the assessee. Stay can be granted when strong prima facie case is made out by the assessee.

"If the party has made out a strong prima facie case, that by itself would be a strong ground in the matter of exercise of discretion as calling on the party to deposit the amount which prima facie is not liable to deposit. As held in the case of Ceat Ltd V/s. UOI 2010 (250) ELT 200 (Bombay) the demand which has no legs to stand upon, by itself would result in undue hardship to the party if called upon to deposit the amount."

Finally, we express our serious disapproval of the manner in which the Revenue has sought to brush aside a binding decision of this Court in the case of the assessee on the issue of a stay on enforcement for the previous year. The rule of law has an abiding value in our legal regime. No public authority, including the Revenue, can ignore the principle of precedent. Certainty in tax administration is of cardinal importance and its absence undermines public confidence.

(14) 82 DTR 130 P & H
Lalit Wadhwa V/s. CIT
In this case application of stay for disputed tax u/s.220(6) was filed to the assessing officer. The assessing officer rejected the stay petition without citing any reasons and the bank accounts and rents were attached of the assessee. Against this order a writ was filed. It was held by the court that non speaking order u/s. 220(6) without assigning any reasons needs to be quashed and therefore the order of attaching accounts and rent of the assessee was also liable to be quashed.

II Instruction no.96 considered by courts

(1) 182 ITR 413 Gujarat
VIKRAMBHAI PUNJABHAI PALKHIWALA vs. S.M. AJBANI, RECOVERY OFFICER & ORS.
In this case the assessee filed writ petition to quash the notice of demand and assessment order against which appeal was filed by the assessee. It was held that notice issued u/s.73 and assessment order cannot be quashed in writ petition.

In this case instruction no.96 with regard to stay in cases of harsh assessments was considered by the Honorable Gujarat High Court on page 420 and 421.

(2) 217 ITR 641 Allahabad
MRS. R. MANI GOYAL vs. COMMISSIONER OF INCOME TAX & ANR.
In this case returned income was Rs.11710/-. The income was enhanced and the tax payable was worked out at Rs.3304450/- i.e. more than several times the income returned.

The appeal was pending before appellate authority. Instruction no.96 was considered in this case and stay against disputed tax was grated. Further it was held that recovery of such huge demand is opposed to principles of good conscious and fair play.

(3) 223 ITR 192 Rajasthan
Maharana Shri Bhagwat Singhji of Mewar v. Income-tax Appellate Tribunal
This case was in relation to Estate duty. In this case also instruction no.96 was considered. Circular was CBDT was binding on Income Tax authority. In this case value of estate was determined on assessment more than twice the value returned. It was further directed not to force to the assessee to deposit 25%

of the disputed tax.

(4) 267 ITR 60 MP

Jain Cycle Spares and Co. v. Commissioner of Income-tax

In this case, instruction no.96 was considered by the court. Property of the assessee was attached. CIT(A) was directed to here and decide the appeal expeditiously. Instruction no.96 should be brought to the notice of CIT(A). The shop should remain under attachment but the assessing officer was directed not to take any coercive action against the assessee.

(5) 303 ITR 115 Madras

M. G. M. Transports (Madras) P. Ltd. v. Income-tax Officer

In this case Instruction No. 96 dated 21-8-1969 was considered by the Honorable Court. In this case return showing loss was filed. Harsh assessment was made and demand of Rs.14025762/- was raised. The assessee filed application for stay of demand. This application was rejected without giving reasons. It was held by the court that instruction no.96 would squarely apply. Without giving any factual finding and simply by writing, "No valid reason has been stated for stay of demand" was not sufficient. The petitioner was entitled to stay for collection to still orders were passed in appeal subject to making certain payments.

(6) 307 ITR 103 Delhi

Valvoline Cummins Limited V/S. SCIT and Others

In this case instruction no.96 was considered returned income of the assessee was Rs.7.5 crore and which was assessed at Rs.58.68 crore and demand of Rs.25.01 crore was raised and appeal was filed against the assessment order and on the next day stay application was filed to the assessing officer. On mutual understanding Rs.1 crore was paid by the assessee in two installments with a request to grant stay of the remaining disputed demand.

It was held by the court that, the assessee would in the normal course be entitled to an absolute stay of the demand on the basis of instruction no.96 dated 21/08/79 issued by board. The petitioner was directed to pay 15% of demand in installments after deducting 1 crore.

(7) 323 ITR 305 Delhi

SOUL V/s. DCIT

In this case instruction no.96 and 1914 dated 02/12/93 were considered by the Delhi high court.

In this case returned income was Rs.10.16 Lac which was assessed at Rs.7.59 crore and demand of Rs.4.31 crore was raised. On account of notice of assessing officer, the banking operations of the assessee came to stand still. Rs.2.24 crore was recovered from the assessee. Further refund of Rs.3.28 Lac was adjusted. An appeal was filed by the assessee. Application of stay was also pending before the commissioner. It was directed by the court to decide stay application.

(8) 324 ITR 247 Delhi

Taneja Developers And Infrastructure Ltd. V/s. ACIT

And Others Date of Order : 24/02/09

In this judgment instruction no.96 was considered.

In this case returned income was Rs.4641070/- which was assessed at Rs.1,67,80,23,590/- which was almost 350 times of the returned income.

The commissioner directed to pay 50% out standing demand. It was held by the court that when assessed income is substantially higher than returned income. CBDT instruction 1222 was not suppressed by ins.no.1914 of 1993. Demand must be stayed.

This judgment was given after considering assurance given by Deputy Finance Minister on the floor of the parliament and on the basis of which instruction no.96 (it should be 95) issued on 21/08/1969 and the judgment given in the case of Soul V/s. Deputy CIT (2010) 323 ITR 305 (Delhi) and other judgments cited during the course of proceedings before Delhi High Court.

(9) 346 ITR 375 Rajasthan
246 CTR 113 Rajasthan Date of order 15/12/11
MAHESHWARI AGRO INDUSTRIES vs. UNION OF INDIA & ORS
In this case instruction no.96 was also considered
This is an excellent judgment given by Dr Vinit Kothari of Rajasthan High Court.

It was held in this case that, the tendency of making high-pitched assessments by the AOs is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice and sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro revenue manner. It may be like execution of death sentence, whereas the accused may get even acquittal from higher appellate forums or courts. Therefore such powers under sub-s (6) of s.220 also have to be exercised in accordance with the letter and spirit of instruction no.96, dt. 21st August 1969, which even now holds the field and its spirit survives in all subsequent CBDT circulars and undoubtedly the same is binding on all the assessing authorities created under the act.

CBDT was urged to issue appropriate guideline for grant of stay in spirit of instruction no.96 dt 21st August 1969 to all the subordinate authorities and to clarify for uniform application all over the country at department level that first appellate authority shall have power to entertain and decide stay application during pendency of appeal before it upon relevant considerations for grant of stay against recovery of disputed demand of tax.

CIT(A) also has inherent and implied powers to grant stay, the assessee-petitioner may also file stay application before the CIT (A), who may also consider such stay application on its own merits upon the relevant factors viz. prima facie case, balance of convenience, irreparable injury, nature of demand and hardship likely to be caused to the assessee, liquidity available to the assessee etc. It is directed that all the first appellate authorities in the cases of other appellant assessees within the State of Rajasthan also would entertain stay applications filed before them during the pendancy of appeals and would decide the same on their own merits in future also.

As the assessed income in this case was 47 times of the returned income, the recovery of entire amount was stayed by the honorable court.

View of Shri T. N. Pandey Ex. Chairman CBDT
In the article of stay of demand of disputed assessments by respected Shri T. N. Pandey Ex. Chairman CBDT (published in 297 ITR page 1 journal on page 6) it is mentioned that income assessed is twice the income return or more the demand to such high-pitched assessments, on applications made by the assesses, has to be stayed till the disposal of appeals by the commissioners of appeals. There is no escape from the situation and assessing officers, could not adhere to this instruction and compel the assesses to pay the demand, which his more than the income returned, on the basis of the criterion in instruction no.96 could be held to be guilty of not following the decision of a committee of parliament and could be said to be committing contempt of parliament. The central board of direct taxes cannot unilaterally issue circulars which are contrary to instruction no.96 dated 21/08/1969 issued with the approval of the informal consultative committee of parliament and the then deputy prime minister / finance minister.

III Parameters for grant stay

(1) 251 ITR 158 Mumbai

KEC International Ltd. V/s. B.R. Balkrishnan and Others

In this case demand of about Rs.13 crores was raised. The assessee filed stay application till the appeal was heard. The stay application was rejected without giving any reason. The assessing officer issued notice to the assessee's banker for recovery of tax.

Writ was filed to the Bombay High Court. The Bombay High Court set aside the order and issued following parameters to be complied with by the authorities while passing orders on stay applications filed pending appeals to the first appellate authority :

(i) The authority has to at least set out the case of the assessee briefly.

(ii) If the assessed income is higher than the returned income the authority has to consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited, for which reasons should be given by the authority.

(iii) If the authority wants the assessee to deposit the amount he can briefly indicate in his order whether the assessee is financially sound and viable to deposit the amount.

(iv) The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may have recourse to coercive action for which brief reasons may be indicated in the order.

The court clarified that the above parameters were only recommendatory and not exhaustive.

The court gave direction to the Assessing Officer to dispose of the stay application of the assessee in accordance with law.

(2) 295 ITR 42 Bombay

Mahindra and Mahindra Ltd. v. Assessing Officer

This is an excellent judgment with regard to recovery of tax. The action of the assessing officer was strongly condemned.

In this case without affording fair opportunity to the assessee to reply to show cause notice, the bank accounts were frozen and the money was also recovered on the same day. It was held by the court that the action of recovery was void ab initio.

The parameters laid down in the case of KEC International Ltd. where also not followed which amounts to contempt of courts. It is the past experience that the consistent approach of the revenue not to follow the law laid down by this court. Action of respondent no.1&2 shocks our judicial conscience. Rule of law has been given a total go-bye and willfully ignored. The income tax authority have acted in a high handed manner.

In this case before appeal period was over the attachment was made and the amount was recovered. It was the reply on behalf of the revenue that the department was not willing to bring back the money which was forcibly recovered ignoring the decision of Bombay High Court.

The court directed the department to return Rs.294256264/- and deposit with registrar general of the court.

The joint commissioner Mr J R Dahad, respondent no.2 who was present in the court and it was made clear that this order has been pronounced loudly in the open court and learned council for the respondent has fully understood the above order and joint commissioner Mr J R Dahad has also fully under stood the

above order. Notice of contempt was issued for prima facie knowingly and willfully disobeying the two order of Bombay High Court.

(3) 345 ITR 71 Bombay (A.Y.09-10)
Kesav Cashew Co. v. Deputy CIT
In this case the assessee filed appeal against the assessment order as well as stay application to CIT(A). Notice was served by TRO for collection of outstanding tax dues. It was the plea of the assessee that it had no liquid funds and there were fair chances of success in appeal.

It was held that when the assessee had not filed an application u/s. 220(6) to the income tax officer he could very well approach the appellate authority to invoke inherent jurisdiction for staying collections of tax pending till the appeal is decided.

(4) 212 ITR 451 All
Tin Manufacturing Co. of India v. Commissioner of Income-tax
In this case the assessee approach CIT(A) for grant of stay of disputed tax. It was the duty of CIT(A) to dispose of the same expeditiously.

(5) 231 ITR 737 Cal
Debasish Moulik v. Deputy CIT
In this case the assessee filed stay application for grant of stay of disputed tax to the assessing officer. The assessing officer directed to pay 50% of the demand, then only the stay petition can be considered. The assessee filed writ to the Honorable court. It was held by the court that appellate authority has inherent and incidental power to grant stay of disputed tax for the effective exercise of the appellate powers. The assessee was directed to approach CIT(A) for grant of stay.

(6) 238 ITR page 820 Calcutta
J K Industries Ltd V/s. CIT
Recovery of tax. Adjustment of refund against sum payable by Assessee for other years. Prior intimation to Assessee. Mandatory. Intimation given after adjustment made. Assessee not objecting. Assessee's right to seek relief not affected.

(7) 239 ITR 871 Gauhati
Bongaigaon Refinery and Petro-Chemicals Ltd. v. Commissioner of Income-tax
In this case the assessee filed writ to the Honorable court to grant stay of disputed tax during pendency of appeal. It was held by the court that Commissioner of Income-tax (Appeals) has power to grant stay. The petitioner was directed to apply within fifteen days to Commissioner of Income-tax (Appeals) and Commissioner of Income-tax (Appeals) directed to apply his mind to application and pass an order within fifteen days. Recovery proceedings were stayed till Commissioner of Income-tax (Appeals) passes his order.

(8) 242 ITR page 281 Bombay
Syndicate Bank Vs. Official Liquidator, Wester Works Engineers Ltd.
Oriental Bank of Commerce Vs. Official Liquidator, Western Works Engineers Ltd.
Recovery of tax. Company in liquidation. Priority of debt. Secured creditors and workers have priority over tax department.

(9) 251 ITR page 20 ITAT Bombay
RPG Enterprises Limited V/S. DCIT
Recovery of tax. Stay refused without speaking order and hearing. ITAT can grant stay of recovery of disputed tax and order refund of tax illegally recovered.

(10) 59 DTR 333 Karnataka
JAGADISH N. HINDUJA vs. COMMISSIONER OF INCOME TAX & ANR.
CIT(A) has inherent power to grant stay of demand though such power is not expressly conferred on him under s. 246A; order passed by him rejecting the request for stay is set aside and he is directed to consider the application for stay on merits and in accordance with law.

VI Liability of Directors of Private Company Section 179
Section 179 deals with liability of a director in a private company. As per this section, when tax from a Private Company cannot be recovered, then every person who was a Director of the private company shall be jointly and severally liable for the payment of such tax, unless he proves that the non recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

With effect from 01-06-13 amendment has been made in this section. Explanation has been inserted which provides that, for the purpose of this section, the expression "tax due" includes penalty, interest or any other sum payable under the Act.

Thus the effect of judgments given by the courts that tax does not include interest or penalty has been nullified by this amendment.

(1) 268 ITR 266 Delhi
Jatinder Bhalla and another V/S. ITO and another
Recovery of tax. Company. Director. Private Company in liquidation. Liability of Director. Director jointly and severally liable for payment of tax. No liability if Director proves non-recovery of tax was not due to gross negligence. Misfeasance of breach of duty.

(2) a. 268 ITR 302 Calcutta
Dipak Dutta and another V/S. Union of India and Others
Recovery of tax. Private Company. Director when liable? Only if there is a finding that tax for relevant period cannot be recovered from company. Section 179.

b. 282 ITR 120 Gujarat
Indubhai T. Vasa (Huf) V/S. ITO
Recovery of tax. Private Co. in liquidation. Liability of Directors for arrears of tax of company. Effect of section 179. Condition precedent for recovery proceedings against Directors. Revenue must establish that recovery cannot be made from company.

c. 308 ITR 113 Gujarat
Amit Suresh Bhatnagar V/S. ITO
Recovery. Company. Director of private company. Condition precedent for recovery of tax due by company from Director. No effective steps to recovery from company. Rev. initiating action against Directors, Not permissible.

(3) 290 ITR 643 Gujarat
ACIT V/S. Official Liquidator of Minal Oil and Industries Ltd. and Others
Recovery of tax. Company in liquidation priority of debts overriding payments in favour of secured creditors and workmen. I.T. Dep. cannot claim propriety over such secured creditors.

(4) a. 326 ITR 85 Bombay
Dinesh T Tailor V/s. TRO
Recovery of tax. Private company Director's liability for taxes due from company. Taxes due not to include

penalty. Assessee resigned as Director at relevant time and non recovery of tax due from company not as a result of any neglect misfeasance of breach of duty on his part. Matter remanded.

b. 352 ITR 468 Delhi
Sanjay Ghai V/s. ACIT
Recovery. Private company. Directors. Liability for tax from company. "Tax due" does not include interest and penalty.

c. 353 ITR 567 Gujarat
Maganbhai Hansrajbhai Patel V/s. ACIT
Section 179. Tax dues not recoverable from company. Tax does not include interest and penalty. Tax not recoverable if director proves non recovery of dues was not due to neglect, misfeasance or breach of duty to company. Order u/s.179 without recording that non recovery was due to neglect, misfeasance or breach of duty by director. Material relied on, not disclose to the assessee. Order u/s.179 not valid.

In this case order was passed against the director for recovery of tax dues on the ground that the director failed prove that non recovery of the outstanding demand was not attributed to his gross negligence, misfeasance or breach of duty in relation to the affairs of the company as required u/s.179. It was held by Hon. Gujarat High Court that, the ACIT did not record that the petitioner failed to prove that the non recovery of tax from the company could not be attributed to his gross neglect, misfeasance or breach of duty, such findings were based on the material which was relied by ACIT but not provided to the petitioner. The order of ACIT was quashed.

(5) 353 ITR 585 Gujarat
Pravinbhai M Kheni V/s. ACIT
Private Company. Recovery of tax dues from Director. Revenue could not recover tax from the company. Onus of the director to establish such non recovery was not attributable to any gross neglect, misfeasance or breach of duty, or failure in discharging duty on his part in connection with affairs of company.

Recovery of tax. Public company. Section 179 (1) not applicable.

Recovery of dues from Director. ACIT recording finding without opportunity to the Director and without disclosing necessary materials. Order not justified. Matter remanded.

VII Section 254 Stay beyond 365 days
Section 254 of the I T Act deals with orders of Appellate Tribunal. As per section 254(2A) proviso, ITAT may pass an order of stay after considering the merits of the application. This stay will be in operation not exceeding 180 days from the date of such order and within the period of 180 days ITAT shall dispose of the appeal.

If within the time limit of 180 days the appeal could not be disposed of, on an application from the assessee, the time may be extended by ITAT as it deems fit but overall period of stay shall not exceed more than 365 days. The delay in disposing the appeal should not be attributable to the assessee.

As per proviso to this section made applicable from 01-10-08 if such appeal in not disposed of within the period of 180 days or maximum 365 days, the stay granted shall stand vacated after the expiry of such period even if the delay in disposing the appeal is not attributable to the assessee.

(1) 240 CTR 265 Bombay
COMMISSIONER OF INCOME TAX vs. RONUK INDUSTRIES LTD.
As per section 254(2A) maximum stay for payment of tax can be extended upto 365 days and if the appeal

is not decided during this period, the stay shall stand vacated.

In this case it was held that, stay of outstanding demand can be extended beyond the period of 365 days if the delay in disposing of the appeal is not attributable to the assessee.

(2) 252 CTR 281 Karnataka
COMMISSIONER OF INCOME TAX vs. ECOM GILL COFFEE TRADING PVT. LTD. & OTHERS
In this case it was held that, legislature stipulate time of 365 days in the third proviso to section 254 (2A) within which the stay order granted by Tribunal can operate. The tribunal has no power to pass orders granting stay beyond the period of 365 days.

(3) 138 TTJ 257 (SB) ITAT Spe. Mumbai
TATA COMMUNICATIONS LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX
It was held in this case that, where the delay in the disposal of the pending appeal is not attributable to the assessee, the Tribunal has to extend the stay beyond the period of 365 days even after the amendment of third proviso to section 254 (2A) wef 01/10/08.

(4) 150 TTJ 661 Delhi
Qualcomm Incorporated V/s. Assistant Director of Income Tax
It was held in this case that, when assessee paid amount of tax as per direction of ITAT and delay in disposal of appeal was not attributable to the assessee. Recovery of demand stayed though more than 365 days passed.

VIII Others

(1) 81 ITR 397 Calcutta
HINDUSTHAN RUBBER WORKS LTD. vs. INCOME TAX OFFICER & ORS.
In this case stay for disputed tax was granted without imposing any condition till the hearing of appeal but for a limited period. As the appeal was not heard till the period of stay, application was moved to the assessing officer by the assessee to extend the stay. No order was passed by the assessing officer. It was held by the court that the stay should continue unless there was anything in the conduct of the assessee.

(2) 86 ITR 699 Madras
R.P. DAVID & ORS. vs. AGRICULTURAL INCOME TAX OFFICER & ANR.
In this case the stay petition was rejected only on the ground that the assesses were financial sound and in a position to pay tax. It was held by the court that this is not ground to reject stay application. The same thing has been mentioned in circular no.589 issued by CBDT.

Power given to public officer is normally for exercise in favour of the person concerned unless there is some sound and relevant reason.

(3) 165 ITR 650 Kerala
N Rajan Nair V/s. ITO and Another
In this case it was held that the assessing officer should apply his mind to relevant fact and circumstances like the assessment history of the assessee, his conduct and co-operation in relation to the department, point raised in appeal, chances of recovery in case of appeal is dismissed, the hardship to the assessee by insistence on immediate payment and the like.

The assessing officer should remember that he is not the final authority of the dispute involved but the first amongst the statutory authority. The assessing officer should not act as a tax gatherer but as a quasi

tax judicial authority vested with the power of mitigating hardship of the assessee.

In this case return income was Rs.12500/- which was assessed at Rs.139770/- for A.Y.1984-85. The stay application was rejected. The assessing officer was guided solely by consideration of collection of revenue and the relevant factors were not taken into consideration. The order of the assessing officer rejecting stay was quashed and remanded back to him for the consideration in the light of the observations contained in the judgment.

(4) 208 ITR 103 Gujarat
Tejal R. Amin (Smt.) Vs. Assistant CIT
Recovery. Salary of debtor cannot be attached u/s.226(3). Debtor is a defaulter for a limited purpose. If the assessee himself is a defaulter, his salary may be recovered u/s.226(2).

(5) 226 ITR 270 Gujarat
Gujarat State Fertilizers and Chemicals Ltd. v. Deputy CIT
In this case the issue in appeal was decided in favour of the assessee in earlier years. Circular no.530 issued by CBDT which is reported in 176 ITR (St.) 640 was applicable. The assessing officer was directed not to insist for payment of 20% of tax. In this case there was huge refund payable to the assessee and it was requested by the assessee to adjust it against outstanding demand.

(6) a. 248 ITR page 482 Delhi
Commissioner of Wealth Tax V/S. Begam Brigees Zahoor Qasim and Others
Recovery of tax cannot be made in protective assessment.

b. 270 ITR 256 Madras
R. Rajbabu V/S. Tax Recovery Officer
Recovery. Attachment of immovable property. Property belonging jointly to Assessee and his sister. Protective assessment and protective attachment of property. Rent from property cannot be collected by revenue.

(7) 314 ITR 288 Calcutta
New Rupayan Jewellers v. Union of India
An appeal was filed by the assessee against the assessment order. Stay application was also filed to the assessing officer. The assessing officer rejected the stay application on the ground that appeal was filed against the order.

It was held by the court that since the assessee has right to prefer appeal against an assessment order, simply on the ground that appeal is preferred by the assessee to reject stay application on this ground was against the spirit of statute. The order was set aside.

(8) 321 ITR 491 Allahabad
230 CTR 173 Allahabad
CTR Vol. 50 Part II, Pg. 96 & 97 Smita Agrawal V/s. CIT
In this case the appellant filed appeal as well as stay application to CIT(A). CIT(A) not passing any order for two and half months. It was held by the court that inaction on the part of CIT(A) was depreciated. CIT(A) was directed to hear and dispose of stay application within 15 days. CBDT directed to issue circular if necessary to all appellate authorities to dispose off stay application expeditiously and A.O. must be slow in initiating recovery process so long the stay application in not disposed off.

(9) 329 ITR 278 Calcutta
Purnima Das V/s. Union of India
In this judgment it was held that before attaching the bank a/c. of the assessee notice to assessee prior to attachment is mandatory. Before attachment of bank a/c. application for stay should be considered. The contention that serving a copy of notice of attachment on the assessee was not necessary is not acceptable because the word, "Shall" is used in section 226(3)(iii). Thus before taking action of attachment notice is required to be served.

(10) 331 ITR 248 A.P.
ITO V/s. Tippala China Appa Rao
Recovery. HUF becoming partner in firm. HUF or Individual property. Finding that he was partner in his individual capacity. HUF properties could not be attached for recovery of tax due by firm.

(11) 346 ITR 11 Gujarat
Tax Recovery Officer v. Industrial Finance Corporation of India
In this case this issue was in relation to section 281 which deals with certain transfer to be void and the priority of income-tax debt. If any property is transferred by the assessee during pendency of income-tax proceeding, such transfer is void only if transferee had notice of pendency of income-tax proceedings.

(12) 352 ITR 396 P & H
Nirmal Singh V/s. Union of India & others
Provisional attachment. Assessment thereafter completed. Revenue not justified in attaching entire amount over and above demand raised against assessee.

(13)a. 167 ITR 668 Delhi
Bank of India V/s. Union of India and Others
Recovery of tax. Attachment of property. Property in name of wife of assessee. No evidence that property really belonged to assessee and that it was held benami. Property cannot be attached to recover arrears of tax of assessee.

b. 286 ITR 453 Calcutta
Jaymac Lasetron P. Ltd. Vs. Commissioner of Income-tax
Munir Ahmed Vs. Union of India
Recovery of tax. No power with revenue to declare a transfer void. Transfer by defaulter before assessment. Not void. Declaration from competent Civil Court necessary.

c. 225 CTR 358 Calcutta
VISHWANATH AGARWALA vs. TAX RECOVERY OFFICER & ORS.
Attachment and sale of immovable property. Power of TRO to examine the question of benami ownership of property. Assessee given enough time to prove ownership of property. Still sale of property stayed for 45 days to approach Civil Court.

(14)a. 246 ITR 814 Madras
Sancheti Leasing Company Ltd. and Another V/s. ITO and Another
Recovery of tax. Transfer of property to defraud revenue. Powers of ITO under section 281. ITO cannot declare a transfer to be void. Income tax authorities must file a suit to have transaction declared void.

b. 306 ITR 234 Bombay
Shamim Bano G. Rathi Vs. Oriental Bank of Commerce Ltd.
Transfer to defraud revenue. Scope of section 281. No adjudicatory machinery to declare transfer fraudulent. Appropriate proceedings to be taken before Civil Court.

(15) 354 ITR 77 Bombay
HDFC Bank Ltd V/s. ACIT
Recovery of tax. CIT holding in favour of assessee in earlier year on same issue. Assessee not in default.

It was held in this case that, once an issue on the same point is decided in favour of the assessee, it was wholly arbitrary on the part of the department to proceed to make an adjustment of the refund. If the adjustment was not made, the assessee would have been entitled to a stay on the recovery. Department making of an adjustment on these facts was totally arbitrary and contrary to law.

(16) 246 CTR 176 Delhi
Maruti Suzuki India Ltd. V/s. Deputy Commissioner of Income Tax
If an order for stay of recovery is passed, the Assessing officer should not pass an order of adjustment u/s. 245 to recover the demand; if the same addition / disallowance / issue has already been decided in favour of the assessee by the appellate authority.

(17) 254 CTR 569 P&H
Motorola Solutions India P Ltd. V/s. CIT
Till actual demand is created by passing an assessment order. Provisional attachment order u/s.281B will remain in operation.

6. Conclusion

I Though time and again the courts have given directions to the I T Authorities
1. To Pass a speaking order for rejection of stay application
2. To give reasons for rejecting stay application
3. To give opportunity of being heard to the assessee before passing stay application
4. To take judicious view while deciding stay application
5. To use discretion in reasonable manner
6. To act fairly while deciding stay application etc

but the same has not at all been followed by the I T authorities. The only way to implement the decisions of the courts is to take contempt action against such officers.

II Though it has been decided in the case of MAHESHWARI AGRO INDUSTRIES vs. UNION OF INDIA & ORS reported in 346 ITR 375 Rajasthan that instruction no.96, dt. 21st August 1969, which even now holds the field and its spirit survives in all subsequent CBDT circulars and undoubtedly the same is binding on all the assessing authorities created under the act.

Though CBDT was urged to issue appropriate guideline for grant of stay in spirit of instruction no.96 dt 21st August 1969 to all the subordinate authorities and to clarify for uniform application all over the country at department level that first appellate authority shall have power to entertain and decide stay application during pendency of appeal before it upon relevant considerations for grant of stay against recovery of disputed demand of tax. Even CBDT has not issued any instruction and the recovery of outstanding demand is yet being forcefully recover though there are number of decisions in favour of the assesses.

Hope that this issue taken by All India Federation of Tax Consultant before Delhi High Court for proper direction in matter of stay application.

In this paper I have covered decisions upto 354 ITR page 77.

Issues On
Deemed Dividend - Section 2(22)(e)
By CA. Sunil Talati, M.Com., LL.B., F.C.A.
Past. President of ICAI

Though the section applies to Individual assessee it arises by and large during the assessment proceedings on Corporate assessees. It has been observed that knowingly or unknowingly during Internal / Statutory / Tax Audit while examining the loans and advances, the issue of sec. 2(22) is escaping the attention of many a Tax Practitioners or Chartered Accountants and in turn the assessee suffers many a times due to ignorance and without any such intention.

1. By-section of Section 2(22)(e)
This is an inclusive definition of the term of Dividend whereby it has been provided that;
(i) any payment made by a company
(ii) not being a company in which public are substantially interested.
(iii) of any sum (whether as representing a part of the asset of the company or otherwise)
(iv) made after 31st day of 1987
(v) by way of advance or loan to a shareholder, being a person, who is a beneficial owner of shares holding not less than 10% of the voting power (not being shares entitled to a fixed rate of dividend where with or without a right to participate in profits).
(vi) or to a concern in which such shareholder is a member or a partner and in which he has substantial interest.
(vii) or any payment made by any such company on behalf , or for the individual benefit, of any such shareholder.
(viii) to the extent to which the company in either case possesses accumulated profit.
There is an Explanation 3 to this section which defines, that for the purpose of this clause;

(a) "concern" means a Hindu Undivided Family, or a firm or an Association of Persons or Body of Individuals or a company;
(b) A person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty percent of the income of such concern.

2. Objects of this provision
This Sub-clause treats loans granted by a closely held company to a class of its shareholders. Such company is normally a company in which there is a group of members controlling its affairs and possessing a block of majority shares. Since there are accumulated profit in the company, this group, if it chooses, can have distribution arranged of all accumulated profits to its shareholders in such a way that shareholder would not be liable to pay tax and thus avoid a tax liability. When such a loan is advanced to shareholder, who has a substantial interest in the company, the inference is irresistible that the loan is a made-up affair and that it is guise of dividend.

3. Strict Interpretation
Section 2(22)(e) creates a fiction bringing in amounts paid (otherwise as dividend) in to the net of dividend and therefore, while auditing accounts of the company one has to be very watchful as to any such loans or advances were given under this provision.

4. Applicability
The clause applies to any payment made by a company, not being a company in which public are substantially interested. The definition of company in which public are substantially interested is separately provided under sec. 2(18). So except this six categories of company as defined in sec. 2(18) the clause will apply to all other private companies and public companies in which public are not substantially interested.

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5. Payments covered

The provisions of this clause are attracted to any payment made by a company of any sum by way of';

(i) Advance, or
(ii) Loan
(iii) Any payment on behalf of any shareholder, or
(iv) Any payment for the Individual benefit of any shareholder.

Thus in first two cases it deals with the payment to shareholder directly. Whereas the last two cases contemplate payment by a company not to shareholder, but to a third party on behalf of or for the individual benefit of the shareholder. This is where the real piercing of the veil exercise comes in to play. To show what is apparent is not real, even if the loan is not granted directly to the shareholder, who has a substantial interest, but if a payment is made to third person on behalf of or for the individual benefit of such shareholder, the amount of loan granted would be treated as dividend. [208 ITR 815 (Guj)]. If a company advances money out of accumulated profit to a low paid employee, who in turn advance the same to the M.D. of the Company, Madras High Court in 109 ITR 508 held that such M.D. was assessable under this clause. Similarly, if advances are received by an assessee from a company in which he is not a shareholder / he has no substantial interest, but such company advances these sums out of sums borrowed by it on the very same date from another company in which the assessee has substantial interest will also be covered by this clause. It is for the Department to find out such co-relation and nexus. It is important to note that in the said section the words "directly or indirectly" are not there, and therefore, it cannot be extended to cover a case where it cannot be established that the amounts were in fact received by such shareholder from such company by way of loans and advances.

COMMISSIONER OF INCOME TAX VS. HOTEL HILLTOP
HIGH COURT OF RAJASTHAN
N.P. Gupta & deo Narayan Thanvi, JJ
IT Appeal No. 25 of 2005
17th March, 2008
(2008) 217 CTR (Raj) 527
Income tax Act, 1961 s. 2(22)(e)

In favour of : Assessee

Dividend- Deemed dividend under s. 2(22)(e) – Loan to firm vis-à-vis partners- Amount advanced by company to partners of a firm, which firm is not a shareholder in the company, cannot be assessed as deemed dividend in the hands of the firm, even though all the partners of firm are shareholders in the company – Rather, it would obviously be deemed dividend in the hands of the individuals, on whose behalf, or on whose individual benefit, being such shareholder, the amount is paid by the company to the firm.

6. Periodicity not material

It is very pertinent to note that once a loan is given, which is returned by the shareholder on the next day, even then such advances or loan will be hit by this clause. 108 ITR 345 (SC). So even if loan is fully repaid with interest before the year end or at the earliest possible, even then the section would get triggered and transactions will be covered by this clause. 229 ITR 444(SC), reaffirmed by Cochin Tribunal 53 ITD 79.

7. Shareholder means a registered shareholder

The section has used the word `shareholder' and therefore, deemed dividend has to be assessed and included in the income of the shareholder, who is a registered shareholder and not to the beneficial shareholder / owner. It amounts that if a loan is given to an H.U.F. by a company then the same cannot be considered as a loan advanced to the shareholder, who is an individual. This view has been confirmed by Supreme Court in 83 ITR 170 and 122 ITR 1 explaining the apparent inconsistency with regard to the identical earlier decision. It, therefore, follows that u/s. 2(31) a person includes a company also and therefore, this deeming fiction would apply where the shareholder is another company. 188 ITR 318 (Bom).

8. Dividend only to the extent of accumulated profit

It is very important to remember that mere giving of loan or advance to such persons would not attract dividend under this section 2(22)(e) but will attract only when such amount is paid by the company if there are accumulated profits. If there are no accumulated profits at all, the loan would be treated as genuine loan and would be outside the ambit. Similarly, if an amount of loan exceeds the amount of accumulated profit, such excess again would be treated as genuine loan. 76 ITR 369 (Bom), 85 ITR 230 (Guj) and 105 ITR 62 (Calcutta).

The relevant date to consider company's accumulated profit would be the date on which loan or advance is made. 199 ITR 418 (All). Similarly, if shareholding of the person on the date of loan is below 20%, then the amount of loan cannot be assessed as deemed dividend. 219 ITR 661 (Ker.).

9. Exceptions

In a recent case Delhi Tribunal in the case of Sunil Sethi vs. Dy.CIT (2008) 26 SOT 95 held that money were advanced by the Company to a shareholder, but were given to purchase the property which ultimately did not materialize. Therefore, such amount was paid back by the said shareholder. In such an event it cannot be said that it was a loan or advance by the company to a shareholder and therefore, inclusion of income u/s. 2(22)(e) was deleted.

SOME IMPORTANT DECISIONS

S.2(22)(e) : Dividend-Deemed dividend-Loans and advances-Legal fiction does not extend to broaden the concept of shareholder to make tax loans or advances as deemed dividend in the hands of deemed share holder. (Companies Act, S.153, 187C).

During search various papers relating share holding pattern of Amod Stampings Pvt. Ltd. were seized . It was found that said company had granted loans to various companies wherein share holdings and voting power exceeded 10 percent .It was explained that on creation of Trust a part of said company were settled in favour of Trust and after excluding of shares the assessee did not have more than 10 percent voting power and the assessee had no beneficial interest in the said Trust. The Assessing Officer held that creation of Trust was an afterthought and taxed the amount as deemed dividend. Before Commissioner (Appeals) it was contended that as per section 153 of the Companies Act a company is not permitted to include the name of the trust

in the register of members. It was also contended that the provision of section 187C have been made ineffective w.e.f.13th December, 2000 and therefore there is no requirement at present to declare beneficial interest etc, therefore such beneficial interest was is not declared in the register of the Company or the Registrar of the Companies. However Commissioner (Appeals) up held the addition. On appeal the Tribunal held that since the said Company was not permitted to include name of Trust in its register , name which was earlier noted as share holders remained same, however through a Board meeting it was resolved to acknowledge change in vesting of shares, hence in view of the facts deemed dividend could not be taxed in hands of assessee. Legal fiction created under section 2(22)(e) does not extend further for broadening concept of shareholder so as to tax loans or advances as 'deemed dividend' in hands of a 'deeming shareholder'. (A.Y. 2006-07)

Krupeshbhai N. Patel v. Dy. CIT (2013) 140 ITD 176 (Ahd.)(Trib.)

S.2(22)(e): Dividend- Deemed dividend – Credit balance in Capital account – Non-encashment of cheque the amount is credited back to company's account cannot be assessed as deemed dividend.

The assessee is running a proprietorship concern which was converted into private limited company. There was credit balance in capital account of the assessee in proprietorship concern against which payment was made by proprietorship concern to the assessee. However, because of conversion, cheque could not be encashed and same was returned to company which was credited to the assessee's account by company. Subsequently money was withdrawn by the assessee. It was held that the said amount could not be treated as deemed dividend. (A.Y. 2008-09)

Dy. CIT v. Radhe Shyam Jain (2013) 140 ITR 244 (Chandigarh**)(Trib.)**

S.2(22)(e):Dividend-Deemed dividend – Accumulated profits – Share premium account does not partake nature of commercial profit hence not be treated as accumulated profit.

Share premium account would not partake nature of commercial profits and thus cannot be treated as accumulated profit. (A.Y. 2008-09)

Dy. CIT v. Radhe Shyam Jain (2013) 140 ITR 244 (Chandigarh**)(Trib.)**

S.2(22)(e):Dividend-Deemed dividend – Advance given to company in which assessee holds substantial stake is held to be deemed dividend.

AO treated advance taken by assessee from a company in which having substantial stake as deemed dividend. It was case of assessees that since they had mortgages their properties with bank to enable company to avail finance facilities from bank, advance by company was not a gratuitous loan or advance but in return for an advantage which company had already availed on account of mortgaging of properties done by assessee. However, it was a fact on record that assessee had not produced any documents to prove fact that personal properties of assessee were actually mortgaged with the bank for sake of availing loans by company. Assessee had also not produced any correspondence made either with bank or with company towards release of properties mortgaged. Thus, revenue rightly considered advances given by company to assessee as deemed dividend. (A.Y. 2002-03, 2003-04 & 2006-07)

Dy. CIT v. B. DhanunjayaRao (2013) 140 ITD 443 (Hyd.)(Trib.)

S.2(22)(e):Dividend-Deemed dividend—Advance towards **Sale** of Property-Matter remanded.

The assessee is engaged in real estate development. The assessee received advance towards sale of property. The Assessing Officer treated the said amount as deemed dividend. Commissioner (Appeals) deleted the addition. On appeal by department the Tribunal seta-side the order of Commissioner(Appeals) as he failed to pass as speaking order. Matter remanded. (A.Y. 2006-07, 2007-08) ITO v. **Nam** Estates P.Ltd (2013) 21 ITR 109 (Bang.)(Trib.)

P. Sarada vs. CIT (SC) 229 ITR 444 :
The fact that loan or advance was ultimately adjusted at the end of the year against the credit balance of another shareholder will not alter the position. Account of another shareholder was not debited on various dates of withdrawals and hence it cannot be said that the assessee was paid money out of the funds lying to the credit of the other shareholder.

Tarulata Shyam & Ors. Vs. CIT (SC) 108 ITR 345 :
Loan advanced to a shareholder was repaid within 23 days still deemed dividend under Section 2(22)(e). If the assessee comes under the letter of law, he has to be taxed, however great the hardship may appear to the judicial mind to be.

Rajesh P. Ved Vs. ACIT (ITAT, Mum) 1 ITR (Trib) 275 :
Accumulated profits means profits upto the date of payment of loan – subsequent repayment of loan not to be considered amount credited towards remuneration of shareholder cannot be set off against the alleged loan considered as deemed dividend.

CIT vs. P.K. Abubucker (Mad) 259 ITR 507 :
Advance to shareholder for building construction which will be later on taken on lease by company – As per the agreement, such advance to be set off against future rent – still deemed dividend arises and is taxable.

M.D. Jindal vs. CIT (Cal) 164 ITR 28 :
Building material advanced to shareholder for construction advance to be set off against purchase consideration when the company buys some flats from assessee later on – value of advance in kind is also taxable as deemed dividend.

L. Alagusundaram Chettiar vs. CIT (SC) 252 ITR 893 :
Company advancing large amount to low-paid employee. Employee advancing loan to assessee, the Managing Director of the said company. Deemed dividend to be assessed in the hands of assessee.

CIT vs. T.P.S.H. Sokkalal (99) 236 ITR 981 (MAD) :
Shares held on behalf of minor children has to be included as the guardian can exercise voting power in respect of those shares in addition to shares held by guardian in his individual capacity.

CORPORATE GOVERNANCE

CA. **HERSH SAMIR JANI**

Nowadays I wonder how these big Companies would be able to manage their day to day affairs and how would they be able to maintain a parity between efficiency and difficulties, but still their profit graph rising day by day. This perplexity of mine was very well handled during my meeting with my very good friend and an Industrialist of Ahmedabad itself.

He said, most of the people proclaim their belief that business was all about money, control and power. But a good businessman would always give equal importance to the concept of Corporate Governance for the advancement of his company. Let us take an example of one of the ethical company like TATA. The TATAs have an elaborate Code of Conduct from which flows the five Tata core values of integrity, understanding, excellence, unity and responsibility. These companies believe in these principles, live by them, and conduct businesses.

It also reminds of a scene when I went for a visit of a manufacturing unit of Aditya Birla group situated in western part of Gujarat. There I could clearly observe that, on every wall of the manufacturing unit as well as the administrative areas, they have visibly displayed their code of ethics, values and hierarchy of administrator. A proper work distribution and adherence to the principles laid down at all the levels would lead to a good business.

I know all of us must be aware about the concept of Corporate Governance. But let me bring out some of the basic concepts which are often ignored by businesses. Corporate governance refers to the set of systems, principles and processes by which a company is governed. They provide the guidelines as to how the company can be directed or controlled such that it can fulfill its goals and objectives in a manner that adds to the value of the company and is also beneficial for all stakeholders in the long term. Stakeholders in this case would include everyone ranging from the board of directors, management, shareholders to

customers, employees and society. In a way good corporate governance would rather mean a strict adherence to the rules and regulations framed by the company for achieving its targets.

My friend was rather, anxious in replying my anxiety as to what was the importance of Corporate Governance in today's world of business. According to him transparency in business along with ethics would always lead to success and satisfaction. Fundamentally, there is a level of confidence that is associated with a company that is known to have good corporate governance. The presence of an active group of independent directors on the board contributes a great deal towards ensuring confidence in the market. Corporate governance is known to be one of the criteria that foreign institutional investors are increasingly depending on when deciding on which companies to invest in. It is also known to have a positive influence on the share price of the company. Having a clean image on the corporate governance front could also make it easier for companies to source capital at more reasonable costs. Unfortunately, corporate governance often becomes the centre of discussion only after the exposure of a large scam.

I would also like to point out the instance where good corporate governance was not observed and the company had to face the consequences of it. A high-profile incident, Crompton Greaves came under fire from institutional shareholders after the management bought an aircraft at a time when its profits were under pressure. Vijay Malia's Kingfisher Airlines also came under the investor radar after auditors noted in their report that the company's net worth had been "completely eroded" and its ability to survive depended on the company's ability to raise more cash.

And of course, who can forget the grand-daddy of corporate misgovernance, Satyam? Image of we Chartered Accountants was depreciated in the most recent Satyam scam. The strange thing is, the scam did not begin by the auditors or the investigative agencies catching Raju doing the dirty. It came from Raju himself, when he sent a letter of confession on 7 January 2009 to the stock exchanges and the company's board saying he had cheated shareholders by overstating profits and cash balances and understating liabilities. Ironically, Satyam had received the Golden Peacock Global Award for Excellence in Corporate Governance in September 2008 but was stripped of it soon after Raju's confession.

In Asia's corporate governance rankings, India lags behind Singapore, Hong Kong, Taiwan, Malaysia and Thailand, but ahead of China, South Korea, the Philippines and Indonesia. Moving up the ladder should make the market more attractive to overseas investors.

Let us being placed at a very respectable and trust worthy position in the society take up the initiative to implement a good governance drive and as a whole be a part of the Nation Building.