President's Message

CA Jayesh Mor
jayeshmor@gmail.com

Dear Members,

I have taken charge as 19th President of the All Gujarat Federation of Tax Consultants on 17th July, 2011 at the Annual General Meeting of the Federation. I wish to record my gratitude to the members of the Federation for reposing trust in me by electing me as the President of the Federation. It is a matter of great honour to serve as President of the Federation.

The Federation enjoys the reputation and goodwill throughout the state of Gujarat, whether at mofussil towns or at major cities like Ahmedabad, Baroda, Surat or Rajkot. From the date of taking over charge as the President of this august body, I have tried to co-ordinate and communicate with the office bearers of various member associations. I have tried to motivate the office bearers of the associations for carrying out various academic programmes as well as representation to the government departments. I have offered assistance for programme or representation to all for the benefit of the members. During my tenure as the President, I have received very positive response from most of the mofussil centers.

The Regional Committees of Saurashtra, North Gujarat, Central Gujarat & South Gujarat have also given positive response for arranging educational programmes at Rajkot, Palanpur, Baroda & Surat as well as at mofussil centers under their area.

The Chairmen of various sub-committees and their members are putting their best efforts to make the Federation vibrant by carrying out various activities for the benefit of the members of the Federation as well as their suggestions are very much helpful in carrying out my duties as the President of the Federation.

The Federation is a bridge between the tax payers, tax consultants and the departments. In true sense, the Federation is honouring its responsibility by educating members for compliance of statutory requirements under the law.

During the year, the Federation has organized educational programmes at various centers, viz, (i) Bhavnagar, (ii) Anand-Nadiad, (iii) Morbi, (iv) Junagadh, (v) Vapi, (vi) Palanpur, (vii) Half day Seminar at Baroda and (viii) RRC at Saputara. I convey heartiest congratulations to Shri Harish N. Shah, Chairman of Mofussil Programme Committee and Shri Ajit C. Shah, Chairman of Convention Committee for arranging educational programmes at the above centers. The Federation has also organized Open House with CPC, Bangalore (I. Tax) for many issues of tax payers related to CPC. Shri Mukesh M. Patel, Past President of the Federation has nicely coordinated Open House programme. The Federation has celebrated the completion of 20 glorious years on 25th February 2012. The Federation has felicitated all the past Presidents for their invaluable support in bringing the Federation to newer height of reputation both with the department as well as the tax consultants.

During the year, the Federation has launched a revamped website **www.agftc.co.in** by the worthy hands of Shri K. H. Kaji, President Emeritus. All members are requested to kindly logon to our website where you will get updated information of the Federation.

During the year, the Federation has made various representations before the Chairman of CBDT and Chief Commissioner of Income-tax, Gujarat for various practical issues of tax payers and the Federation has got positive response from the Department and many issues have been resolved. I convey my heartiest congratulation to Shri Dhiresh T. Shah, Chairman of Representation Committee for whole-hearted support for making various representations during the year. During the year, all the past Presidents of the Federation have made strong and successful representation against corruption prevailing from top to bottom in the Income Tax Department. It shows unity amongst the past Presidents and when there is a need for strong representation before the Department, everyone works hand in hand and shoulder to shoulder for the cause of the profession. On our representation, 2 Chief Commissioners of Income-tax were transferred to other places, which is a great success for the Federation.

At the Annual General Meeting, many past Presidents have expressed their view that every month the Federation should come out with Tax Gurjari as a news letter. But looking to the financial constraints and other circumstances, it is not viable to publish Tax Gurjari every month. Most of the important topics of direct taxes are uploaded on website which reaches to all the members of the Federation and they can read the topics just by logging on to the website and downloading the topics of their interest on their computer. Looking to the latest technology, now every where the system of sending of hard copy of Journal/ News letter has been abandoned and most of the members are now computer savvy, as such they can see the latest development under any tax laws by clicking the suitable website.

I convey my heartiest thanks to the Editor and Chairman of Tax Gurjari, CA Shri K. V. Karkar for his best efforts by editing various articles published in the Journal. I also convey my sincere thanks to the faculties who have written the articles to be published in Tax Gurjari. All the articles on direct and indirect taxes are very relevant in day-to-day practice for tax consultants at Mofussil centers; I am confident that the members would be greatly benefited by the articles published in Tax Gurjari

With Warm regards,

Jayesh Mor

EDITORIAL

CA K. V. Karkar
kvkarkar@gmail.com

The profession of chartered accountant and tax consultant is facing challenges in several areas with the advent of Direct Tax Code, Goods and Service Tax and new Companies Act and sweeping changes taking place in other indirect tax laws. To top it all, there are news of scams and rampant corruption and misuse of power by the political class coming at an alarming speed and of serious magnitude. The concern of the general public regarding corruption and black money is evident from the support they have extended to the movements against corruption by Shri Anna Hazare and against black money stashed in foreign countries by Rev. Baba Ramdev.

Though the implementation of Direct Tax Code is delayed, the direction of the impending changes is quite evident from the proposed provisions of the DTC Bill. Retrospective amendments in the provisions relating to non-resident taxation and introduction of General Anti-avoidance Rule (GAAR) are clearly taking us closer to DTC regime. Looking to the increase in cross-border transactions, the professionals are required to be more vigilant in advising the clients in view of aggressive stand being taken by the tax authorities.

Introduction of Goods and Service Tax means that the professionals practicing only some of the laws like VAT, service tax, etc. may be required to study laws relating to excise, custom, etc. This may require consolidation or networking by the professionals. The Goods and Service Tax would present great professional opportunities, albeit with matching challenges, which the professionals are competent to counter with flying colours.

In view of constantly mounting pressure exerted by the activists with the support from general public and even political parties, the Union Government has laid on the table of the Parliament the White paper – May, 2012. The White Paper defines 'Black money as assets or resources that have neither been reported to the public authorities at the time of their generation nor disclosed at any point of time during their possession.'

According to the White Paper significant amount of black money is generated through legally permissible economic activities, which are not accounted for and disclosed or reported to the public authorities as per the law or regulations, thereby converting such income into black money. The failure to report or disclose such activities or income may be with the objective of evading taxes or avoiding the cost of compliance related to such reporting or disclosure. It may also be the result of non-compliance with some other law. For example, a factory owner may under-report production on account of theft of electricity which in turn leads to evasion of taxes. Generally, a high burden of taxation, either actual or perceived, provides a strong temptation to evade taxes and generate black money. Sometimes the procedural regulations can be such that complying with them may increase the probability of further scrutiny and thereby the incidence of the burden of compliance, creating a perverse incentive not to report at all and remain outside the reported and accounted proportion of the economy. Culture and social practices may also play a vital role in deciding the preferences of citizens between tax compliance and black money generation. In a society where tax evasion and under-reporting of activities and income is perceived to be very common or the norm, such activities may be considered acceptable and honest tax compliance and paying one's due share to the public fund may not be considered a virtue. Studies indicate that countries with relatively poor implementation of regulations tend to have a higher share of unaccounted economy, whereas countries with properly implemented regulations and sound deterrence have smaller 'black' economies.

The professionals have definite role to play as far as removal of corruption and preventing generation of black money is concerned. Advising the clients on tax issues can be done keeping in view of the substance of the law rather than form. The proposed DTC and the recent amendments in the Income-tax Act, 1961 have focused on the substance of the transaction. Temptation by the tax payers for quick gains should be discouraged and advantages of compliance with tax laws should be propagated amongst the tax payers. The professionals should not be lured by the short-term benefits of thin-line planning often practiced with much impunity. As torch bearers of the society, the professionals are expected to follow ethical path and also guide the tax payers on that path by scrupulously following the law and paying legitimate taxes for the cause of nation building and upliftment of the less privileged. At the same time, the government is expected to reduce the complexity in the tax laws and streamline the procedure for the tax compliance.

With Regards
K.V.Karkar
(Editor-Tax Gurjari)

Place : Ahmedabad
Date : 27/05/2012

SOME ISSUES RELATING TO SCRUTINY ASSESSMENT

Advocate Upendra J Bhatt
Past President of AGFTC

Email id : bhattandco@gmail.com

1. PREAMBLE

In scrutiny assessment, number of issues arises. Some of the issues are dealt with in this article, which will be useful to the professional friends. While applying the ratio of any judgement cited in this article, it should be ensured that the facts of the judgement match with the facts of your case. If the facts of the case are different, the ratio of the judgement may not be applicable.

The Honorable Supreme Court in the case of CIT Vs. Suresh Chandra Mittal 251 ITR 9 (SC) (judgement delivered on 26th July, 2001) held that if the income is offered to tax to buy peace of mind and avoid litigation, penalty u/s. 271(1)(c) cannot be levied. In this case, the assessee declared meager income. After search, he filed revised returns showing higher income to purchase peace and avoid litigation. The Supreme Court relied on its earlier decision in case of Sir Sadilal Sugar and General Mills Ltd Vs. CIT 168 ITR 705 (SC).

Same three judges of the Supreme Court decided the case of K P Madhusudhanan Vs. CIT on 21st August 2001 (within less than 1 month) reported in 251 ITR 99 (SC) held that, after addition of the explanation to section 271, judgment given in the case of Sir Sadilal Sugar and General Mills Ltd Vs. CIT 168 ITR 705 was not a good law.

In this article, I have tried to cover latest case laws which will be useful to my professional brothers.

2. GUIDELINE FOR SELECTION OF CASES FOR SCRUTINY DURING F.Y. 2011-12

A. By this time, scrutiny assessments for A.Y. 2010-11 would be underway. It is mentioned in the circular that list of cases selected under scrutiny shall be submitted by the assessing officer to their respective range heads by the 15th of the following month and also displayed on the notice boards of their offices. (Though there are clear instructions, this direction is not followed). It is also mentioned in this circular that the criteria for selection of cases is not to be disclosed even under the Right to Information Act.

B. Criteria for selection of cases under scrutiny are as under

I. Where value of international transaction as defined u/s. 92B exceeds Rs. 15 crore.

ii. Cases where there was addition of Rs. 10 lakh or more in earlier assessment year and question of law or fact is confirmed in appeal or pending before appellate authority.

iii. Cases in which addition of Rs. 10 crore or more was made in earlier assessment year on the issue of transfer pricing.

iv. In case of survey carried out during the financial year. However, this criterion will not apply in the following cases:

a. there is no impounding of books or documents

b. there is no retraction of disclosure, if any, made during survey

c. the income declared in the return excluding any amount of disclosure made during the survey is not less than the declared income of the preceding assessment year.

v. Assessment in search and seizure cases

vi. Assessments initiated u/s. 147 / 148 (Reassessment cases)

vii. Cases of research organizations (in order to examine credibility of research and other activities as provided u/s. 35 of the I T Act).

viii. After amendment to definition of "Charitable purpose" u/s. 2(15) of the I T Act, cases in which exemption is claimed u/s. 10(23C) or u/s. 12AA are claimed.

ix. Over and above the above stated criteria, the assessing officer may select maximum 25 cases in mofussil stations with the prior approval of Additional CIT / Joint CIT.

In other areas, i.e., metros and bigger cities, the assessing officer may select maximum 10 cases after recording reasons for doing so.

It is also directed to the approving authorities to monitor and ensure that quality assessments are framed in these cases.

x. Officer dealing with company cases can select other cases over and above the above mentioned criteria, which are in its initial years of operation and are infusing investment by introducing capital or are taking loans but the return filed shows loss.

3. ISSUANCE OF NOTICE U/S. 143(2) - Time limit

A. After the case is selected for scrutiny, the assessing officer is required to issue notice u/s. 143(2). The notice is required to be served on the assessee within 6 months from the end of the financial year in which the return is furnished (effective from 01/04/08. Previously this limit was 12 months from the end of the month in which the return was filed). Thus, whether the return is filed on 1st April or on 31st of March, the time limit is 6 months from the end of the financial year.

B. Some of the important case laws

i. CIT Vs. CPR Capital Services Ltd 330 ITR 43 (Del)
It is the duty of the assessing officer to prove that notice u/s. 143(2) was served on the assessee and in absence of that the assessment framed is null and void. Service of notice is mandatory.

ii. CIT Vs. Kishan Chand 328 ITR 173 (P&H)
Service of notice by affixture without trying other modes of service is not valid where there was no evidence that there was any refusal to accept service of notice.

iii. CIT Vs. Silver Streak Trading P. Ltd. 326 ITR 418 (Del)
If the assessee files an affidavit that, mandatory notice u/s. 143(2) was not received by him within the prescribed time, it is the duty of the revenue to prove that notice was served in time.

iv. a CIT Vs. AVI-OIL India P. Ltd. 323 ITR 242 (P&H)
When the notice was served by affixture at the premises of the assessee on the basis of the report of notice server that the factory of the assessee was closed at the time of his visit and another notice dated 30th October was served by registered post on November 1st was invalid as there was no proof of avoidance of service by the assessee (SLP of the department dismissed 317 ITR (Statute) 1).

b Kunj Behari Vs. ITO, Amritsar 139 ITR 73 (P&H)
Substituted service by affixture - The department has to prove that the assessee was avoiding service of notice or summons by ordinary way.

v. CIT Vs. Vishnu and Co. P. Ltd. 319 ITR 151 (Del)
When the notice u/s. 143(2) was served on the last date after office hours when no authorized person was present at the premises to receive the notice and the notice was affixed, it was held that it was not valid service of notice and assessment framed on the basis of such notice was not valid.

vi. a. CIT VS. Sohan Lal Chhajan Mal 307 ITR 53 (P&H)
Defective return u/s 139(9) – Assessment - Time limit for issue of notice u/s. 143(2) - Not from the date when defect rectified but from the date of filing of return.

b. Nismukh Investment & Trading Ltd. Vs. DCIT [2009] 213 Taxation 221 (Bom)
If there is any defect in the return, and if that defect is removed, the return takes effect from the original date of filing and notice u/s. 143(2) is to be issued from original date of filing of return.

vii. R L Narang Vs. CIT 136 ITR 108 (Del)
If the notice is served by post, the word 'by post' implies by registered post. If it is served under certificate of posting, it does not amount to proper service.

viii. ACIT Vs. Vision Inc. 130 TTJ (Delhi) 696
If the notice is served on the employee who was not authorized and it was not served on any partner of the firm, there was no valid service of notice making the assessment invalid.

ix. CIT Vs. Aiswarya Trading Co. 236 CTR (Ker) 334, 331 ITR 521 (Ker)
Notice u/s. 143(2) served beyond the statutory period of 12 months, ITAT was correct to hold that the assessment was invalid.

x. a CIT Vs. Cebon India Ltd. 229 CTR (P&H) 188

Assessment - Notice u/s 143(2) - Finding by CIT(A) & ITAT that notice u/s. 143(2) was not served within the stipulated time - Mere giving dispatch number will not render the said finding to be perverse - In absence of service of notice, the A.O. had no jurisdiction to make assessment - Absence of notice cannot be held to be curable u/s. 292B.

b. Gajendra Kumar Bantha Vs. Union of India 222 ITR 632 (Cal)
If the notice served is illegal or invalid, this defect cannot be cured as per section 292B.

Thus, the notice should be served on the proper assessee, otherwise the entire proceedings fails.

C. Notice in case of reassessment

a R. K. Upadhyaya Vs. Shanabhai P Patel 166 ITR 163 (SC)
CIT Vs. Major Tikka Khushwant Singh 212 ITR 650 (SC)
In case of reassessment, time limit for issuing notice is mentioned in section 149. As per this section, notice u/s.148 is required to be issued.....Thus, if the notice was issued within period of limitation but served on the assessee beyond the period, it was a valid service of notice and the assessment was valid assessment.

b Arjun Singh and Another Vs. ACIT 246 ITR 363 (MP)
If the notice of reassessment is served on the charter accountant and through Inspector, it is not a valid service of notice.

c Service of notice to the proper person
Proper service of notice is the foundation for jurisdiction u/s. 148. If the notice is not served on the proper person, the service is insufficient and the assessing officer does not have the jurisdiction to reassess escaped income. The following authorities are worth noting.

1. CIT Vs. Baxiram Rodmal, 2 ITR 438 (Nagpur)
2. CIT Vs. Dey Brothers, 3 ITR 213 (Rang)
3. C N Natraj Vs. Fifth ITO, 55 ITR 250 (Mysore)
4. Lakshmibai Vs. ITO, 86 ITR 804 (Mysore)
5. C T Raja Gopal Vs. State of Mysore, 86 ITR 814 (Mysore)
6. Thangam Textiles Vs. First ITO, 90 ITR 412 (Mad)
7. P N Sashikumar & Others Vs. CIT, 170 ITR 80 (Ker)
8. S K Manekia Vs. CST, 39 STC 426 (Bom)
9. CIT Vs. Lunar Diamonds Ltd. 281 ITR 1 (Del)
10. BHPE Kinhill Joint Venture Vs. ACIT 304 ITR (AT) 285 (Del)

Onus is on the revenue to prove valid service of notice. If there is no such proof, assessment framed is not valid.

In the above cases, it was held that, there should be a valid service of reassessment notice on the proper person and such notice has to be served in terms of the Code of Civil Procedure, 1908.

4. SERVICE OF NOTICE – Section 282 - Mode of service

As per section 282 of the Act, any notice, summons, requisition, order or any other communication may be made by delivery or transmitting a copy thereof to the person named therein.
For the service of notice, provisions of Code of Civil Procedure, 1908 shall be applicable, which are as under:

a. The notice can be served by post / courier.
b. In the manner as provided under the Code of Civil Procedure, 1908 for the purpose of summons.
c. In the form of electronic record.
d. In any other manner as provided by rules by CBDT.

The service of assessment order and demand notice is very important because the time limit for taking further action starts for the assessee like filing an appeal, application for stay of disputed tax, etc.

5. SECTION 292BB (APPLICABLE FROM 01/04/08)

In case of assessment / reassessment where the assessee appeared in any proceedings or co-operated in any inquiry relating to assessment or reassessment, then it will be presumed that the notice was served in time on him and he shall be precluded from taking any objection under this Act that -

a. no notice was served upon him or
b. not served upon him in time or
c. served upon him in an improper manner
unless the assessee has taken objection before the completion of such assessment or reassessment.

6. INQUIRY BEFORE ASSESSMENT - SECTION 142(2A)

During the course of assessment proceedings, looking to the nature and complexity of the accounts and interest of revenue, the assessing officer feels that the books of account of the assessee needs to be audited by an accountant, he shall direct the assessee to get the books of account audited by the auditor (C.A.). The auditor shall furnish a report of such audit in prescribed form (Form No. 6B) in which he shall furnish such particulars as the assessing officer may require.

With effect from 01/06/07, before giving direction to get the books of account audited under this section, the assessee shall be given a reasonable opportunity of being heard.

Some of the important case laws

i. Rajesh Kumar Vs. CIT 320 ITR 731 (Delhi)
Notice to be given to the assessee before passing order applies prospectively and it was not open to the assessee to raise question of limitation.

ii. West Bengal State Co-op. Bank Ltd. Vs. JCIT 267 ITR 345 (Cal)
Before passing order of compulsory audit of accounts by special audit u/s. 142(2A), the assessing officer must examine books of account and form opinion that account are complex and require special audit. CIT must apply his mind and not to accord sanction mechanically. Order of compulsory audit was not valid.

iii. DCIT Vs. Muthoottu Mini Kuries 266 ITR 213 (Ker)
Before passing order of compulsory audit of accounts, the assessing officer must be satisfied that accounts of the assessee are complex. Before passing order for compulsory audit and fixing remuneration, the assessee is entitled to be heard. Post decision hearing does not redress assessee's grievance as no one will repay expenses incurred by assessee.

iv. U.P. State Handloom Corporation Ltd. Vs. CIT 245 ITR 192 (All)
The audit of accounts u/s. 142(2A) places financial burden on the assessee. Order passed mechanically and without application of mind is not valid.

v. ITC Ltd. Vs. JCIT 239 ITR 921 (Cal)
The assessee was having 43 branches all over India. Complexity of accounts is the only criteria for deciding whether special auditor should be appointed.

vi. Peerless General Finance and Investment Co. Ltd. Vs. DCIT 236 ITR 671 (Cal)
Complexity of accounts and interest of revenue both conditions should be fulfilled. Litigation or appointment of auditor was beneficial to revenue was not a reason to appoint auditor u/s. 142(2A). Appointment of auditor was not valid.

7. REVISED RETURN AND REVISED COMPUTATION

A. Revised return u/s. 139(5)
After furnishing return u/s. 139(1) or in pursuance of notice u/s. 142(1), the assessee discovers any omission or any wrong statement in the return, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before completion of the assessment, whichever is earlier.

In the case of Goetze (India) Ltd. Vs. CIT 284 ITR 323 (SC) it is held that if any deduction is required to be claimed after filing of the return, it can be claimed through revised return only. In this case, after filing revised return claim of deduction was made through a letter.

It may be noted here that intimation u/s. 143(1) is not assessment order as held in the case of S. R. Koshti Vs. CIT 276 ITR 165 (Guj). Revised return can be filed after intimation is received.

B. Revised Computation
At present, the assessment proceedings for A.Y. 2010-11 are in progress. During the course of assessment

proceedings, if the income is required to be enhanced / reduced, what is the remedy as the time for filing the revised return has elapsed.

The assessing officer is required to assess the correct income which has either accrued or received. When any legitimate claim is allowable to the assessee, the assessing officer should allow such claim.

Some of the important case laws

i. Rotary Club of Ahmedabad Vs. ACIT 336 ITR 585 (Guj)
If the revised computation of income was submitted by the assessee in assessment proceedings and the re-computation was correct and accepted by the assessing officer, simply because it was submitted beyond time specified in section 139(5), it cannot be held to be invalid and on this ground reassessment proceedings cannot be initiated.

ii. S. R. Koshti Vs. CIT 276 ITR 165 (Guj)
If the assessee is in a position to show that he has been over assessed regardless of whether over assessment is a result of assessee's own mistake or otherwise, the Commissioner has power to correct such an assessment u/s. 264(1) of the Act.

On page 175, it is held in this case that the state authorities should not raise technical pleas, if the citizens have a lawful right and the lawful right is being denied to them merely on technical grounds. The state authorities can not adopt the attitude which private litigants might adopt.

While delivering this judgement, decision given by the Supreme Court in the cases of Ramlal Vs. Rewa Coalfields Ltd. AIR 162 SC 361, State of West Bengal Vs. Administrator, Howarah Municipality AIR 1972 SC 749 and Bhabhutmal Raichand Oswal Vs. Laxmibai R Tarte AIR 1975 SC 1297 were considered.

On page 175, there is mention of unreported decision of Gujarat High Court in the case of Vinay Chandulal Satia Vs. N O Parekh, CIT. Special Civil Application No. 622 of 1981 in which it is mentioned that the authorities under the Act are under an obligation to act in accordance with law. The tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.

iii. CIT Vs. Metalman Auto P Ltd 336 ITR 434 (P&H)
If there is omission to claim the exemption in the return, the assessing officer can not debar the assessee from claiming the deduction. The judgement of the Honorable Supreme Court in Goetze (India) Vs. CIT (2006) 284 ITR 323 (SC) was not applicable to such exemption.

iv. Vs. Ramco International 332 ITR 306 (P&H)
The claim of deduction u/s. 80-IB was not allowed on the ground that assessee had not filed revised return. ITAT allowed deduction on the ground that assessee was not making any fresh claim, but had duly furnished documents and Form 10CCB during assessment proceedings. There was no requirement for filing any revised return. The judgment of Goetze (India) Vs. CIT (2006) 284 ITR 323 (SC) was distinguished.

v. CIT Vs. Bharat Aluminium Co. Ltd. 303 ITR 256 (Delhi)
If any revised claim of expenses incurred is made during assessment proceedings, it is not a new claim but enhancing quantum of expenditure. Assessment based on revised claim was valid.

vi. Duty of Assessing Officer
   (i) Navnitlal C. Zaveri Vs. K K Sen, ACIT Bombay 56 ITR 198 (SC)
   (ii) Chokshi Metal Refinery Vs. CIT 107 ITR 63 (Guj)
   At the time of original assessment, the assessee did not claim relief though the responsibility of claiming refund and relief rested with the assessee, the income tax officer should have drawn the attention of the assessee to the relief which the assessee was entitled but the assessee had omitted to claim.

8. FIXATION OF PARTICULAR TIME AND DATE IN THE NOTICE

Sometime it happens that when the time is fixed in the notice for hearing and the assessee / his representative is not able to attend at that particular time, the I T Authority says that as you have not complied with timing, the case has been decided on merits without accepting any evidence / papers. This is not correct approach. If this is done, it is against the principal of natural justice. It is futile to fix a particular hour of a day as the outer limit for making any submission. Reasonable time must be granted to the assessee and that is at least before expiry of the working hours. The I T Authority cannot fix an hour, a minute or a second of the day. It will be difficult for such authority to obey such timing for all purposes. There may be instances where the authority may not be able to take up the case on that day due to official pressure or otherwise.

When the opportunity is given to the party who explained its objections, papers, documents, such an opportunity must be realistic and not notional. This was decided in the case of S. Velu Palandar Vs. DCIT, Thanjavur II 83 ITR 683 (Mad).

9. REJECTION OF BOOK RESULT

A. Some times in the business, the assessee purchases goods from `X' but bill is issued by `Y' and, some times simply bill is obtained (without goods being purchased) so assessee is the best judge to know, whether the purchases are genuine or not. When inquiry is made by the assessing officer in respect of purchases, some times the letter is returned with a note "Not known" when I.T. inspector is deputed to inquire regarding details of seller, the seller is not available or his where about is not known, or the seller on affidavit states that he has issued simply bill, and goods were not supplied. Under the circumstances, the following issues may be considered to strongly represent the case of the assessee.

1. Whether quantity account is maintained by the assessee? If yes, whether the purchases are recorded in stock register?
2. If the purchases were received by transport, transport receipt and proof of payment of transport charges?
3. Signature of godown keeper regarding receipt of goods?
4. Payment of such purchases, whether made by account payee cheque?
5. Percentage of such purchases, against total purchases?
6. If goods were purchased through broker, his name, address, PAN, etc.
7. Payment of such purchases has not come back to the assessee in any form. The burden of proof is on the department
8. If such purchases are not considered, what would be percentage of G.P?
9. If such purchases are sold to reputed companies, firms, institutions, details of such sales and proof of payment received?
10. Who has received payment of purchases?
11. Whether sales tax/VAT is paid on such sales?
12. If sales tax/VAT assessment is completed, whether purchases and sales are accepted?
13. Whether books of account are audited u/s. 44AB of the I.T. Act?
14. There can not be sales without purchases. Alleged bogus purchases are sold to some one, and if the buyers are considered to be genuine, the sales can not be rejected?
15. In case of alleged bogus purchases, whether the commodity is in short supply? If it is in short supply, generally the same is available by paying premium?
16. Whether the seller of goods is related with the purchaser?
17. The goods purchased were used for manufacturing? Whether the production is recorded in production register?
18. If the goods manufactured are subject to excise, whether it is recorded in R.G. 4 register?
19. Could it be proved that without these goods the production was not possible?
20. Whether the goods were purchased at market price?

B. Addition on account of purchases

i. Diagnostics Vs. CIT 334 ITR 111 (Cal)
If the purchases of goods were paid by account payee cheques and the assessee is not able to produce party after 3 years, the addition for bogus purchases was not justified.

ii. Sanjay Oilcake Industries Vs. CIT 316 ITR 274 (Guj)
In this case, addition on account of inflated purchases of oilcakes was restricted @ 25% by CIT(A) and confirmed by ITAT. In this case, sellers who issued sale bills were not traceable. The goods were received from the parties other than the persons who had issued bills for such goods. Payment of purchases was

made by account payee cheques and there after the entire amount was withdrawn by bearer cheques and there was no trace or identity of the person withdrawing the amount from the bank account. Under such circumstances, the likelihood of the purchase price being inflated could not be ruled out and there was no material to dislodge such finding. Thus, the addition was confirmed. The assessee failed in this case to produce material to disprove inflated purchases.

This was a case of manufacturing assessee and as the assessee could not produce the necessary evidence, the addition was confirmed.

iii. DCIT Vs. Adinath Industries 252 ITR 476 (Guj)
When the assessee furnished the details of purchases, gate passes, receipt notes, laboratory reports, sample reports, the use of materials in production, simply because the bank account of seller and purchaser was in the same bank and the amount credited in the purchaser account was withdrawn on the same day without proving that the amount had come back to the assessee's hands, the addition on account of bogus purchases cannot be made in the case of the purchaser of goods.

If the A.O. is of the view that the purchases are bogus, he ought to have recorded the statement of Bank Manager, Accountant or cashier or the party who introduced the seller to the bank. When all the facts were considered and decided, the matter on appreciation of evidence, no interference was called for in the matter.

iv. CIT Vs. M. K. Bros 163 ITR 249 (Guj)
If the payment of purchases are made by account payee cheque, and the same has not been received back in any form, even if seller of goods declares that he has simply issued bill and he has not sold goods, still nothing can be added in the case of assessee.

v. YFC Projects Pvt. Ltd. Vs. DCIT 134 TTJ (Del) 167
Purchases can not be disallowed due to non-filing of confirmation from suppliers especially when the assessee furnished certificate from bank stating that cheques were cleared and no defect in the books of account was pointed out by the assessing officer.

C. **Addition on account of sales**

i. CIT Vs. Samir Synthetics Mill 326 ITR 410 (Guj)
In case of suppression of sales, the addition of sales amount can not be made, but addition of only profits in respect of such sales can be made.

ii. CIT Vs. Mascot (India) Tools and Forgings (P) Ltd. 320 ITR 116 (All)
The assessing officer cannot estimate the income of the assessee on the basis of suppression of sales and payment of commission when the books of account were audited by the auditors and verified by excise authority. The auditor gave unqualified report and excise authority had checked and verified periodically the books of account.

iii. Man Mohan Sadani Vs CIT 304 ITR 52 (MP)
Income from undisclosed sources – Assessment - Entire sale proceed can not be added to income - Net profit rate to be adopted - The entire sale proceed cannot be regarded as profit or treated as undisclosed income. Only profit rate has to be adopted in such cases.
Followed President Industries 258 ITR 654 (Guj)

iv. CIT Vs. Gurubachan Singh J. Juneja 302 ITR 63 (Guj)
Search and seizure - Unaccounted cash sales - Seizure of loose sheets reflecting sales - Addition on the basis of unaccounted sales - There was no proof that assessee made investment for alleged unaccounted sales - Entire amount can not be taxed - Only G.P. on sales can be added.

v. CIT Vs. President Industries 258 ITR 654 (Guj)
The amount of sales could not represent the income of the assessee who had not disclosed the sales. The

excess over cost incurred could be treated as profit.

vi. R. R. Carrying Corporation Vs. ACIT 126 TTJ (Cuttak) 240
If there is difference in sales as per books of account and as per TDS certificates, only G P on difference is to be added. Followed CIT Vs. President Industries 258 ITR 654 (Guj)

D. Addition on account of Gross Profit

i. CIT Vs. Smt. Poonam Rani 326 ITR 223 (Delhi)
If there is fall in G.P. and the assessee has not maintained stock register, only on the ground of non-maintenance of stock register alone, the book result cannot be denied and when the explanation of the assessee was accepted by CIT(A) and ITAT.

* In this case, no defects were found in the books of account. The G. P. disclosed was 1.4 in the year under consideration as against 5.91 even in the previous year.

ii. CIT Vs. Jas Jack Elegance Exports 324 ITR 95 (Delhi)
Looking to the nature of business, if it is not possible to maintain quantity account but other details are maintained and produced to the assessing officer, then the assessing officer can not reject book result. In this case, the assessee was engaged in the business of readymade garments and he was doing embroidery work, stitching work, etc. It was not possible to maintain quantity account.

iii. Malani Ramjivan Jagannath Vs. ACIT 316 ITR 120 (Raj)
When the books of account are maintained regularly and inventories of stock was found to be correct and reasonable explanation was given for reduction in profits in the year under consideration, the book result cannot be rejected. The gross profit cannot be estimated.

iv. CIT Vs. Om Overseas 315 ITR 185 (P& H)
When the books of account are regularly maintained and no specific defect in the books of account is pointed out by the assessing officer, the book result cannot be rejected simply because there is fall in G.P.

v. DCIT Vs. Vishwanath Prasad Gupta 137 TTJ (Jabalpur) 385 (TM)
When A.O. could not find any mistake in the books of account of the assessee; simply on the ground of fall in G.P. and the stock register was not maintained item-wise, addition could not be made.

vi. ITO Vs. Laxmi Narayan Ram Swaroop Shivhare 123 TTJ (Agra) 289 (TM)
When all sales of liquor are made in cash without proper vouchers, etc., but the books of account are audited u/s. 44AB, suppliers of the assessee are verifiable, the payment of goods was made through Government Warehouses; looking to the nature of business of the assessee, it was not possible to maintain proper sales bills. Profit rate of liquor business varies from area to area and depends on bid money, and no significant defects are pointed out in the books of account, addition for not maintaining cash sales cannot be made.

vii. CIT Vs. Jas Jack Elegance Exports 191 Taxman 386 (Delhi)
The assessing officer cannot reject books of account without pointing out any defect. Merely because the assessee has declared low gross profit rate compared to earlier years and further assessee could not produce the persons to whom payments were made by the assessee. The assessing officer failed to issue summons before making addition.

viii. Shanker Exports Vs. ACIT 132 TTJ (Jaipur) 107
Accounts cannot be rejected merely on the ground that summons issued to parties were either returned unserved or no compliance was made where the assessee has maintained regular books of account and they were audited u/s. 44AB and also day-to-day stock register, production and manufacturing record were maintained and were produced before the A.O. in which no other defect were found. Marginal fall in G.P. rate does not justify rejection of books of account and disturbing the trading result.

E. Addition on account of stock

i. CIT Vs. Vimal Moulders (India) Ltd. 330 ITR 214 (Delhi)
Undisclosed income - Addition on the basis of discrepancy in stock found during survey - No independent

enquiry by A.O. or CIT (A) -Finding that no discrepancy in stock and deleting addition - Finding of fact.

ii. ACIT Vs. Narmada Chematur Petrochemicals Ltd. 327 ITR 369 (Guj)
Liability of excise arises only at the time of removal of the goods and the value is not includible in valuation of closing stock of finished goods at the end of the accounting period.

iii. CIT Vs. N. Swamy 241 ITR 363 (Mad)
Addition due to difference between value of stock as recorded in books and found in declaration to bank for getting overdraft. Burden of proof on revenue could not be discharged by merely referring to statement of assessee to third party. Addition deleted.

iv. CIT Vs. Hindustan Mills and Electrical Stores 232 ITR 421 (MP)
Undisclosed income - Addition made because stock was found less in books than in inventory on the date of search by applying gross profit rate - Not justified.

v. CIT Vs. Arrow Exim (P) Ltd 230 CTR (Guj) 293, 35 DTR 280 (Guj)
When the stock is hypothecated and not pledged with bank and the value of stock is inflated to avail higher credit facilities and supported by vouchers, the books and accounting system is found to be genuine, no addition on account of higher stock to the bank could be made.

F. If sales and purchases both are not recorded in books of account

In such situation, the assessing officer will try to add entire amount of bogus purchases and unrecorded sales. This is not correct approach. If it is proved that the purchases were made out of undisclosed income, amount of purchases shall be added, but in case of unrecorded sales, amount of profit involved in such transaction can be added and not the entire sale price.

Looking to the above decisions, it is the duty of the assessing officer to know the nature of business, VAT if at all payable on the commodity in which the assessee is dealing, and after considering all allied evidences / records / profit disclosed by other traders dealing in the same commodity and under same circumstances, addition if at all required should be made, if without application of mind and relevant evidences the additions are made, it may not be sustained in appeal.

G. Show cause notice to the assessee

Zenith Processing Mills Vs. CIT 219 ITR 721 (Guj)
Where the assessing officer is not inclined to accept the return submitted by the assessee and if he wants to modify the assessment from the return, a show-cause notice is required to be given to the assessee.

In many cases we have experienced that assessing officers, without giving show cause notice, make huge additions. This approach of the assessing officers is not correct. Even in the open house meeting in the Gujarat Chamber of Commerce and Industries jointly with All Gujarat Federation of Tax Consultants, it has been assured by the Chief Commissioners that show cause notice will be given before making addition.

H. Assessment order must be signed

i. Kalyankumar Ray Vs. CIT 191 ITR 634 (SC)
If the assessment order is not signed by the assessing officer,
the order served on the assessee without signature is an invalid order.

ii. Smt. Kilasho Devi Burman and Others Vs. CIT 219 ITR 214 (SC)
For valid assessment, an order has to be signed by the assessing officer.

I. Principle of consistency

i. CIT Vs. Haryana Tourism Corporation Ltd. 327 ITR 26 (P& H)
When the fundamental facts remaining the same, mode of assessment can not be changed without reason, there must be consistency in framing the assessment order.

ii. CIT Vs. Gopal Purohit 336 ITR 287 (Bom)
[SLP of Dept Dismissed 334 ITR (St.) 308]

Business income or capital gains - Trading in share or investment - Two separate portfolios – Permissible – Income-tax - General principles - Consistent practice of treating transactions in shares as investment – Consistency - Different view should not be taken for year under consideration - Nature of income - Entries in books of account not conclusive.

J. Assessment order as per the direction of Commissioner

CIT Vs. Greenworld Corporation 314 ITR 81 (SC)

Assessment order passed by assessing officer at dictates of Commissioner is nullity. By no stretch of imagination can a higher authority interfere with the independence which is the basic feature of any statutory scheme involving adjudicatory process.

K. In case of remand power of Assessing Officer

i. DCIT Vs. Surat Electricity Co. 337 ITR 271 (Guj)

When there is remand of case to the assessing officer by appellate authority, the assessing officer has no power to consider a new issue.

ii. Saheli Synthetics P. Ltd. Vs. CIT 302 ITR 126 (Guj)

When the matter is sent back by ITAT to the assessing officer with regard to particular items, it is not open to the assessing officer to deal with other issues or new source of income.

L. Note in return in case of e-filing

T. Govindappa Setty Vs. ITO 231 ITR 892 (Kar)

Note in the statement which is annexed to the return is part and parcel of the return filed. It can not be ignored.

* Due to e-filing of return, it is not possible to incorporate any note in the return. In such cases, a separate letter should be addressed to the assessing officer justifying the claim of expenditure, allowance, etc.

M. A.O. cannot direct assessee, how to run his business

CIT Vs. Raja Baldeodas Birla Santatikosh 190 ITR 578 (Cal)

ITO can not dictate to an assessee as to how he should carry on his business. I.T. Department can not claim to be a sleeping partner of assessee entitled to question validity of his actions.

N. Fresh claim of deduction in set aside cases can be put

CIT Vs. Shree Bajrang Electric Steel Co. (P.) Ltd. 174 ITR 672 (Cal)

When the Tribunal has given direction to the assessing officer to frame fresh assessment, assessee can claim deduction not claimed in the original return.

10. BAD DEBTS

A. As per section 36(1)(vii), bad debt or part thereof which is written of as irrecoverable in the accounts of the assessee is an allowable expenditure.

There was litigation on this issue for allowability of bad debt. The law was amended with effect from 01/04/89. As per amendment, for claiming bad debt as an allowable expenditure, the assessee has to establish that the debt was written off. After amendment it is not necessary to establish that debt in fact had become irrecoverable. TRF Ltd. Vs. CIT 323 ITR 397 (SC), 230 CTR (SC) 14

B. If the amount of bad debt is written off in the same year, the assessing officer still disallows the claim of bad debt. Recently, the Gujarat High Court, in the case of ACIT Vs. Pullen Pump Industries 337 ITR 294 (Guj) has held that after amendment with effect from 01/04/89, writing off amount is sufficient. Assessee need not prove that debt had been bad.

11. DISALLOWANCE OF EXPENSES FOR NOT DEDUCTING TAX - SECTION 40(a)(ia)

A. As per this section, any interest, commission, brokerage, rent, royalty, fees for professional services/technical services, amount payable to contractor or sub-contractor on which tax is deductible at source and the same has not been deducted or after deduction not paid on or before the due date specified in section 139, such expenditure will not be allowed as business expenditure.

If the tax is deducted during the previous year, but paid after the due date specified in section 139(1) or the tax is deducted in subsequent year and paid after the due date specified in section 139(1), such sum shall be allowed as

deduction in the year in which such tax has been deducted.

B. This section has undergone frequent amendments. Last amendment was made with effect from A.Y. 2010-11. Question arose, whether this amendment is a curative in nature? Whether this amendment is applicable to pending assessments?

C. ITAT 'B' Bench Ahmedabad decided the case on this issue in the case of Kanubhai Ramjibhai Makvana Vs. ITO Ward–1, Anand. After considering various decisions of Supreme Court and High Courts, it was held that amendment made in section 40(a)(ia) is curative in nature and applicable to previous years also.

D. Many appeals were pending or if decided the views of appellate authority were different. Thus, the matter was referred to Special Bench in the case of Bharati Shipyard Ltd. Vs. DCIT, Circle 3(1) Mumbai. The matter was decided on 09/09/11 by 3 members ITAT 'B' Bench, Mumbai. As held in this case, when any amendment which has not been given retrospective effect by legislature, cannot be construed as retrospective on solitary ground that original provision caused some hardship to assessee. Any provision causing hardship and any subsequent relaxation in it will not be retrospective unless expressly stated. When legislature itself has made the provision prospective, judicial or quasi judicial authorities cannot help situation by holding that the relaxation given has retrospective effect. As per amendment in section 40(a)(ia), it relaxed the hardship by increasing time available for deposit of tax. Thus, amendment by Finance Act, 2010 to section 40(a)(ia) with effect from 01/04/2010 being not remedial and curative in nature cannot be declared as having retrospective effect from date of insertion of provision, i.e., 01/04/2005.

This judgment has been reversed by the honorable Calcutta High Court in the case of CIT Vs. Virgin Creations dated 23/11/11 (reported in www.itatonline.org). While delivering this judgement, the Calcutta High Court relied on the following decisions:

1. Jodha Mal Kuthiala (R.B.) v. CIT 82 ITR 570 (SC)
Hardship provisions have retrospective effect
Income from property - Assessee's property vested in Custodian of Evacuee Property in Pakistan - Assessee whether "owner" of property so vested - Whether income from such property could be included in income of assessee - Interpretation of statutes - Taxing statutes - Reasonable interpretation - Indian Income-tax Act, 1922, section 9—Pakistan (Administration of Evacuee Property) Ordinance, 1949, Ss. 6(1), 9, 12, 14(1), 16(1), 20, 22(1).

* It is true that equitable considerations are irrelevant in interpreting tax laws. But those laws, like all other laws, are to be interpreted reasonably and in consonance with justice.

2. CIT Vs. J. H. Gotla 156 ITR 323 (SC)
Equity and Taxation
Hardship provisions have retrospective effect
Though equity and taxation are often strangers, attempt should be made that these do not remain always so and if a construction results in equity rather than in justice, then such construction should be preferred to the literal construction. Where strict literal construction leads to injustice or absurd result, equitable construction should be applied.

3. Allied Motors (P.) Ltd. Vs. CIT 224 ITR 677 (SC)
Hardship provisions have retrospective effect
Business expenditure - Tax, duty, cess or fee - Deduction only on actual payment - Proviso clarifying that ` sums paid after accounting year but before due date for submission of return deductible - To be treated as retrospective - Income-tax Act, 1961, s. 43B.

Interpretation of statutes - Reasonable construction - Proviso inserted
to remedy unintended consequences - To be treated as retrospective.

4. CIT Vs. Alom Extrusions Ltd. 319 ITR 306 (SC)
Business expenses - Removal of hardship
Hardship provisions have retrospective effect
Business expenditure - Deduction on actual payment - Contribution to provident fund - Existing provision creating difficulties - Amendment to remove difficulty - Has retrospective effect - Finance Act, 2003, making amendment but as if with effect from 1-4-2004 to be read as having retrospective effect from 1-4- 88.

Interpretation of statues - Retrospective operation - Provision intended to remove unintended consequences - To be read retrospective to give effect thereto - Strict construction not preferred where leads to unintended consequences.

E. If the tax is not deductible as the recipient of income furnished Form 15G, 15H, etc., but the same is furnished belated, whether provision of section 40(a)(ia) would be applicable? It was held in the case of Valibhai Khanbhai Mankad Vs. DCIT 139 TTJ (Ahd) 70 that section 40(a)(ia) would not be applicable in such cases. Any other action under the Act may be taken for not furnishing the relevant form to the CIT in time.

12. REASSESSMENT FOR CASH PAYMENT AND RULE 6DD

I. As per section 40A(3), if any payment to any person is made otherwise than by an account payee cheque or account payee bank draft exceeding Rs. 20,000/-, such expenditure shall not be allowed.

Similarly, as per section 40A(3A), if liability of any expenditure is allowed and subsequently assessee makes payment in respect of such liability otherwise than by account payee cheque or account payee bank draft, such payment shall be deemed to be considered as business or professional income and chargeable to income tax as income of subsequent year, if such payment exceeds Rs. 20,000/- in a day by cash.

If the payment was made by cash exceeding Rs. 20,000/-, but if the payment is covered by rule 6DD, no disallowance should be made.

ii. Payments covered by rule 6DD

a. Payments to Reserve Bank of India or any banking company

b. Payments to State Bank of India or any subsidiary bank

c. Payments to any co-operative bank or land mortgage bank

d. Payments to any primary agricultural credit society

e. Payments to LIC of India

f. Payments to Government and as per rule the same is required to be paid by cash

g. Payments made by:
i. any letter of credit arrangement through a bank
ii. a mail or telegraphic transfer through a bank
iii. book adjustment from any account in a bank or any other account in that or other bank
iv. bill of exchange made payable to a bank
v. the use of electronic clearing system through a bank account
vi. a credit card
vii. a debit card

h. Payment is made by way of adjustment against the amount, if any, liability incurred by the payee for any goods supplied or services rendered by the assessee to such payee

i. Payment is made for the purpose of:
I. Agricultural or forest produce or

ii. the produce of animal husbandry (including livestock, meat, hides and skins) or dairy or poultry farming

iii. fish or fish products

iv. the products of horticulture or apiculture

to the cultivator, grower or producer of such articles, produce or products

j. Payment for the product in manufacturing process without the aid of power in a cottage industry

k. Where there is no banking facility on the date of payment

l. When the payment is made, it is a bank holiday or there is strike in the bank, etc……

iii.[A] Question arises, if the land stands in the names of family members in the Government record, but the bill is issued only in one name or if the agricultural land is given for cultivation purpose on ad hoc payment and the bill is issued in the name of the person who has taken the land for cultivation purpose, how to claim such income as agricultural income?

It is the general practice that, the family member is involved in sale of agricultural produces on behalf of the family and at that time all the family members are not required to remain present but care should be taken to see that the bill is issued in the name of all the owners of the land appearing in 7/12 extract and if the agricultural produce is sold by any other person who is doing agricultural operation on behalf of the owners, it should be ensured that the bills are issued in the names of the owners and it should be mentioned that this sale is through XYZ...

Because the words mentioned in rule 6DD(e) are payment made to cultivator, grower or producer of such articles, produce or products.

[B] A question is raised by the member that, though during the course of assessment proceedings all the details regarding sale of agricultural produces, 7/12 extracts, confirmation of the member that the product was sold through family member, etc. was given, still the cases are reopened on the audit objections by audit party.

It may be noted that reassessment proceedings can be initiated on the ground that income chargeable to tax escaped assessment. If the assessment is framed u/s. 143(3), and there is failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

CIT Vs. Kelvinator of India Ltd. 320 ITR 561 (SC)
The assessing officer has to record his reasons that the income chargeable to tax has escaped assessment. There must be tangible material for the formation of the belief.

CBDT Cir. 549 Dt. 31-10-89 (182 ITR 1)
When the amendment in section 147 was made by Direct Tax Laws (Amendment) Act, 1987, it is explained in circular no. 549 dated 31/10/89 on page 29 that if the assessing officer was of the opinion that income chargeable to tax escaped assessment, it would give arbitrary power to the assessing officer to reopen completed assessment on mere change of opinion, to allay these fears, the amendment in 1989 has again amended section 147 and the words, "has reason to believe" were reintroduced.

Thus, looking to the circular issued at the time of introduction of this section as well as, latest decision in the case of CIT Vs. Kelvinator of India Ltd., according to my view the case can not be reopened.

[C] Reassessment on account of audit objection
The case cannot be reopened on the basis of audit objection. The following decisions are worth noting.

i. Indian and Eastern Newspaper Society Vs. CIT 119 ITR 996 (SC)
Opinion of an internal party of income tax department on a law point can not be regarded as information u/s. 147(b).

ii. CIT Vs. Hackbridge-Hewittic and Easun Ltd. 154 ITR 378 (Mad)
Audit party was not competent to give any advice on points of law.

iii. Bhagwandas Jain Vs. CIT 156 ITR 608 (MP)
Reassessment - Audit party bringing to notice principal of law regarding higher value of S.O. - Reopening not justified.

iv. Punjab Produce and Trading Co. Ltd. Vs. CIT 158 ITR 524 (Cal)

Reassessment - Audit party's opinion is no information - Reassessment not valid.

v. Jayraj Madeppa Kadadi Vs. CIT 186 ITR 161 (Bom)
Reassessment on the basis of audit note on facts disclosed in original returns - Reassessment not valid

vi. Rajesh Jhaveri Stock Brokers P. Ltd. Vs. ACIT 284 ITR 593 (Guj)
Reassessment - Condition precedent - Reason to believe that income had escaped assessment - Audit objection to computation of loss - A.O. not accepting objection - Subsequent reassessment notice based on audit objection - Notice not valid.

vii. Purity Techtextile Private Limited Vs. ACIT 325 ITR 459 (Bom)
Reassessment - Information available with A.O. at the time of original assessment - Can not be a ground to reopen assessment on the basis of audit objection.

13. CASH CREDIT

A. As per section 68 of the Income-tax Act, "Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the assessing officer satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year."

There was no provision corresponding thereto in 1922 Act. When the amount is borrowed by the assessee, it is the duty of the assessee to prove by cogent and proper evidences that there were genuine borrowings, because the facts are exclusively within the knowledge of the assessee.

B. In case of cash credit, identity of the person, genuineness of transaction and credit worthiness of depositor is required to be established by the assessee. If this is done, primary duty of the assessee shifts to the assessing officer to prove that the amount credited is not genuine and for which he has to bring cogent evidences for rejecting the explanation of the assessee.

C. In case of cash credit, when the assessee is not able to trace out the depositor due to lapse of time, non-co-operation of depositors, etc., the assessee should request the assessing officer to obtain bank details of the assessee by issuing summons to the bank authorities. As per recent KYC (Know Your Customer) norms the bank is collecting all the necessary evidences / proof, etc. at the time of opening of the bank account like PAN, photograph, address proof, identity proof, certificate of the bank employee regarding his visit to the business premises of the lender, etc. If the bank furnishes these details to the assessing officer directly, it can reduce the burden of the assessee, because as per KYC norms, these details cannot be furnished to the assessee directly by the bank being a secret document.

D. In cases of the assessees who are not maintaining books of account and any credit in the bank account of the assessee is found and explanation of the assessee is rejected, additions are made u/s. 68. This is not correct. As per section 68, the credit must appear in the books of the assessee and passbook is not books of the account of the assessee, because it is not maintained by the assessee or maintained under his instruction.

I. CIT, Poona Vs. Bhaichand H. Gandhi 141 ITR 67 (Bom)

ii. CIT Vs. Pooni Sugars & Chemicals Ltd. 306 ITR 392 (SC)
Vinod Behari Jain & others Vs. ITO 306 ITR 392 (SC)
When books of account are not maintained by the assessee, the amount received as gift is credited in his bank account and if there is finding that the gift amount was not genuine and represented assessee's own money introduced as gifts. Such amounts are deemed income of assessee. Additions can be made u/s. 69A.

iii. ACIT Vs. Satyapal Wassan 295 ITR 352 (Jabalpur)
When the additions are made on the basis of loose papers, loose papers are not books of account; hence addition can not be made u/s. 68.

E. Decisions for cash credit

i. CIT Vs. Dwarkadhish Investment P Ltd 330 ITR 298 (Delhi)
When the identity of the depositor and his PAN is furnished to the assessing officer and when the amount is received by account payee cheque, but the assessee is not able to find out share applicants, it was not sufficient to invoke section 68.

* It was held in this case that it is the revenue which has all the power and to trace any person.

ii. CIT Vs. Orbital Communication (P) Ltd. 327 ITR 560 (Delhi)
If the assessee is able to produce substantial evidence with regards to credit worthiness and genuineness of the transaction in relation to cash credit (for share application money), but he is not able to produce the creditor, addition u/s. 68 could not be made.

iii. CIT Vs. Usha Stud Agricultural Farms Ltd. 301 ITR 384 (Delhi)
CIT Vs. Prameshwar Bohra 301 ITR 404 (Raj)
Cash Credit - Credit not fresh but of previous year - Addition not justified

iv. CIT Vs. S. M. Aggarwal 293 ITR 43 (Delhi)
Income from undisclosed sources - Explanation that amount belonged to assessee's daughter - Assessee's daughter stating amount did not belong to her - Addition of amount - Without giving assessee opportunity to controvert statement or give further evidence - Not valid.

v. CIT Vs. Jeeta Khan 292 ITR 597 (P& H)
Amounts shown as loans - Identity of creditors proved - Loans through bank drafts - Amount not assessable as income.

vi. Bhaiyalal Shyam Behari Vs. CIT 276 ITR 38 (All)
Cash credit - Assessee stating that all credits were genuine - Claim for benefit of peak credit can not be made.

vii. Nemi Chand Kothari Vs. CIT 264 ITR 254 (Gauhati)
Cash credit - Assessee establishing identity of creditors and amounts received by him by way of cheques - Assessee must be taken to have proved that creditor had creditworthiness.

viii. Subhash Dall Mill Vs. ACIT 257 ITR 115 (Agra)
Cash Credits - Assessee obtaining loan by cheque and furnishing confirmation certificate - Assessee deducting tax at source for interest paid to creditor and creditor also assessed to tax - Loan genuine - Disallowance not justified.

ix. DCIT Vs. Rohini Builders 256 ITR 360 (Guj)
Cash Credit - Identity of creditors proved - Amounts received by account payee cheques - Initial burden of proving cash credit discharged - Source of credits need not be proved - Fact that explanation was not satisfactory would no t automatically result in deeming amount as income of assessee.

x. Smt. Prabhavati S. Shah Vs. CIT 231 ITR 1 (Bom)
Appeal - Cash Credit - ITO treated loans as income from undisclosed sources as summons could not be served on creditors - Assessee wanted to prove loan as repayment of loan was repaid by account payee cheque – The copy of bank account - AO should have considered evidence produced by assessee.

xi. a Anand Ram Raitani Vs. CIT 223 ITR 544 (Gauhati)
Cash credits - It should be in Assesse's books of account not in any body else's account - Assessee partner in firm - Cash credit in firm's books cannot be added as income from undisclosed sources in hands of Assessee (partner).

b CIT Vs. Jaiswal Motor Finance 141 ITR 706 (All)
Cash credit - Deposit in accounts of partners in books of firm in first year of assessment of firm - Deposits made by partners towards capital - Without the deposit they could not have become partners - Deposits cannot be assessed as income of firm, without any material to indicate that they were the profits of the firm - It was explained by the assessee that the deposit was out of agricultural income of the partners which was not accepted by the assessing officer - Under peculiar circumstances, it was held that the amount of credit cannot be assessed as income of the assessee firm.

xii. CIT Vs. Chandball Rice Mills (Pvt.) Ltd. 203 ITR 368 (Cal)

Cash credits - Confirmations produced by the assessee in the original assessment and accepted by ITO - Subsequent confession by creditor that loan given to assessee was bogus - Reassessment proceedings on the basis of creditors' confession not valid.

xiii. Basantipur Tea Co. (P.) Ltd. Vs. CIT 180 ITR 261 (Cal)
Cash credits - Amount credited on the first day of incorporation of company - Assessable as income from other source.

* In this case, total cash credit was Rs. 4,19,300/- and out of that Rs. 1,50,000/- was credited on the first day of its incorporation. As the assessee could not prove that the amount was earned as business income the same was rightly added as income from other sources.

xiv. Sarogi Credit Corporation Vs. CIT 103 ITR 344 (Patna)
Cash credit - Burden of proof - Credit entries in the names of third parties - Accepted by third parties - Initial burden shifted on assessee to prove truth of entry - Difference when parties are close relations of assessee and other parties - When burden shifts to department.

(The Assessee is not bound to prove the source of source while explaining the alleged cash credit. It will not, therefore, be for the assessee to explain further as to how or in what circumstances the third party obtained the money and how or why he came to make an advance of the money as a loan to the assessee.)

xv. ITO Vs. Computer Force 136 TTJ (Abd) 221
Cash Credit - Assessee made payment to the creditors in the subsequent years, which is corroborated by ledger accounts - Addition in respect of such credits can not be made.

xvi. ACIT Vs. Ajnara India Ltd. 135 TTJ (Delhi) 430
Share application money - Parties did not exist at the given address - Assessee produced bank details of the share applicants which go to indicate and establish that all the share applicants were existing account holders and were operating bank accounts as per norms fixed by the bank - Addition could not be sustained.

xvii. ITO Vs. Mayur Agrawal 133 TTJ (Agra) 1 (TM)
Once summons were issued on the creditors, their identity is duly proved and A.O. could not make addition u/s. 68 without enforcing the attendance of the parties.

14. SECTION 14A

A. Section 14 provides heads of income and section 14A provides that expenditure incurred in relation to income not includible in total income shall not be allowed. Section 14A was inserted by the Finance Act, 2001 with retrospective effect from 01/04/62.

B. Provision of section 14A

I Section 14A inserted by Finance Act, 2006 with effect from 01/04/07, for the purpose of computing income under this chapter (This provision is inserted in chapter IV and this chapter contains sections 14 to 59), no deduction of expenditure shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act. Thus, the income which is not taxable and exempt u/s. 10 and any expenditure is incurred by the assessee to earn exempt income, the expenditure will not be allowed.

II This provision shall be applicable when the assessing officer is not satisfied with the accounts and correctness of the claim of the assessee. As per section 14A(2), the A.O. shall determine the amount of expenditure in relation to such income as per rule 8D, which was prescribed with effect from 24/03/08.

III When the assessee claims that no expenditure has been incurred in relation to income which does not form part of total income, the assessing officer shall work out such expenditure as per rule 8D.

IV As per proviso inserted with effect from 11/05/01, the assessing officer shall be prohibited to enhance income u/s. 147 or to pass an order u/s. 154 to increase the liability of the assessee for any assessment year beginning on or before 01/04/01 (A.Y.2001-02).

C. Formula for determining expenditure
The expenditure shall be aggregate of the following amount.

I The amount of expenditure directly relating to income which does not form part of total income.

II When the expenditure is incurred by way of interest which is not directly attributable to any particular income or receipt, the following formula shall be applicable.

$$\frac{A \times B}{C}$$

Where A = Amount of interest expenses [Other than interest shown above in C-I]
B = Average value of investment appearing in the balance sheet on the first day and last day of the previous year (accounting year)
C = Average of total assets appearing in the balance sheet on the first day and last day of the previous year (accounting year)

III The amount equal to 1/2 % of the average of the value of investment appearing on the first and last day of the balance sheet of the assessee.

Example:

A. D-mate charges / bank collection charges in connection with the exempt income **50**

B. $\frac{A \times B}{C}$

A =	Expenditure on interest		50000
B =	Total investment from which exempt income arises as on 01/04/10	19225	
	Total investment from which exempt income arises as on 31/03/11	19247	
	For average	38472 / 2	19236
C =	Total assets as on 01/04/10	1963845	
	Total assets as on 31/03/11	2174356	
	For average	4138201/2	2069101

$\frac{A\ 50000 \times B\ 19236}{C\ 2069101} = 465$

C. ½ % of average of total investment from where tax free income arises (1/2 % of B Rs. 19236) 95

D. Total disallowance

Expenses directly relating to exempt income	Rs. 50
Interest expenses as worked out above	Rs. 465
Other expenses	Rs. 95
Total	**Rs. 611**

D. 1 Thus, the expenditure incurred for earning the income u/s. 14 to 59 relates to expenses like rent, taxes, salary, interest, etc. Thus, section 14A relates to all the five heads of income.

2 Section 14A is applicable in case of expenditure and not in the case of return of investment.

3 If the expense is allowable under any head of income, like interest u/s. 36 (1) (iii), still disallowance can be made u/s. 14A, if it relates to exempt income.

4 Direct / indirect expenses relating to income not forming part of total income is to be considered for disallowance u/s. 14A.

5 The burden is on the assessing officer to show that the expenditure was incurred against income exempt from tax.

Thus, if the assessee claims that the expenditure incurred is allowable, he has to show that income forms part of total income.

6 The disallowance of expenses may be even more than exempt income. There is nothing in the provision that the expenditure disallowed should not exceed exempt income.
Sanchayita Mercantile (P) Ltd Vs. ACIT 25 SOT 57 (Mum)

Against this judgement, there is judgment of ITAT Chandigarh Bench 'B' in the case of ACIT Vs. Punjab State Co-op. and Marketing Fed. Ltd. In this case, dividend received was Rs. 4,00,410/- while the disallowance of Rs. 12,73,462/- was made u/s. 14A. It was submitted by the assessee that investment was made out of reserve and surplus and no expenditure was incurred for earning exempt income. The investment was very old and no new investment was made during the year. On these facts, the disallowance was deleted considering the decision reported in CIT Vs. Winsome Textile Industries Ltd 319 ITR 204 (P&H) and CIT Vs. Hero Cycles Ltd. 323 ITR 518 (P&H).

This judgment seems to be sound, because even applying the ratio of human probabilities, no prudent man will spend considerable amount for earning meager income. It is against the principle of human probabilities as held in the case of Sumati Dayal Vs. CIT 214 ITR 801 (SC).

7 Section 14A is applicable to expenditure incurred against exempt income and not against loss - Navin Bharat Industries Vs. DCIT 90 ITD 1 (Mum) (TM).

8 The nature of receipt of income has to be looked in the hands of the recipient and not in the hands of payer.

9 The assessing officer cannot add expenses on ad hoc basis after rule 8D are prescribed.

10 If the income of assessee comprise of taxable as well as non-taxable income, amount of expenditure relating to non-taxable income is to be worked out as per section 14A.

11 Even if there is no exempt income earned or received in the year under consideration, the expenses can be disallowed u/s. 14A.

12 On the ground of double taxation of income, share of profit received from the partnership firm is exempt in the case of partner u/s. 10(2A), still section 14A would be applicable in case of partner.

13 Section 14A is applicable in the case of the assessee engaged in the business of dealing in shares as well as shares held as stock-in-trade, when earning of dividend income is incidental to trading in shares.

14 When the investment in shares by the assessee is out of his own funds, no disallowance of interest could be made u/s. 14A merely on the ground that assessee had taken loans on which interest was paid.

15 In the case of investment company, dividend earned is exempt u/s. 10 (33). Hence, expenditure incurred on salary can be disallowed. CIT Vs. Tata Investment Co. 114 ITD 584 (Mum).

16 Where the interest paid for acquisition of shares is capitalized, such interest paid is not incurred in relation to exempt income, i.e., dividend, but as part of acquisition of share and no disallowance u/s. 14A could be made. S Balan Vs. DCIT 120 TTJ (Pune) 397

17 a In case of bank, even though the tax free investment are made to maintain SLR, disallowance u/s. 14A could be made. Punjab National Bank Vs. DCIT 103 TTJ (Delhi) 908

b No disallowance could be made u/s. 14A as it is statutory obligation to maintain SLR ratio. State Bank of Travankore Vs. ACIT 318 ITR (AT) 171 (Cochin)

18 If there are substantial reserves in addition to other reserves in the books of the assessee and it can be proved that the investment was out of surplus funds, no disallowance on account of interest u/s. 14A could be made. Harisons Malayalam Ltd Vs. ACIT 19 SOT 363 (Cochin)

E Effect of proviso to section 14A inserted by the Finance Act, 2002 with effective from 11/05/01 (Prohibition on reopening or rectification by assessing officer)

I If the matter is pending before CIT(A) or ITAT or heard by these authorities, but the order is not passed, in such cases, amended proviso to section 14A has to be applied retrospectively by them.

II The assessing officer can not reopen case u/s. 147 or pass rectification order u/s. 154 for the assessments prior to A.Y. 2001-02. Thus, section 14A will not be applicable in such cases.

III If the assessment for A.Y. 2001-02 or earlier years is pending before the assessing officer and the issue relates to allowability of expenses, against exempt income, then he will pass the order as per amended law.

IV If the assessing officer is directed by appellate authority to consider expenses against exempt income, then the assessing officer will apply amended provisions of section 14A. In such case, restriction imposed by section 14A will not come in the way of the assessing officer.

V If for A.Y. 2001-02 or earlier year, the CIT has set aside the case u/s. 263 for fresh adjudication, the assessing officer shall apply amended proviso to section 14A. In such cases, it can not be said that the assessment became final or concluded until expiry of the statutory time limit.

VI If the income is falling under any heads of income, but due to deduction under chapter VI-A (section 80A to 80U) the same is not liable to tax, provisions of section 14A will be applicable.

VII If the assessing officer has rightly reopened the case u/s. 147, he will be prohibited to consider issue of disallowance u/s. 14A. As per amendment in section 147 with effect from 01/04/89, the assessing officer is entitled to assess any other income which has escaped assessment, but due to special provision in section 14(3) proviso, the A.O. can not make addition u/s. 14A.

VIII If the return is processed u/s. 143(1) or assessment order assessed u/s. 143(3) or rectification order is passed u/s. 154 in which claim of expenditure against income not forming part of total income is accepted by the assessing officer, the assessing officer cannot initiate any proceedings for A.Y. 2001-02 or earlier years.

IX CIT is not assessing officer, so he is not prohibited to take action as per amended proviso to section 14A.

X If the assessment could be modified by any higher authority, it cannot be said that the order has become final until expiry of period provided for such order.

XI After the rule 8D is made applicable, it is binding on the assessing officer and the assessing officer cannot disallow pro-rata expenses but he has to strictly follow rule 8D applicable with effect from 24/03/08.

F Some important authorities

1. CIT Vs. Walfort Share and Stock Brokers P Ltd 326 ITR 1 (SC)
Income - Purchase of securities "cum dividend" - Sale at loss - Claim to set off of loss – Permissible - Loss not expenditure relating to dividend.

2. D. J. Mehta Vs. ITO 290 ITR 238 (Mum)
Interest on borrowed funds - No nexus between income and borrowed funds - Interest not deductible u/s. 14A

3. ACIT Vs. Citicorp Finance (India) Ltd. 300 ITR 398 (Mum)
Provisions of section 14A - Applicable to pending assessment

4. Haryana Land Reclamation and Development Corporation Vs. CIT 302 ITR 218 (P& H)
Deduction - Expenditure incurred in relation to income not includible in total income - Substantial income generated out of agriculture - Assessee not able to prove that expenditure for business purposes - Section 14A applies.

5. CIT Vs. Winsome Textile Industries Ltd. 319 ITR 204 (P& H)
Deduction - Acquisition of shares using assessee's own funds - No interest expenditure incurred - No claim made for exemption - No disallowance warranted.

6. CIT Vs. Ms. Sushma Kapoor 319 ITR 299 (Delhi)
   A. Interest on borrowed capital - Interest free advances - Finding that advances given before taking of loan - Disallowance not justified.
   B. Section 14A - Borrowed funds utilized only for investment and such investments co-related with borrowed funds - Disallowance on ad hoc basis not justified.

7. Pradeep Kar Vs. ACIT 319 ITR 416 (Kar)
Exemption - Other sources - Interest on capital borrowed for investment in shares – Deductions – Dividend - Dividend not assessable as income from other sources - Dividend exempt from tax - Expenditure related to exempted income - Not deductible.

8. CIT Vs. Hero Cycles Ltd. 323 ITR 518 (P& H)
Deduction - Disallowance of expenditure in relation to income which does not form part of total income - Dividend income - Disallowance not permissible where no nexus between expenditure incurred and income generated.

9. CIT Vs. Popular Vehicles And Services Ltd. 325 ITR 523 (Ker)
Interest on borrowed capital - Expenditure in relation to income not forming part of total income - Funds diverted to sister concern of which assessee was a partner - Share income from firm not taxable - Interest not deductible

10. Kankhal Investments and Trading Co P Ltd Vs. ACIT 301 ITR 359 (Mum)
Deduction – Dividend - Disallowance of expenditure on exempt income - Ad hoc disallowance not permissible.

11. Nishmukh Investments & Trading Pvt. Ltd. Vs. DCIT 312 ITR 1 (Bom)
Daga Capital Management Pvt. Ltd. 119 TTJ (Mumbai) (SB) 289, 117 ITD 169, 26 SOT 603, 15 DTR 68
DCIT Vs. Zaveri V. Mandalia 4 DTR (Ahd) (Trib) 636
Section 14-A – Deduction - Special provision disallowing expenditure in relation to exempted income - Applicable for all heads of income – Sub-sections (2) and (3) are procedural and retrospective in nature

12. ACIT Vs. Cheminvest Ltd. 317 ITR (AT) 86 Delhi (SB)
Cheminvest Ltd. Vs. ITO 124 TTJ (Del) (SB) 577, 121 ITD 318, 27 DTR 32
Deduction - Expenditure in relation to exempted income - Shares purchased out of borrowed funds - Dividend exempted - Whether shares held as investment or as stock-in-trade - Interest paid thereon - Not allowable.

13. State Bank of Travancore Vs. ACIT 318 ITR (AT) 171 (Cochin)
Deduction - Disallowance of expenditure in relation to income which does not form part of total income - Bank subscribing to tax free bonds not for earning tax free income but for meeting its statutory obligation of maintaining statutory liquidity ratio - No disallowance u/s. 14A.

14. CIT Vs. Ms. Sushma Kapoor 320 ITR 307 (Delhi)
Deduction - Expenditure incurred in relation to income not includible in total income - Loss on sale of securities for payment of interest on P.F. - Section 14A not applicable - To be allowed.

15. Godrej and Boyce Mfg. Co. Ltd. Vs. DCIT 328 ITR 81 (Bom)
Section 14A applicable to dividend income and income from mutual funds exempted u/s. 10(33) - Section 14A(2) and 14(3) are constitutionally valid - Rule 8D not retrospective - Applicable from A.Y. 2008-09. - Disallowance to be determined on reasonable basis.

16. Catholic Syrian Bank Ltd. Vs. CIT 330 ITR 556 (Ker)
Section 14A - Concluded assessment could not be reopened - What is concluded assessment - Assessment which could be modified by higher authority is not a concluded assessment till expiry of time limit for such modification - Order remanded in appeal - Subsequent revision of order - Permissible.

17. Catholic Syrian Bank Ltd. Vs. CIT 336 ITR 434 (P& H)
Exempted dividend – Omission to claim exemption for dividend - Not relevant - Assessee entitled to exemption - Disallowance u/s. 14A cannot be made on basis of presumption - No evidence that expenditure incurred in earning dividend - No disallowance permissible u/s. 14A.

G. Penalty u/s. 271(1)(c) when addition is made u/s. 14A

1. a Hindustan Steel Ltd. Vs. State of Orissa 83 ITR 26 (Orissa)
Penalty - When to be levied - General principles - Failure to register as "Dealer" under Sales-tax Act - Bona fide belief that assessee was not a "Dealer" - Levy of penalty - Whether justified?
As held in this case, "An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the act or where the breach flows from a bona fide belief" that the offender is not liable to act in the manner prescribed by the statute."

b Cement Marketing Co. Vs. CST 124 ITR 15 (SC)
Sales Tax – Penalty - "False" return - Omission to include in return of turnover freight included in price of bona fide belief that it was not taxable - Return not "False" - No penalty leviable.

* If any act is done under bona fide belief, no penalty is leviable.
This judgment was given in relation to Central Sales Tax Act, 1956.

2. Dilip N. Shroff Vs. JCIT 291 ITR 519 (SC)
It was held in this case that assessing office has to be fair and objective in the matter of imposition of penalty. It was held that penalty u/s. 271(1)[c] is leviable for the default of concealment of income or furnishing inaccurate particulars thereof. But by reason of such concealment or furnishing inaccurate particulars alone, the assessee does not ipso facto become liable to penalty. Imposition of penalty is not automatic. Penalty proceedings are not to be initiated merely to harass the assessee. The approach of the A.O. in this behalf must be fair and objective. In the penalty proceedings, the authority must consider the matter afresh as the question has to be considered from a different angle.

3. CIT Vs. Caplin Point Laboratories Ltd. 293 ITR 524 (Mad)
Penalty u/s. 271(1)(c) - When disallowances were made on the basis of different interpretations it can not be said that the assessee concealed particulars of income or furnished inaccurate particulars of income. In this case, the assessee adopted a particular view on the basis of certain case law or some bona fide belief.

4. CIT Vs. Phi Seeds India Ltd. 301 ITR 13 (Delhi)
Penalty - Concealment of income - Claim for deduction found to be erroneous - No concealment of income penalty could not be imposed – S. 271(1)(c) is attracted only in those instances where assessee concealed the particulars of income or has furnished inaccurate particulars of such income with an intent to mislead the revenue - IT Act does not envisage or explicitly provide that in every case where return is not accepted as correct and assessment is framed at an income higher than that presented and offered for taxation by an assessee in the form of its return penalty proceedings must be initiated. This proposition must logically follow from the word "may" in contradiction to "shall" in section 234.

5. CIT v. Atul Mohan Bindal [2009] 317 ITR 1 (SC)
The Supreme Court pointed out that Union of India & Others v. Dharamendra Textile Processors & Others (2008) 306 ITR 277's case has been explained in Union of India v. Rajasthan Spinning and Weaving Mills [2010] 1 GSTR 66 (SC)/ 224 CTR (SC) 1 and concluded in line with this decision that penalty u/s. 11AC of the Central Excise Act could not be levied in every case of non-payment or short payment of duty and that penalty in respect of section 271(1)(c) of the Income-tax Act would be leviable, subject only to the conditions thereunder. It required the matter to be considered not solely with reference to Dharamendra Textile Processors' case but along with the decision of Rajasthan Spinning and Weaving Mills' case (supra).

6. CIT Vs. Reliance Petroproducts 322 ITR 158 (SC), 230 CTR (SC) 210
Penalty - Concealment of particulars of income - No information given in return found to be incorrect - Making incorrect claim - Does not amount to concealment of particulars.

15. SECTION 36(iii) - DEDUCTION OF INTEREST

A. 1. As per this section, interest paid on capital borrowed for the purpose of business or profession is allowable as deduction against business or professional income.

2. With effect from 01/04/04, interest on capital borrowed for acquisition of asset, for extension of existing business or profession from the date of capital borrowed till the date of such asset was first put to use shall not be allowed as deduction.

B. Some important authorities

1. CIT Vs. Abbas Wazir (P.) Ltd. 274 ITR 448 (All)
Income - Accrual of income - Interest on amount advanced - Recovery of even principal amount doubtful - Decision not to charge interest - Interest does not accrue.

2. S. A. Builders Ltd. Vs. CIT (Appeals) 288 ITR 1 (SC)
Interest on borrowed capital - Interest on money borrowed from bank and lent to sister concern without charging interest - When allowable - Test same as that for allowance of business expenditure - Viz "For the purpose of business" - Allowable as a measure of commercial expediency.

3. CIT Vs. South India Corporation (Agencies) Ltd. 293 ITR 237 (Mad)
Income - Loans advanced to sister concern and subsidiary without interest - No fresh loans in relevant account year - No evidence that loans were from borrowed funds - Notional interest on advanced not includible in total income.

4. a CIT Vs. Ms. Sushma Kapoor 319 ITR 299 (Delhi)
Interest on borrowed capital - Interest free advances - Finding that advances given before taking of loan - Disallowance not justified

b S.A. Builders (supra) followed
CIT Vs. H. B. Stock Holdings Ltd. 325 ITR 316 (Delhi)
Interest on borrowed capital - Interest free loans given to sister concern prior to borrowed amount - Not relevant - Interest deductible

5. CIT Vs. Lalsons Enterprises 324 ITR 426 (Delhi)
Interest on borrowed capital - Disallowance on ground of diversion of funds to sister concern - Finding of mutual advances between assessee and sister concern in course of business and no interest charged by either party - Interest paid to bank not to be disallowed

6. CIT Vs. Pankaj Munjal Family Trust 326 ITR 286 (P& H)
Interest on borrowed capital - Amount borrowed at 16% interest and invested in 4% Non-cumulative preference shares - No evidence that transaction not genuine - No part of interest could be disallowed u/s. 36(1)(iii).

7. CIT Vs. Rockman Cycle Industries Pvt Ltd 331 ITR 401 (P& H)
Interest on borrowed capital - Borrowings from sister concern at higher rate of interest and investment in shares of another sister concern carrying dividend at lower rate - Taxing authorities and court entitled to determine true legal relation resulting from transaction - Must look at the matter from the view point of prudent businessman - Not entitled to hold roving inquiry.

8. CIT Vs. Bharti Televenture Ltd. 331 ITR 502 (Delhi)
Interest on borrowed capital - Loans granted interest-free to subsidiaries - No direct nexus between borrowed funds and advances - Sources of advances explained and assessee having adequate non-interest bearing funds at relevant time - Advances to subsidiaries found to be made for business considerations - Onus to prove commercial expediency discharged - Deduction of interest allowable.

16. SECTION 32 - DEPRECIATION

A.1. Depreciation is allowable on tangible assets like building, machinery, plant or furniture and on intangible assets like know-how, patents, copy rights, trade marks, licenses, franchises or any other business or commercial rights of similar nature.

2. Depreciation is allowable on assets owned wholly or partly by the assessee and used for the purposes of the business or profession.

3. In the case of block of assets, depreciation is allowed on WDV as per percentage which may be prescribed.

4. If the asset is put to use for less than 180 days, depreciation shall be allowed at 50%.

5. From 1/04/1988, if the building in which the business or profession is carried out is not owned by the assessee, but the assessee hold leasehold right or other right of occupancy, any capital expenditure incurred by the assessee on construction of any structure or by way of renovation, for extension or improvement to the building, the assessee shall be presumed to be the owner of such property and the depreciation will be allowed accordingly.

6. From 01/04/2002 as per explanation 5 to this section, whether or not the assessee has claimed deduction in respect of depreciation, it will be presumed that depreciation was claimed and allowed to the assessee.

B. Some important authorities

1. Hindustan Machine Tools Ltd. Vs. CIT 175 ITR 220 (Kar)
Increased cost due to exchange fluctuations. Depreciation allowable on such increased value of asset.

2. Crompton Engineering Co. Ltd. Vs. CIT 193 ITR 483 (Mad)
Jeeps are motor cars.

3. CIT Vs. Anand Theatres 244 ITR 192 (SC)
Hotel/Cinema Theater is not a plant as it is specifically equipped for the purpose of business. It is a building.

4. Techno Shares and Stock Ltd. Vs. CIT 327 ITR 323 (SC)
On Bombay Stock Exchange membership card, depreciation is ineligible being an intangible asset.

5. CIT Vs. Bharat Aluminium Co. Ltd. 187 Taxman 111 (Delhi)
Depreciation is allowed on block of assets. Individual assets lose their identity after becoming inseparable part of block of assets. It is not necessary that each asset of block should be used.

6. Asset ready to use

a. View in favour of the assessee

i. Capital Bus Service (P) Ltd Vs. CIT 123 ITR 404 (Delhi)
Asset ready to use, but not actually used is entitled to depreciation.

ii. CIT Vs. India Tea and Timber Trading Co. 221 ITR 857 (Gauhati)
Even a passive use includes actual use for the purpose of depreciation.

iii. a ACIT Vs. Ashima Syntex Ltd. 251 ITR 133 (Guj)
Depreciation - Machinery purchased for expansion of business - Trial run of machinery - Assessee entitled to depreciation.

b CIT Vs. Mentha and Allied Products 326 ITR 297 (All)
Trial run of plant constitutes use of assets and depreciation is allowable.

iv. a CIT Vs. Southern Petrochemical Industries Corporation Ltd. 292 ITR 362 (Mad)
Stand-by asset (machine parts) is entitled to depreciation.

b CIT Vs. Southern Petrochemical Industries Corporation Ltd. 301 ITR 255 (Mad)
Depreciation - Asset kept as stand-by - Entitled to depreciation.

c CIT Vs. Southern Petrochemical Industries Corporation Ltd. 311 ITR 202 (Mad)
Depreciation – Stand-by asset not put to use during accounting year - Entitled to depreciation.

v. Siv Industries Ltd. Vs. DCIT 306 ITR 114 Madras
Depreciation - Meaning of put to use - Machinery used or kept ready to use for 180 days - Full depreciation allowable.

b. User test - other view

I. Dineshkumar Gulabchand Agrawal Vs. CIT 267 ITR 768 (Bom)
The words used "for the purpose of business" denotes actually used and not merely ready for use.

ii. DCIT Vs. Yellamba Dasappa Hospital 290 ITR 353 (Kar)
For claiming depreciation, the asset has to be actually used. Asset kept ready theory is not available to the assessee.

iii. CIT Vs. Suhrid Geigy Ltd 133 ITR 884 (Guj)

7. Challapalli Sugars Ltd. Vs CIT 98 ITR 167 (SC)
Depreciation - Interest paid for installing machinery for the period prior to commencement of production is part of asset and depreciation is allowable on combined cost.

8. CIT Vs. Mangalore Chemicals and Fertilizers Ltd. 191 ITR 156 (Kar)
Business income – Depreciation - Unabsorbed depreciation - Deduction u/s. 37(2A) (Entertainment expenses) to be allowed first - Loss carried forward from earlier years to be deducted next and unabsorbed depreciation deduction from balance.

9. CIT Vs. Mirza Ataullaha Baig 202 ITR 291 (Bom)
Truck purchased on installment is entitled to depreciation though not registered in the name of the transporter.

10. a CIT Vs. Sekar Offset Press 214 ITR 516 (Mad)
Depreciation - Revaluation of asset due to disputes among partners and transfer to partner - Not for purpose of tax evasion - Explanation 3 to section 43(1) not applicable - Depreciation allowable on market value of assets.

b CIT Vs. Alagappa Cotton Mills 253 ITR page 100 (Mad)
Depreciation - Change in firm's constitution by retirement and introduction of new partners - Value of assets enhanced - Depreciation allowable on W.D.V.

c Nagammal Cotton Mills (Pvt.) Ltd. Vs CIT 258 ITR 390 (Mad)
Depreciation - Firm of two partners forming new company with 2 Directors - Firm dissolved after 13 months - Assets of firm taken over by the Company - Value of assets shown at much higher value than its market value - A.O. justified in taking WDV of the asset - Section 32 & 43(1).

11. CIT Vs. Tamilnadu Dairy Development Corporation 216 ITR 535 (Mad)
Transfer of asset by Government does not require registration - Depreciation allowable.

12. a CIT Vs. Virmani Industries Pvt. Ltd. 216 ITR 607 (SC)
Depreciation - Unabsorbed depreciation – Carry forward and set off of "profits and gains" in section 32(2) - Meaning of profits and gains include income from other heads - Not necessary that business in respect of which depreciation was granted should be carried on in the following year - Asset which earned depreciation need not exist in the following year.

b CIT Vs. Fabriquip P. Ltd. 260 ITR 207 (Guj)
Depreciation - Unabsorbed depreciation – Carry forward and set off - Condition for availing of benefit - Assessee need not carry on any business or profession in subsequent year - Assessee entitled to carry forward and set off unabsorbed depreciation.

13. CIT Vs. Agrawal (G.N.) (Individual) 217 ITR 250 (Bom)
Depreciation - Truck used in business - Truck under repairs - Entitled to depreciation.

14. CIT Vs. Tata Iron and Steel Co. Ltd. 231 ITR 285 (SC)
Actual cost - Depends on the amount paid by assessee to acquire asset - Loan taken to acquire asset - Manner of repayment of loan or non-payment of loan will not alter cost of asset - Fluctuation in rate of foreign exchange result in gain or loss while repaying installments of foreign loan will not alter cost incurred for purchase of asset for computing depreciation.

15. CIT Vs. Nagpur Golden Transport Co. 233 ITR 389 (Delhi)
Vehicle taken on the hire purchase agreement - Depreciation allowable to the user

16. Mysore Minerals Ltd. Vs. CIT 239 ITR 775 (SC)
Depreciation - Building - Condition precedent for claiming depreciation - Ownership of building - Meaning of ownership in section 32 - Wide meaning must be given - Assessee in possession of building on part payment of price - Building not registered in name of assessee - Assessee was owner of building for purpose of section 32 - Entitled to depreciation on it - Interpretation beneficial to assessee.

17. CIT Vs. Karnal Co-operative Sugar Mills Ltd. 243 ITR 2 (SC)
Amount deposited to open letter of credit for purchase of machinery required for setting up plant - Interest is directly connected and incidental to construction of plant - Interest is a capital receipt, which will go to reduce the cost of asset.

19. Escorts Electronics Ltd. Vs. CIT 258 ITR 23 (Delhi)
Depreciation - Other sources - Unabsorbed depreciation of earlier years can be set off against income from other sources of current year (Section 32 & 56).

20. CIT Vs. Taxspin Engineering and Manufacturing Works 263 ITR 345 (Bom)
If firm is converted in to company, depreciation to the firm is allowable till it was a firm.

21. CIT Vs. Navdurga Transport Co. 149 CTR (All) 219
When asset registered in the name of the partner is introduced in the partnership firm, depreciation is allowable even though the vehicle continued to remain in the name of the partner.

17. NATURAL JUSTICE

In the assessment proceedings, principle of natural justice has to be applied. If any evidence/material is collected behind the back of the assessee, such evidence/material has to be given to the assessee. Opportunity of cross examination is to be provided to the assessee. Without furnishing such evidence to the assessee, if the assessment is framed, it is a breach of principle of natural justice and such assessment can not sustain in appellate proceedings. The following decisions are worth noting.

a. CBI Vs. V. C. Shukla (1998) 3 SCC 410
The loose papers and documents found from the possession of the third party, even if such documents contain narration, the revenue cannot be justified in resting its conclusion on it.

b. Mehta Parikh & Co. Vs. CIT 30 ITR 181 (SC)
High denomination notes of Rs. 1,000/- in possession of assessee - Assessment as undisclosed profits - Finding based on mere surmise – Affidavits - Rejection without cross examination - Legality.

c. C. Vasantlal & Co. Vs. CIT 45 ITR 206 (SC)
Income-tax enquiries – Evidence – Income-tax authorities whether bound by technical rules of evidence - Rules of natural justice - Examination of witnesses in the absence of assessee - Duty to give opportunity to assessee to cross examine.

d. Joseph Thomas & Bros. Vs. CIT 68 ITR 796 (Ker)
When income is estimated without furnishing details of such cases to the assessee the assessment is illegal.

e. Gargi Din Jwala Prasad Vs. CIT 96 ITR 97 (All)
Assessment - Principle of natural justice - Addition of amount of income - Opportunity to assessee to be heard and inspect record - Permission to cross examine witnesses given but names of witnesses and substance of statements made by them not given - Assessment whether valid? - Held that the assessment was vitiated by violation of the principle of natural justice as the permission given for cross examination of witnesses was illusory.

f. International Forest Co. Vs. CIT 101 ITR 721 (J&K)
Orissa Fisheries Development Corp. Ltd. Vs. CIT 111 ITR 923 (Ori)
Assessment - Income from forest coupe - Additions made by ITO to amount returned – Validity - Mere low yield of outturn - Lesser outturn in accounting year than in earlier years - Ignoring report of forest officer about extent of rot without good grounds or examining forest officer – Non-acceptance of sale of timber referred to by assessee - Use of schedule adopted by forest department for working out of yield of sawn timber - Reliance on Ayyangar Commission report - Opportunity to assessee to meet remarks in that report - Arbitrary addition to income based on guess work - Whether justified?

g. Kishinchand Chellaram Vs. CIT 125 ITR 713 (SC)
Income-tax proceedings - Evidence to be used against assessee - Letter from manager of bank through which money remitted - Not shown to assessee - Not admissible - Opportunity to controvert should be given to assessee.

h. Vijay Hemant Finance and Estates Ltd. Vs. ITO 238 ITR 282 (Mad)
TDS - Declaration in Form No. 15H filed along with return of TDS - Minor defects in Form No. 15H - Opportunity to rectify must be given -Natural justice - Opportunity to be heard - Obligatory where adverse consequences to party likely - Even where statute does not specifically provide for it.

i. Kusumben M. Parikh Vs. CBDT 242 ITR 501 (Guj)
Refund u/s. 119 - Refund exceeding Rs. 10,000/- - Application to CBDT for condonation of delay to CBDT - Rejection of application without giving reasons - Not justified - Power u/s. 119 are quasi judicial power - Must be exercised in conformity with principle of natural justice.

j. Tin Box Company Vs. CIT 249 ITR 216 (SC)
Income-tax proceedings - Opportunity of being heard – Assessment - Appellate Tribunal finding that assessee was not given proper opportunity of being heard - Appellate Tribunal holding assessee had opportunity before Commissioner (Appeals) - Deciding claim of assessee as not having merit and not remanding matter to assessing officer - High Court - On reference confirming order of Tribunal - Supreme Court – Appeal - Orders of High Court, Tribunal and Commissioner (Appeal) set aside and matter remanded to assessing officer for fresh consideration after giving assessee proper opportunity of being heard.

k. J. T. (India) Exports Vs. Union of India 262 ITR 269 (Delhi)
Natural justice - Personal hearing before exercising discretion is necessary - Unless specifically excluded - Even if

statute is silent, there is requirement to follow a fair procedure before taking a decision.

l. CIT Vs. C. F. Thomas 284 ITR 557 (Ker)
Order passed without giving assessee opportunity to rebut statement collected behind his back - Failure of natural justice – Effect - Order quashed and matter restored to stage where illegality intervened.

m. CIT Vs. Dharmpal Premchand Ltd. 295 ITR 105 (Delhi)
Natural justice - Refusal despite request by assessee to permit cross examination of analyst - Violation of natural justice

n. V. Selladurai Vs. CCIT 295 ITR 303 (Mad)
Order by CIT passed u/s. 263 without granting personal hearing to assessee - Violation of natural justice.

o. Prakash Chand Nahta Vs. CIT 301 ITR 134 (MP)
Assessment - Statement of third party relied on by revenue - Third party retracted statement subsequently - Assessee not allowed to cross examine third party - Power of A.O. to summon third party -Violation of principle of natural justice - Assessment order not valid.

p. M. Pirai Choodi Vs. ITO 302 ITR 40 (Mad)
Violation of principle of natural justice - Documentary evidence tendered by assessee not considered - Assessee not given opportunity to disprove statement by third party relied on by A.O. - Writ maintainable.

q. CIT Vs. Rajesh Kumar 306 ITR 27 (Delhi)
Unexplained investment - Addition on account of purchase of house property based on statements recorded during inquiry - Neither copies of statements nor material collected during enquiry disclosed to assessee - ITAT finding that principle of natural justice had not been followed - Justified.

r. State of Kerala Vs. K. T. Suaduli Grocery Dealer Etc. 1977 CTR (SC) 260
Opportunity - Cross examination - Interpretation of statutes - Kerala ST Act, 1963, section 17(3), proviso - Kerala General ST Rules, rule 15 - Interpretation of section 17(3) of the Act alongwith proviso thereto - Provisions for the opportunity of being heard under the Act - Whether include the right of cross examination by assessee of a third party whose accounts formed the basis of best judgement assessment by STO - Entries in one Haji P. K. Usmankutty's books constituting the ground for the best judgement assessment - Refusal to grant right to cross examine Usmankutty - Whether such a right is inherent in the Kerala Act - The legal position.

s. Swamy Bros. Vs. CIT 34 ITR 123 (Ker)
Indian Income-tax Act (XI of 1922), sections 22(4), 23(4) - Travancore Income-tax Act, 1921, sections 29(4), 30(4) - Best judgement assessment - Production of accounts - Rejection of profits returned - Profits determined on estimate on turnover - Material taken from comparable cases - Opportunity to assessee to explain - Necessity of.

t. K. Baliah & Anr. Vs. CIT 56 ITR 182 (Mys)
Best judgment assessment - Reassessment based on comparable cases - Duty to give opportunity to assessee to explain such cases -Indian Income-tax Act, 1922, s. 23(4).

u. Dhanlakshmi Pictures Vs. CIT 144 ITR 452 (Mad)
Best judgment assessment - Nature of - Not different in kind from assessment u/s. 143(3) - Revenue bound to give opportunity to assessee to state his objections to the materials to be used in completing the assessment - Income-tax Act, 1961, Ss. 143(3), 144.

v. CIT Vs. Laxminarain Badridas 5 ITR 170 (PC)
Best judgment assessment - Guiding principles - How far discretionary - Nature and finality of such assessment - Local inquiry, whether necessary – Cancellation - Sufficiency of cause – Reference - Question of fact – Adjournment - Respective duties of assessees and Income-tax Officers - Indian Income-tax Act (XI of 1922), Ss. 23(4), 27, 33, 66(2).

w. CIT Vs. Segu Buchiah Setty 77 ITR 539 (SC)
Best judgment assessment - Failure to submit return and to produce accounts - Sufficient cause shown only for not producing accounts - Whether assessment liable to be cancelled and fresh assessment to be made - Indian Income-tax Act, 1922, Ss. 22(2), (4), 23(4), 27.

x. Prabhat Mills Stores Co. Ltd. Vs. CIT (1966) 59 ITR 197 (Cal)
Firm - Registration - Renewal of registration - Non-compliance with notices under section 22(2) & 22(4) - Best judgment assessment - Refusal to renew registration - Appeals against best judgment assessment and refusal to renew registration - Best judgment assessment upheld - Order refusing to renew registration cancelled - Action of Appellate Assistant Commissioner whether proper - Indian Income-tax Act, 1922, Ss. 22(2), (4), 27, 30, 31(3)(c).

y. Star Television News Ltd. Vs Union of India 317 ITR 66 (Bom)
Settlement of cases - Change of law - Provision of cut off date for Settlement Commission to complete proceedings - Impossible to comply with the provisions for abatement where no order passed by that date - Discrimination likely among applicants for factor not under their contract - Automatic abatement of proceedings likely to prejudice applicant by making available confidential information to assessing authority - Provision arbitrary - To be read down so that proceedings treated as abated only where failure owing to reasons attributable to applicant.

z. Centurion Investment and International Trading Co. Pvt Ltd Vs. ITO 133 TTJ (Delhi) 803, 126 ITD 356 (Delhi)
Cash credit - Reassessment on the basis of statement made by entry operator, assessee not given opportunity to cross examine entry operator - Violation of principle of natural justice - Defective proceedings - Defect procedural in nature - Order irregular but not void or illegal - Matter remanded to be continued from stage at which irregularity supervened.

aa. Jindal Stainless Ltd. Vs. ACIT 122 TTJ (Delhi) 902
Opportunity of being heard - Assessee not given opportunity to cross examine the person on the basis of whose sole statement addition was made and when assessee denied under-billing - No addition could be made.

ab. Bangodaya Cotton Mills Ltd. Vs. CIT 330 ITR 104 (Cal)
When there was no evidence of receipt of enhanced consideration by the assessee failure to summon persons concerned or providing cross-examination to the assessee, addition is not proper.

ac. Dr. N. Rajkumar Vs. DCIT 231 CTR (Mad) 308
Natural justice - Appeal transfer - Assessee had sought for transfer of his cases to another bench and also approached the President of the Tribunal who sought for report in this regard and therefore orders passed by Tribunal - Only on the basis of written submission of assessee's counsel - Set aside with a view to comply with the principle of natural justice.

18. ASSESSMENT OF HUF

Whether HUF can consist of husband and wife?

A. In the Income-tax Act, definition of HUF is not given, but definition of person is given in section 2(31) and as per this section, person includes -
   i. an Individual
   ii. a Hindu Undivided Family
   iii. a Company
   iv. a Firm, etc.

B. Gift can be given to HUF consisting of husband and wife. Intention of the donor for giving the gift is important. If there is a specific statement/ intention that gift was given for the benefit of donee/his wife and children it is a valid gift. The income from such gift will be assessable under the status of HUF.

C. CIT Vs. M. Balasubramanian 182 ITR 117 (Mad) (FB)
In this case, gift was given by father for the benefit of son's wife and children. The son was unmarried at the time of receipt of gift. It was held that the income was assessable in the case of HUF and not individual.

D. CIT Vs. Arunkumar Jhunjhunwala 223 ITR 45 (Gau)
A HUF can consist of sole coparcener and his wife. In order to constitute a joint family, it is not always necessary that there should be two male coparceners. After marriage of the assessee, he could form a Hindu Undivided Family and be assessed in the status of HUF.

E. Salary to partner who is partner on behalf of HUF

The Partnership Act recognises only partner and not his status. From A.Y. 1993-94 there has been a radical change in the assessment of partnership firm. Salary to working partner is allowable as per section 40(b). As per explanation to this section, "working partner" means an individual who is actively engaged in conducting affairs of the business or profession of the firm of which he is a partner.

A contract of partnership has no concern with the obligation of partners to others in respect of their share of profit in the partnership. It only regulates the rights and liabilities of the partners. A partner may be the karta of HUF or trustee of a trust or benami for another, etc. In all such cases, he occupies a dual position. Qua the partners, the functions in his personal capacity: Qua the third parties, in his representative capacity. (CIT Vs. Bagyalakshmi & Co. 55 ITR 660 (SC))

As per rule 234(3) a Karta or manager acting on behalf of the family can enter into a partnership with a stranger. This partnership is exclusively between the contracting members and the partner, other than Karta or Manager, is not accountable to the members of the family.

Issue regarding partner who is actively engaged in the conduct of the business is decided by the Gujarat High Court in the case of CIT Vs. Natwarlal Tribhovandas 87 ITR 703 (Guj)

As per this judgment, the words 'actively engaged in the conduct of the business' should be given a liberal meaning. It does not signify active and continuous participation in actual transaction of the day-to-day business of the firm. In this case, the partner in a construction business was sent abroad to obtain higher educational qualification in civil engineering and the assessee was away from India. It was held by the Gujarat High Court that his stay abroad would ultimately benefit the firm and help it in carrying its business more efficiently and also to expand its business. The partner was considered to be actively engaged in the conduct of the business of the firm.

In the partnership firm, if the partner is representing his HUF and drawing salary as a working partner, the attempt of the Department will be to disallow such salary and specially after radical changes in the assessment of partnership firm with effect from 1993-94. On the basis of facts of each case taxability of salary will depend. The income should be taxed in the hands of the real owner as per the principle of "REAL INCOME". The ratio laid down by the Honorable Supreme Court and other Courts should be borne in mind to decide the taxability of income in the case of Individual or HUF. The cases are discussed hereunder.

1. CIT Vs. Kalu Babu Lal Chand 37 ITR 123 (SC)

In this case, the HUF was one of the promoters of a company to be floated. The articles of association of the company provided for the remuneration of the member. The shares were acquired with funds belonging to the joint family. The family enjoyed the dividend paid on these shares. There was no contribution by the member in his individual capacity. The company was all along financed by the family. The Managing Director's remuneration received was credited in the books of the family. For the first time, it was pleaded that the remuneration of M.D. should be assessed as personal income and should not be added in the income of the family.

The Supreme Court held that looking to the facts of the case; it was the income of the family.

2. Palaniappa Chettiar Vs. CIT 68 ITR 221 (SC)

Out of 300 shares of the company, 90 shares were acquired with the funds of the family. After some time, the member became M.D. of the company. The only qualification of M.D. was holding of not less than 25 shares in the company. The question was whether the remuneration and commission and sitting fees received by the karta were assessable as income of the family?

It was held by the Supreme Court that the shares were not acquired by the family with the object that the karta should become M.D. There was no real connection between the investment of the family and appointment of the karta as M.D. The remuneration of the M.D. was not earned by any detriment to the joint family assets. The remuneration, commission and sitting fees were not assessable as income of the family.

3. I. V. D. Dhanwatey & other Vs. CIT 68 ITR 365 (SC)

The karta was a partner. The contribution to the capital of the firm belonged to the family. Interest was payable on the capital contributed by each partner. In the partnership deed the general management and supervision of the partnership was in the hands of the karta.

It was held by the Supreme Court that the karta became partner on account of investments of the joint family assets. There was real and sufficient connection between the investment and the remuneration to karta. The salary paid to the karta was assessable as income of the HUF.

4. CIT Vs. Gurunath V. Dhakappa 72 ITR 192 (SC)

In this case, Rs. 6,000/- per annum was paid to the karta as salary over and above the share of profit as he was a partner in the firm representing the family. It was held by the Supreme Court that there was no finding that the salary received by the karta was directly related to any assets of the family utilized by the firm. The salary income could not be treated as income of the family.

5. Raj Kumar Singh Hukam Chandaji Vs. CIT 78 ITR 33 (SC)

This is a very important judgement regarding assessment of remuneration received whether individual income or income of family. The tests have been laid down in this case. The tests are:-

i. Whether the remuneration received by the coparcener in substance though not in form is one of the modes of return made to the family because of the family fund in the business? If the reply is in yes, it is the income of the family.

ii. Whether it was compensation made for the services rendered by the individual coparcener? If the reply is in yes, it is the income of the individual coparcener.

iii. If the income was essentially earned as a result of the fund invested, the fact that a coparcener has rendered some services would not change the character of the receipt.

iv. If it is essentially a remuneration for the services rendered by a coparcener, the circumstances that his services were availed of because of the reason that he was a member of the family which had invested funds in the business for that he had obtained the qualification shares from out of the family funds would not make the receipt the income of the HUF.

In this case, the M.D. was appointed by a resolution of the board of directors of the company and he was subject to removal at any time. The appointment as Managing Directors was not a result of detriment of the family property. Thus, the remuneration received by the karta was assessable as individual income.

F. Amendment to Hindu Succession Act, 1956

With effect from 05/09/05, radical changes are made in Hindu Succession Act. As per amended section 6 of the Hindu Succession Act, a daughter -

i. is considered to be a coparcener in the same manner as a son,
ii. has same rights as if she would have been a son in coparcenary property,
iii. will be subject to same liability in coparcenary liability as of a son,

Thus, the HUF of father and married daughter/daughters is possible after the amendment.

19. APPEAL AGAINST AGREED ASSESSMENT

Whether appeal against agreed assessment can be filed?

A. Appeal against agreed assessment is permissible as held in the case of Chhat Mull Aggarwal Vs. CIT 116 ITR 694 (P&H). There is no provision in the IT Act, whereby the remedy of appeal against the order of the ITO or against the order of the AAC is bared, if the impugned order mentioned that it had been passed on the admission of the assessee. The provision of section 246(1)(c) of the IT Act, 1961 entitles an assessee to file an appeal against the order of the ITO before the AAC, where the assessee denied his liability to be assessed under the Act.

B. Section 96(3) of the Code of Civil Procedure, 1908 forbids an appeal from a consent order. Thus, only against consent decree, there is no provision of appeal, but as per section 246(1)(c) of the Income-tax Act, if the assessee denies his liability to be assessed under this Act, he can file an appeal.

20. GRANT OF STAY AGAISNT DISPUTED TAX

When the assessed income is more than twice of the returned income, Instruction no. 96 is clear. In such cases, when 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.

The following Courts have also directed the concerned officers to follow this instruction.

a. N. Raja Nair Vs. ITO 165 ITR 650 (Ker)

b. Vikrambhai Punjabhai Palkhiwala Vs. S. M. Ajbani, Recovery Officer 182 ITR 413 (Guj)

c. Mrs. R. Mani Goyal Vs. CIT 217 ITR 641 (All)

d. His Late Highness Maharana Shri Bhagwat Singhji of Mewar Vs. ITAT 223 ITR 192 (Raj)

e. I. V. R. Constructions Ltd. Vs. ACIT 231 ITR 519 (AP)

f. KEC International Ltd Vs. B R Balakrishnan 251 ITR 158 (Bom)

In this case, the High Court laid down the parameters to be complied with by the authorities while passing order on stay application filed, pending appeals to the first appellate authority.

1. The authority has to set out the case of the assessee briefly.
2. If the assessed income is higher than returned income, the authority has to consider whether the assessee has made out a case for unconditional stay. If part of the amount is required to be deposited, the reasons should be given.
3. If the authority wants the assessee to deposit the amount, it is to be briefly indicated in the order whether the assessee is financially sound and viable to deposit the amount.
4. No coercive action should be taken till the time to prefer appeal has expired. If the assessee is likely to lose the appeal, the AO has recourse to coercive action for which brief reasons may be indicated in the order.

The court clarified that the above parameters are only recommendatory and not exotic.

g. Jain Cycle Spares & Co. Vs. CIT 267 ITR 60 (MP)

h. Valvoline Cummins Ltd. Vs. DCIT 217 CTR (Delhi) 292, 307 ITR 103 (Delhi)

i. Soul Vs. DCIT 323 ITR 305 (Delhi)

j. Purnima Das Vs. Union of India 329 ITR 278 (Cal)

Recovery of tax - Garnishee proceedings – Attachment - Condition precedent - Notice to assessee prior to attachment – Mandatory - Appropriation of sums in bank account without notice to assessee and without considering application for stay pending appeal against assessment - Not proper.

k. Taneja Developers & Infrastructure Ltd. Vs. CIT 222 CTR (Delhi) 521

After considering instruction no. 96 dated 21st August, 1969 and instruction no. 1914 dated 2nd December, 1993 the stay was granted.

l. Maheshwari Agro Industries Vs. Union of India & Ors 246 CTR (Raj) 113

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-section (6) of section 220 also have to be exercised in accordance with the letter and spirit of instruction no. 96, dated 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 dated 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.

l. View of Shri T. N. Pandey, Ex Chairman, CBDT

In the article on stay of demand of disputed assessments by respected Shri T. N. Pandey, Ex Chairman, CBDT (297 ITR

(Journal) 6) it is mentioned that if income assessed is twice the income returned 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 who would not adhere to this instruction and compel the assesses to pay the demand, which is 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 the Parliament. The Central Board of Direct Taxes cannot unilaterally issue circulars which are contrary to instruction no. 96 dated 21st August, 1969 issued with the approval of the Informal Consultative Committee of Parliament and the then Deputy Prime Minister/Finance Minister.

21. REASSESSMENT PROCEEDINGS u/s. 147

In reassessment proceedings, the assessing officer can reassess the income which has escaped assessment and also add any other income chargeable to tax which escaped assessment. Question arises if during reassessment proceedings, if there is finding that the particular item on which reassessment proceedings were initiated has not escaped assessment, but other income found to have escaped assessment, such other income cannot be added.

a. CIT Vs. Dr Devendra Gupta 336 ITR 59 (Raj)
b. same issue decided in CIT Vs. Jet Airway Pvt Ltd. 331 ITR 236 (Bom)

22. CHAPTER XX-B - REQUIREMENT AS TO MODE OF ACCEPTANCE, PAYMENT OR REPAYMENT IN CERTAIN CASES TO COUNTERACT EVASION OF TAX - SECTION 269SS & 269T

A. Section 269SS

1. As per this section, no person can take or accept from any other person any loan or deposit otherwise than by an account payee cheque or account payee bank draft, if the amount is Rs. 20,000/- or more. Thus, loan or deposit upto Rs. 19,999/- can be accepted by cash, but if it is Rs. 20,000/- or more, it's a breach of this section.

   For considering amount of Rs. 20,000/-, any deposit taken earlier shall be taken into account.

   As per exception to this section, if the loan or deposit is taken from -
   a. Government
   b. Any banking company, post office saving bank or co-operative bank
   c. Any corporation establish by a Central or State Provincial Act
   d. Any Government company
   the provisions of this section shall not apply.

   As per the provisions of this section, if the loan or deposit is given/taken by the parties and neither of them is having taxable income, provisions of this section shall not apply.

2. This section was introduced with the intention to counteract evasion of tax. Thus, in the transaction where there is no evasion of tax, this section should not be applied.

3. Some important Authorities

i. ADI (Inv) Vs. Kum. A. B. Shanthi 255 ITR 258 (SC)
Intention of section 269SS/269T
The object of introducing section 269SS is to ensure that a tax payer is not allowed to give false explanation for his unaccounted money or if he makes some false entries, he shall not escape by giving false explanation for the same. During search and seizure, unaccounted money is unearthed and the tax payer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for so-called lender also to manipulate his records to suit the plea of the tax payer. The main object of section 269SS was to curb this menace of making false entries in the accounts books and later giving an explanation for the same.

ii. CIT Vs. Kundrathur Finance and Chit Co. 283 ITR 329 (Mad)
Section 269SS - Depositors not having Bank Account
Receipt of cash exceeding Rs. 20,000/- - Depositors not having bank accounts and transactions were genuine - Penalty can not be imposed - Section 269SS, 271D.

iii. CIT Vs. Idhayam Publications Ltd. 285 ITR 221 (Mad)
Section 269-SS / Amount received from Director
Amount received by private company from a director is not a loan or deposit.

iv. Omec Engineers Vs. CIT 294 ITR 599 (Jarkhand)
Section 269SS - Transaction genuine - No loss of revenue
If transaction is genuine and return is accepted by A.O. - When transaction was not with the object to conceal money - Penalty can not be imposed on technical mistake when there is no loss of revenue.

v. ITO Vs. Jagdip Kanjibhai 60 TTJ (Ahd) 199
Amount paid by firm to partner or by partner to firm is payment to self and not a loan or deposit.

vi. Vatika Hotels Pvt. Ltd. Vs. ACIT 134 TTJ (Delhi) 708
Assessee discharged outstanding liability towards purchase price of land by crediting the same as share application money in the account of the vendor, there was no loan or deposit within the meaning of section 269SS and penalty u/s. 271D was not leviable.

vii. Citizen Co-op. Society Ltd. Vs. ADIT 41 DTR (Hyd) 305
Directors and members of co-operative society are not covered by the expression "any other person" occurring in section 269SS, when transaction was accepted as genuine and the assessee was under bona fide belief that provisions of section 269SS are not applicable.

B. Section 269T

1. Any loan or deposit accepted by any banking company, co-operative bank, company, co-operative society, firm or other person shall not be repaid by cash, if the amount of loan or deposit with interest is Rs. 20,000/- or more.

As per exception to this section, if the loan or deposit is repaid to -

a. Government
b. Any banking company, post office saving bank or co-operative bank
c. Any corporation establish by a Central or State Provincial Act
d. Any Government company
this section will not be applicable.

As per the provisions of this section, if the loan or deposit is given/ taken by the parties and both are having agricultural income and neither of them having non-agricultural income, this section will not be applicable.

2. Some important Authorities

i. CIT Vs. Etachi Agencies 248 ITR 525 (Bom), 118 Taxman 654 (Bom)
Assessee acted under a genuine belief that section 269T was not applicable to deposits, but only applied to loans - Tribunal was justified in deleting penalty.

ii. CIT Vs. Rukmini Ram Raghav Spinners P. Ltd. 304 ITR 417 (Mad), 220 CTR (Mad) 520
Repayment of advance towards share application money - Neither deposit nor loan - No interest paid on any advance - Bona fide belief that receipt of advance towards allotment of shares not loan or deposit - Sufficient to drop penalty.

iii. Canara Housing Development Co. Vs. ACIT 127 TTJ (Bang) 446
Transactions between sister concerns being in the nature of current account and belief of the assessee that transactions with sister concerns do not get hit by section 269T is a reasonable cause and no penalty is leviable.

Conclusion u/s. 269SS

Thus, if the transaction is genuine, identity of the borrower and lender is proved, it is not with intention to take any illegal or wrong benefit or if the transaction is carried out under bona fide belief, generally the penalty should not be lived.

23. CONCLUSION

In this article, I have tried to cover some of the issues which we face in our day-to-day practice. Other views against the judgements given in this article may be there. I have tried to cover the issues which are in favour of the assessee and which seem to be sound decision as per my view. I have also covered some landmark decisions of the Hon'ble Supreme Court in this article. I hope that the issues covered in this article would be helpful to my professional friends.

SYNOPSIS OF BUDGET 2012-13

CA. Hersh Samir Jani
hershjani@yahoo.co.in

I have summarized certain provisions useful in day-to-day practice, procedural aspects, TDS provisions and of General Anti Avoidance Rule introduced by the Union Budget 2012-13 hereunder:

Provisions useful in day-to-day practice

(A) Rates of Income Tax

1) Individual, HUF, AOP and BOI whether incorporated or not, and artificial juridical person:

		Savings
Up to Rs. 2,00,000	NIL	
Rs. 2,00,001 to Rs. 5,00,000	10%	
Rs. 5,00,001 to Rs. 10,00,000	20%	
Above Rs. 10,00,000	30%	22,660

2) Senior Citizen (Whose age is between 60 and 80 years)

		Savings
Up to Rs. 2,50,000	NIL	
Rs. 2,50,001 to Rs. 5,00,000	10%	
Rs. 5,00,001 to Rs. 10,00,000	20%	
Above Rs. 10,00,000	30%	20,600

3) Super Senior Citizen (Having an age more than 80 years)

		Savings
Up to Rs. 5,00,000	NIL	
Rs. 5,00,000 to Rs. 10,00,000	20%	
Above Rs. 10,00,000	30%	20,600

Education cess @ 2% and SHEC @ 1% extra on the above rates

(B) Deemed payment of Tax under Chapter XVII-B of Income Tax Act.

In case of any short payment / non deduction of tax as prescribed under this chapter, the assessee shall be deemed to be an assessee in default under section 201(1) in respect of the amount of such non/short deduction. Section 191 of the Act provides that the deductor cannot be treated as assessee in default if the payee has discharged his tax liability.

Consequently, section 40(a)(ia) has also been amended to provide that where the payee has discharged his tax liability, no expenditure shall be disallowed in case of the payer under section 40(a)(ia), if a certificate from a Chartered Accountant to this effect has been obtained.

(C) Presumptive Taxation Scheme under section 44AD not applicable for certain professionals

It is clarified that the presumptive taxation scheme shall not apply to a person carrying on profession as referred to in section 44AA, persons earning income in the nature of commission or brokerage income or a person carrying on any agency business.

(D) Fair Market Value to be considered as value of consideration u/s 50D

Where a capital asset is transferred by an assessee and consideration received or accrued is not ascertainable or cannot be determined for the calculation of capital gain tax, the fair market value of that asset on the date of transfer shall be deemed

to be the full value of consideration received or accrued as a result of such transfer.

(E) Benefit of Section 54B available to HUF also

As per the existing provisions of section 54B, exemption from Capital Gain Tax was available to an individual assessee only on fulfillment of certain conditions. However, w.e.f. A.Y 2013-14 these provisions are amended to provide exemption u/s 54B to HUF also if all the prescribed conditions are fulfilled.

(F) Capital Gain on transfer of residential property to be exempt u/s 54GB

It is proposed to insert new section 54GB so as to provide relief from long term capital gain tax to an individual or HUF on sale of residential house or a plot of land in case of investment of net consideration in the equity shares of eligible SME company manufacturing an article or a thing and such sum is used for the purpose of purchase of new plant and machinery subject to fulfillment of certain conditions.

(G) Relative of HUF as per section 56

There is a change in the definition of relative in relation to an HUF w.e.f. 01.10.2009 so as to include the members of HUF as relatives of the HUF for the purpose of section 56.

(H) Share Premium in Excess of Fair Market Value to be treated as income

Any company, other than a company in which public are substantially interested, receives any consideration for issue of shares from a resident person which exceeds the face value of such shares, the excess of consideration over the fair market value shall be considered as income in the previous year in which such consideration is received as per the provisions of newly inserted clause (viib) of section 56(2), except in case of venture capital company or venture capital fund.

(I) Cash Credit to be deemed income of the company

As per section 68, if any share application money, share capital or premium is received by the closely held company or found credited in the books of the company for which no explanation about the source is available from the person advancing such monies or in whose name the amount is credited, shall be deemed to be the income of the company. The said clause shall not apply in case of a venture capital fund /company.

(J) Deduction in respect of Life Insurance Premium u/s 80C

Life Insurance Premium u/s 80C shall not be allowable in excess of 10% of the sum assured as against 20% at present for policies issued after 01.04.2012

(K) Amount on Preventive Health Checkup u/s 80D

An amount up to Rs. 5000 spent on account of preventive health check-up of self, spouse, dependent children, parents shall now be eligible for deduction under section 80D. The amount can be paid in cash also. However, the overall qualifying limit under the section shall remain same as before.

(L) Reduction in the Age limit of Senior Citizen u/s 80D and 80DDB

With effect from A.Y 2012-13, the qualifying age for senior citizen, being a resident individual, was reduced from 65 years to 60 years, only for the purpose of threshold exemption. Now a similar amendment has been made under section 80D in respect of higher deduction of medical insurance premium of Rs.20,000 where the premium is paid on health of senior citizen, and in section 80DDB in respect of higher deduction of Rs.60,000 on amount spent on medical treatment of a specified disease, etc. of a senior citizen, making the effective age of senior citizen uniform across all the provisions of Income Tax Act, 1961.

(M) Payment above Rs.10000 – Deduction u/s 80G and 80GGA

Presently, deduction in respect of donation to charitable trusts is available u/s 80G in respect of any donation being a sum of money. Similarly, u/s 80GGA deduction is available in respect of donation for scientific research, rural development, etc. Currently, there is no restriction for mode of payment for eligibility of deduction, which can be paid in cash also. Now, it is provided that any such payment exceeding Rs. 10,000 shall only be allowed as deduction if such sum is paid in any mode other than cash.

(N) AMT (Alternate Minimum Tax) provisions to apply to all persons other than companies

At present AMT provisions are applicable to Limited Liability Partnership only. However, it is proposed to extend the applicability of these provisions to all the non-corporate assessees. The rate of AMT shall be @ 18.5% of the Adjusted Total Income. However, the provisions will not be applicable to an individual or a HUF or an association of persons or a body of individuals, or an artificial juridical person, if the adjusted total income of such person does not exceed Rs. 20 lakh.

Procedural sections

(A) Furnishing Return of Income by Person Holding Asset Outside India u/s 139

Any resident who is otherwise not required to furnish a return of income, will now be required to furnish a return before the specified due date, if he has an asset located outside India including any financial interest in any entity, or has signing authority in any account located outside India. This amendment is effective from A.Y 2012-13.

(B) Processing of Return u/s 143(1) not required in Scrutiny Cases – Section 143(1D)

Presently, every return is required to be processed under section 143(1) irrespective of the fact as to whether the case has been selected for scrutiny or not and the refund, if any, is to be issued. It is now provided that in respect of a return being selected for scrutiny assessment u/s 143(2), it will not be necessary to process the return u/s 143(1). This amendment is effective from 01.07.2012.

(C) Reassessment

It is now provided that if a person is found to have any asset located outside India or a financial interest in any entity outside India, income shall be deemed to have escaped assessment.

(D) Extension of time limit for completion of Assessment Proceedings.

At present, the time limit for completion of assessment proceedings is 21 months from the end of the relevant assessment year. It is now proposed that the time limit will be extended by 3 months, i.e., 24 months from the end of the relevant assessment year. The new time limit of 24 months is applicable for assessment proceeding relating to A.Y. 2010-11 onwards.

TDS provisions

(A) Intimation on Processing of statement of TDS - Rectification and Appeal

A statement of TDS is processed u/s 200A and an intimation is sent to the deductor as provided u/s 200A(1). Presently, there is no provision for rectification or appeal against the said intimation. It is now provided that any mistake apparent from the record in the intimation issued u/s 200A shall be rectifiable u/s 154.

(B) TDS on Interest on Securities - Section 193

No deduction of income tax shall be made from interest on debentures issued by a listed company, if the amount of interest is up to Rs. 2,500/-.

(C) TDS on Remuneration to Directors

Any fees/ commission/ remuneration by whatever name called, paid/ payable to a director of a company, other than salary, shall be liable for TDS u/s 194J @ 10%. w.e.f. 01/07/2012

(D) TDS on payment of Compensation on Compulsory Acquisition of certain immovable Properly – section 194LA

The threshold limit for the applicability of this section has been increased from Rs. 1 lakh to Rs. 2 lakh w.e.f. 1/7/2012.

(E) Tax Collection at Source – section 206C

Requirement of TCS is extended w.e.f. 1/7/2012 to sale of minerals, being coal or lignite or iron ore. Tax is required to be collected at source @ 1%. The provision now also applies to every person who receives any amount in cash as consideration for sale of bullion or jewellery, where tax is to be collected at source from the buyer @ 1% of the sale consideration of bullion exceeds Rs. 2 lakh and sale consideration of jewellery exceeds Rs. 5 lakh.

(F) Fees/Penalty for delay in furnishing of TDS/TCS statement

Existing section 272A provides for penalty of Rs. 100/- per day for delay in furnishing of TDS/TCS statement. It is now proposed for a levy of fees of Rs. 200 for every day of delay in furnishing of TDS/TCS statement. However, total fees shall not exceed the amount of tax deductible/collectible for the quarter delayed.

In addition to the above, a new section 271H is also proposed to be inserted for levying penalty for not furnishing quarterly TDS statements within prescribed time limit which will range from Rs. 10,000/- to Rs. 1,00,000/-.

General Anti Avoidance Rule (GAAR)

1. GAAR provisions are introduced in the Income-tax Act w.e.f. A.Y. 01-04-2014. These new provisions apply notwithstanding anything contained in any other provisions of this Act. Essentially, GAAR empowers the Tax Department to declare an "arrangement" entered into by an assessee to be an "Impermissible Avoidance Arrangement" (IAA) and the consequences therefore could be denial of tax benefit either under the provisions of the Act or under DTAA.

2. Not only an arrangement, but also any step in or a part of any arrangement may also be declared as IAA.

3. The term "tax benefit" is defined to mean reduction, avoidance, deferral of tax or increase in refund or any other amount under the Act. Such reduction, avoidance, deferral of tax or increase of refund may be as a result of the provisions of the Act or the DTAA. The term also includes an increase in loss or reduction in total income.

4. It is also provided that in deciding as to whether an arrangement lacks commercial substance or not, the period or time for which the arrangement exists or the fact that the taxes have been paid or there exists an exit route in the arrangement made are irrelevant factors.

5. Once an arrangement is declared as an IAA, the consequences could be denial of tax benefit either under the provisions of the Act or under the DTAA. Such denial could be in any manner including by way of disregarding a step, combining a step, re-characterizing a step, disregarding an accommodating party, treating accommodating party and any other party as one person, piercing the corporate veil, treating equity as a debt, treating capital as revenue and vice versa, etc.

6. The CBDT is empowered to issue guidelines and prescribe the conditions and the manner in accordance with which the provisions of GAAR can be invoked.

BASICS OF SERVICE TAX LAW

INTRODUCTION

Dr. Nilesh V. Suchak
Chartered Accountant
nileshsuchak@yahoo.co.uk

Service tax is payable by provider of taxable service in most of the cases. In some specified cases, the receiver of service is also made liable to pay service tax. Provisions relating to service tax are governed by the Finance Act, 1994 and various rules made thereunder. At present, since 01-05-2011, there are 119 taxable services as specified in section 65(105) of the Finance Act, 1994. However, from a date to be notified after the enactment of Finance Bill, 2012, a new concept of Negative List will be introduced and all the services except those included in Negative List will be treated as taxable service. Apart from services in Negative List, there are some other services that will be exempted from levy of whole of service tax leviable thereon and they will be treated as exempted services. According to figures released in Union Budget presented on 16th March, 2012, actual revenue from service tax for the year 2010-11 was Rs. 71,015.87 crores. The budgeted revenue for 2011-12 had been Rs. 82,000 crores but now, the estimate for 2011-12 has been revised upward to Rs. 95,000 crores due to better collections than the earlier estimate. The budgeted revenue for the year 2012-13 is estimated at Rs. 1,24,000 crores. This shows the magnitude of additional burden that the ultimate consumer of goods or services will bear in the current financial year 2012-13. This article covers the important basic knowledge relating to service tax law in Question-Answer form. Sections referred to here are of the Finance Act, 1994 and Rules are of Service Tax Rules, 1994, unless otherwise specified.

Q. 1 Who is liable to pay service tax?

A. Generally a person providing service is liable to pay service tax. However, in relation to services specified in rule 2(1)(d), recipient of service is made liable to pay service tax instead of provider of service.

Q. 2 What is the rate of service tax?

A. From 01-04-2012, general rate of service tax is 12%. On top of it, 2% education cess and 1% secondary and higher education cess is payable on service tax. Thus, effective rate of service tax is 12.36% on gross amount charged for taxable service. For example, if a CA charges fee of Rs. 10,000 for taxable service to his client, he will have to charge in addition to this fee a service tax of Rs. 1,236 (1,200+24+12) in his bill. Apart from this general rate, there are some composition rates of service tax for specified services.

Q. 3 Is there any basic exemption?

A. Yes. When a service provider is liable for payment of service tax, he may avail basic exemption upto value of Rs. 10 lakhs in a financial year. It must be kept in mind that if value of services provided in the preceding financial year exceeds Rs. 10 lakhs, no exemption will be available in the current year. Also, if one is liable to pay service tax as recipient of service, this basic exemption is not available. For example, if value of services provided by a person in the financial year 2011-12 is Rs. 11 lakhs, he will not be eligible to avail basic exemption in financial year 2012-13 and will have to pay service tax from first rupee that he charges. However, if his services provided in financial year 2011-12 are Rs. 10 lakhs or less, he will be eligible to avail exemption upto first Rs. 10 lakhs billed in financial year 2012-13. At the same time, if ABC Corporation is liable to pay service tax, say on transportation of goods by road service, as a recipient, he is not eligible for basic exemption and will have to pay such service tax even if the amount is say Rs. 10,000.

Q. 4 If one is liable to pay service tax, how can he get service tax registration?

A. Any person liable to pay service tax has to get himself registered by making online application for registration on www.aces.gov.in. After filing online application, one should submit copy thereof duly signed with address proof, PAN card and constitution proof to the Range Superintendent who shall grant the registration within 7 days. No fee is

payable for registration. Single registration is sufficient for all the taxable services for which a person is liable to pay service tax.

Q. 5 Is issue of Invoice for service mandatory?

A. Yes, a service provider has to issue invoice, bill or challan within 30 days from the date of completion of service or receipt of payment, whichever is earlier and such invoice should contain all the prescribed particulars. Those providing banking and financial service can issue such document in 45 days.

Q. 6 Is reimbursement of expenses taxable?

A. Yes, value of taxable service includes the gross amount charged for the service and it includes all reimbursable expenses also. However, if such amount is recovered as a pure agent of the service receiver satisfying all conditions specified in rule 5(2) of Service Tax (Determination of Value) Rules, 2006, then value of such amount received as pure agent will not be included in value of taxable service; no service tax will be payable on such amount.

Q. 7 What is the time by which service tax is payable?

A. Any person liable to pay service tax is required to pay service tax within 6 days from the close of the month in which the service is deemed to be provided if the service tax is paid electronically using internet banking. In other cases, it is payable within 5 days from the close of month. However, for individuals, proprietary concerns and partnership firms, service tax is to be paid quarterly within 5/6 days from the close of the quarter in which the service is deemed to be provided. But, for all the assessees, the service tax for month/quarter ending 31st March, service tax is payable by 31st March. Specified assesses have to compulsorily pay service tax electronically.

Q. 8 Is service tax payable on import of services?

A. Yes, on taxable services provided from outside India and received in India, the service receiver in India is made liable to pay service tax.

Q. 9 Is service tax payable on export of service?

A. There are two options. One may pay service tax and can get rebate (refund) of service tax so paid or one can export the service without payment of service tax.

Q. 10 s any service tax return required to be filed?

A. Yes, every assessee or person liable to pay tax has to file half yearly (half year ending on 31st March and 30th September) return within 25 days from the close of the half year. Such returns are to be filed electronically through website www.aces.gov.in. Single service tax return is to be filed for all the taxable services giving therein details for each service.

Q. 11 What is the liability if service tax is not paid by due date?

A. One is liable to pay interest at the rate of 18% p. a. for the period of delay and can also be liable to pay penalties, if there is delay in payment of service tax. For assesses, with turnover not exceeding Rs. 60 lakhs, the rate of interest is 1% p.a.

Q. 12 If there is short payment or less payment or erroneous refund of service tax, how can department recover it?

A. For recovery, central excise officer is required to serve a notice within a period of 12 months (18 months from the date of enactment of Finance Bill, 2012) from the relevant date. However, if such short payment, non-payment, short levy, non-levy or erroneous refund is on account of fraud, collusion, willful mis-statement, suppression of facts or violation of any of the provisions of law with intent to evade payment of service tax, the notice (Show Cause Notice) can be served within 5 years from the relevant date.

Q. 13 What are the penalties for various violations?

A. At present various penalties are imposable under section 76, 77 and 78 of the Finance Act, 1994 for violations specified therein.

Q. 14 What is point of taxation?

A. Service tax is payable at the point in time when the service is deemed to be provided. Point of Taxation Rules, 2011 prescribes the manner of determination of point of taxation. At present, most of the service providers have to pay tax at the earliest point of date of receipt of payment, date of completion of service or date of issue of invoice. However, from 01-04-2012, in case of individuals and partnership firms whose aggregate value of taxable services provided from one or more premises is 50 lakh rupees or less in the previous financial year, the service provider shall have the option to pay tax on taxable services provided or to be provided by him upto total Rs. 50 lakhs in the current financial year, by the dates specified in this sub-rule with respect to the month or quarter, as the case may be, in which payment is received. [4th Proviso to Rule 6(1) of STR]

Q. 15 What is abatement or exemption?

A. Certain services are exempted from levy of whole of the service tax leviable thereof. In respect of certain services, specified percentage of value is exempted which is known as abatement. For example, for construction service, 75% abatement (exemption) is prescribed if the gross amount charged includes cost of land and construction. This abatement is provided to give relief for the value of land and materials used in providing this service as the service tax is basically a tax on service and not on goods or on the cost of land. For ease of determination, such abatements are prescribed for different services.

Q. 16 What is CENVAT Credit?

A. A provider of taxable service can avail CENVAT credit in respect of excise duty or service tax paid on inputs or capital goods or input services used for providing output service. For example, a CA providing taxable service of Rs. 10,000 charges service tax of Rs. 1,236. He avails service of other CA for providing his output service who charges him Rs. 5,000 and service tax of Rs. 618. The provider of service can avail CENVAT credit of Rs. 618 that he has been charged as it is an input service used by him for providing his output service. This CENVAT Credit can be utilised for payment of service tax on output service. In this example, though gross service tax payable by the service provider is Rs. 1,236, the net service tax that he will pay after utilizing the CENVAT Credit of Rs. 618 will be only Rs. 618 (1,236-618).

Q. 17 Those who have not paid service tax on renting service because of doubts prevailing at relevant time prior to March, 2012, can penalty be waived?

A. Penalty will be waived for those tax payers who pay the service tax due on the renting of immovable property service as on 06-03-2012 in full along with interest within 6 months from the date of enactment of Finance Bill, 2012. [Section 80 of the Finance Act, 1994]

Q. 18 What are different models and practices being followed in construction sector and how is the service tax liability determined in case of construction service (both commercial and residential complex)?

A. CBEC Circular No. 151/2/2012-ST, dated 10-02-2012 has issued following clarifications in this regard for each business model.

1. **Tripartite Business Model (Parties in the model:** (i) landowner; (ii) builder or developer; and (iii) contractor who undertakes construction): Issue involved is regarding the liability to pay service tax on flats/houses agreed to be given by builder/developer to the land owner towards the land /development rights and to other buyers.

   Clarification: Here two important transactions are identifiable: (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers: (a) from

landowner: in the form of land/development rights; and (b) from other buyers: normally in cash.

(A) Taxability of the construction service:

(i) For the period prior to 1-7-2010 : construction service provided by the builder/developer will not be taxable, in terms of Board's Circular No. 108/2/2009-S.T., dated 29-1-2009 [2009 (13) S.T.R. C33].

(ii) For the period after 1-7-2010, construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/ developer before the issuance of completion certificate and the service tax would be required to be paid by builder/developers even for the flats given to the land owner.

(B) Valuation:

(i) Value, in the case of flats given to first category of service receiver, is determinable in terms of section 67(1)(iii) read with rule 3(a) of Service Tax (Determination of Value) Rules, 2006, as the consideration for these flats, i.e., value of land/development rights in the land may not be ascertainable ordinarily. Accordingly, the value of these flats would be equal to the value of similar flats charged by the builder/developer from the second category of service receivers. In case the prices of flats/houses undergo a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as are sold nearer to the date on which land is being made available for construction should be used for arriving at the value for the purpose of tax. Service tax is liable to be paid by the builder/developer on the 'construction service' involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument (e.g. allotment letter).

(ii) Value, in the case of flats given to the second category of service receivers, shall be determined in terms of section 67 of the Finance Act, 1994.

2. **Redevelopment including slum rehabilitation projects:** Generally in this model, land is owned by a society, comprising members of the society with each member entitled to his share by way of an apartment. When it becomes necessary after the lapse of a certain period, society or its flat owners may engage a builder/developer for undertaking re-construction. Society /individual flat owners give 'No Objection Certificate' (NOC) or permission to the builder/developer, for re-construction. The builder/developer makes new flats with same or different carpet area for original owners of flats and additionally may also be involved in one or more of the following:

(i) construct some additional flats for sale to others;

(ii) arrange for rental accommodation or rent payments for society members/original owners for stay during the period of re-construction;

(iii) pay an additional amount to the original owners of flats in the society.

Clarification: Under this model, the builder/developer receives consideration for the construction service provided by him, from two categories of service receivers. First category is the society/members of the society, who transfer development rights over the land (including the permission for additional number of flats), to the builder/developer. The second category of service receivers consist of buyers of flats other than the society/members. Generally, they pay by cash.

(A) Taxability:

(i) Re-construction undertaken by a building society by directly engaging a builder/developer will not be chargeable to service tax as it is meant for the personal use of the society/its members. Construction of additional flats undertaken as part of the reconstruction, for sale to the second category of service receivers, will also not be a taxable service, during the period prior to 1-7-2010;

(ii) For the period after 1-7-2010, construction service provided by the builder/developer to second category of service receivers is taxable in case any payment is made to the builder/developer before the issuance of completion certificate.

(B)Valuation:

Value, in the case of flats given to second category of service receivers, shall be determined in terms of section 67(1)(i) of the Finance Act, 1994.

3. **Investment model:** In this model, before the commencement of the project, the same is on offer to investors. Either a specified area of construction is earmarked or a flat of a specified area is allotted to the investors and as it happens in some places, additionally the investor may also be promised a fixed rate of interest. After a certain specified period an investor has the option either to exit from the project on receipt of the amount invested alongwith interest or he can re-sell the said allotment to another buyer or retain the flat for his own use. .

Clarification: In this model, after 1-7-2010, investment amount shall be treated as consideration paid in advance for the construction service to be provided by the builder/developer to the investor and the said amount would be subject to service tax. If the investor decides to exit from the project at a later date, either before or after the issuance of completion certificate, the builder/developer would be entitled to take credit under rule 6(3) of the Service Tax Rules, 1994 (to the extent he has refunded the original amount). If the builder/developer resells the flat before the issuance of completion certificate, again tax liability would arise.

4. **Conversion Model:** Conversion of any hitherto untaxed construction/complex or part thereof into a building or civil structure to be used for commerce or industry, after lapse of a period of time.

Clarification: Mere change in use of the building does not involve any taxable service, unless conversion falls within the meaning of commercial or industrial construction service.

5. **Non-requirement of completion certificate/where completion certificate is waived or not prescribed:** In certain states, completion certificates have been waived or are considered as not required for certain specified types of buildings. Doubts have been raised, regarding levy of service tax on the construction service provided, in such situations.

Clarification: Where completion certificate is waived or is not prescribed for a specified type of building, the equivalent of completion certificate by whatever name called should be used as the dividing line between service and sale. In terms of the Service Tax (Removal of Difficulty) Order, 2010, dated 22-6-2010, authority competent to issue completion certificate includes an architect or chartered engineer or licensed surveyor.

6. **Build-Operate-Transfer (BOT) Projects:** Many variants of this model are being followed in different regions of the country, depending on the nature of the project. Build-Own-Operate-Transfer (BOOT) is a popular variant. Generally under BOT model, Government or its agency, concessionaire (who may be a developer/builder himself or may be independent) and the users are the parties. Risk taking and sharing ability of the parties concerned is the essence of a BOT project. Government or its agency by an agreement transfers the 'right to use' and/or 'right to develop' for a period specified, usually thirty years or near about, to the concessionaire.

Clarification: Transactions involving taxable service take place usually at three different levels: firstly, between Government or its agency and the concessionaire; secondly, between concessionaire and the contractor and thirdly, between concessionaire and users, all in terms of specific agreements.

At the first level, Government or its agency transfers the right to use and/or develop the land, to the concessionaire, for a specific period, for construction of a building for furtherance of business or commerce (partly or wholly). Consideration for this taxable service may be in the nature of upfront lease amount or annual charges paid by the concessionaire to the Government or its agency. Here the Government or its agency is providing 'renting of immovable property service' (renting of vacant land to be used for furtherance of business or commerce) and in such

cases the concessionaire becomes the service receiver.

In this model, though the concessionaire is undertaking construction of a building to be used wholly or partly for furtherance of business or commerce, on the land provided by the government or its agency for temporary use, he will not be treated as a service provider since such construction has been undertaken by him on his own account and he remains the owner of the building during the concession period.

At the second level, transaction can take place between a concessionaire and the contractor. Where the concessionaire himself does not have exposure to construction sector, he may engage a contractor for undertaking construction of a building on the land, in respect of which right to use has been obtained in his favour, from the Government or its agency. If the concessionaire is himself a builder/developer, this level of transaction may not arise. Where an independent contractor is engaged by a concessionaire for undertaking construction for him, then service tax is payable on the construction service provided by the contractor to the concessionaire.

At the third level, the concessionaire enters into agreement with several users for commercially exploiting the building developed/constructed by him, during the lease period. For example, the user may be paying a rent or premium on the sub-lease for temporary use of immovable property or part thereof, to the concessionaire. At this third level, concessionaire is the service provider and user of the building is the service receiver. The concessionaire may provide to the users, taxable services such as 'renting of immovable property service', 'business support service', 'management, maintenance or repair service', 'sale of space for advertisement', etc. Service tax is leviable on the taxable services provided by the concessionaire to the users.

There could be many variants of the BOT model explained above and implications of tax may differ. For example, at times it is possible that the concessionaire may outsource the management or commercial exploitation of the building developed/constructed by him, to another person and may receive a pre-determined amount as commission. Taxable service here will be business auxiliary service and service tax is leviable on the commission.

(A) Taxability:

(i) the service provided by the Government or its agency to the concessionaire is liable to service tax;

(ii) the construction services provided by the contractor to the concessionaire would be examined from the point of taxability as to whether the activity is not otherwise excluded;

(iii) the services provided by the concessionaire to the user of the facility are liable to service tax;

(B) Persons liable to pay tax:

Government or its agency and concessionaire are liable to pay tax on the services being provided by them. There could be several other persons liable to pay service tax, depending on the variant of the BOT model followed.

7. **Joint Development Agreement Model:** Under this model, land owner and builder/developer join hands and may either create a new entity or otherwise operate as an unincorporated association, on partnership/joint/collaboration basis, with mutuality of interest and to share common risk/profit together. The new entity undertakes construction on behalf of landowner and builder/ developer.

Clarification: Circular 148/17/2011-S.T., dated 13-12-2011 [2012 (25) S.T.R. C3], particularly paragraphs 7, 8, 9 apply mutandis mutandis in this regard.

Conclusion: Due to sweeping changes proposed in the latest Union Budget in service tax law, each class of persons needs to carefully go through the definition of 'Service", Negative List and List of Exempted services to check whether they are liable to pay service tax or not. Under the regime of self assessment, one faces huge demands of service tax, interest and penalties by invoking extended period of limitation at a later date if one overlooks the taxability of service rendered or received. To avoid such shocks, one needs to invest time and money in knowing the precise service tax liability and compliance requirements. Representation should be forwarded immediately by the affected class that feels covered within the ambit of service tax as per proposed scheme of taxation but if their activity needs to be kept out of service tax net in the larger public interest.

VALUE ADDED TAX ON WORKS CONTRACT

CA Bharat L. Sheth
bharatsheth_advocate@yahoo.co.in

Preamble

The Constitution (Forty-sixth Amendment) Act, 1982 has amended the Constitution in several respects in order to bring many of the transactions, in which property in goods passed, but were not considered as sale for the purpose of levy of sales tax, within the scope of the power of the States to levy sales tax. The Constitution (Forty-sixth Amendment) Act, 1982 enhanced taxing capacity of the States under Entry 54 (i.e., Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92-A of List I) of the List-II of the Seventh Schedule to The Constitution of India, 1950.

Prior to enactment of the Constitution (Forty-sixth Amendment) Act, the Central Sales Tax Act, 1956 was in force. Controversy had arisen before some of the High Courts about the liability of contractor who has undertaken to carry out works contract to pay sales tax on the transfer of property in the goods involved in execution of a works contract.

The Supreme Court in the case of **State of Madras Vs. Gannon Dunkerley and Co. (Madras) Ltd.,** (1958) 9 STC 353(SC) held that on a true interpretation the expression "Sale of goods" meant an agreement between the parties for the sale of very goods in which eventually property passed. In a building contract where the agreement between the parties was that the contractor should construct the building according to the specifications contained in the agreement and in consideration therefore received payment as provided therein, there was neither a contract to sell the material used in the construction nor the property passed therein. The Supreme Court held in other cases, that certain other kind of transactions were also not sales liable to payment of sales tax even though they involved transfer of property in goods.

The Constitution (Forty-sixth Amendment) Act, 1982

The Constitution (Forty-sixth Amendment) Act, 1982 has added Clause 29A to Article 366 of the Constitution. Sub-clause (b) of Clause 29A states "Tax on the sale or purchase of goods" includes- a tax on transfer of property on goods (whether as goods or in other form) involved in the execution of a works contract.

By the amendment in Article 366 of the Constitution, the works contract which was an indivisible one, by a legal fiction altered into a contract which is divisible in to one for sale of goods and the other for supply of labour and services. Now, State government is entitle to levy sales tax on the value of goods involved in execution of a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into two distinct and separate parts.

State of Gujarat has amended definition of 'dealer', 'purchase price', 'sale' and 'sale price' to levy tax on transfer of property on goods (whether as goods or in other form) involved in the execution of a works contract, by the Gujarat Sales Tax (Amendment) Act, 1985 w.e.f. 5-8-1985. The Gujarat Value Added Tax Act, 2003 came in to force w.e.f. 1-4-2006. The definition of 'dealer', 'purchase price', 'sale' and 'sale price' are almost same on the line of Sales tax law.

The Central Government has amended the Central Sales Tax Act, 1956 by substituting definition of 'sale' to levy tax on inter-state works contract by the Finance Act, 2002 w.e.f. 11-5-2002.

Works Contract as per State VAT Act

The term "works contract" is not defined in the Gujarat Value Added Tax Act, 2003. The explanation (ii) of the definition of 'sale' states that 'works contract' means a contract for execution of works and includes such works contracts as the State Government may by Notification in the Gazette, specify.

The State Government, vide Notification No. (GHN-23) VAT-2006/S.2(23)(1)-Th dated 31-3-2006, has specified 15 types of work as a works contract. The descriptions of 'works contract' are as under;

1. The construction, improvement or repair of any building, road, bridge, dam or other immovable property.

2. The installation, fabrication, assembling, commissioning or repairs of any plant or machinery whether or not affixed to any building, land or other immovable property.

3. The installation, fabrication, assembling, commissioning of any air conditioner plant, air conditioner, air cooler, whether or not affixed to any building or other immovable property.

4. The assembling, fitting out, reassembling, improving, producing, repairing or otherwise treating of furniture, fixtures, partitions, including contract of interior decoration.

5. The installation, fabrication, assembling, commissioning or repairs of lift, elevators or escalators.

6. The construction, fabrication, assembling, commissioning or repairs of bodies on chassis of motor vehicles including three wheelers and fire fighters or of vessels of every description meant for plying on water.

7. The overhauling or repairing or dismantling of any motor vehicle, vessels of every description meant for plying on water or any other vessel propelled by mechanical means, any air craft or any equipment or part of any of the aforesaid items.

8. The fitting out, assembling, altering, ornamenting, reassembling, blending, finishing, furnishing, improving, processing or otherwise treating or adapting or fabrication of any goods.

9. Erection, installation and commissioning of wind turbine generator including power evacuation system and repairing thereof.

10. Fixing of marble, slabs, polished granite stones and tiles (other than mosaic tiles).

11. Fixing of sanitary fittings for plumbing, drainage and the like.

12. Painting and polishing.

13. Laying of pipes.

14. Tyre re-treading.

15. The supply of goods in providing know-how, designs, labour, supervision, inspection, training or other services in connection with any of the operations mentioned in serial numbers 1 to 14 above.

The State Government, vide Notification No. (GHN-27) VAT-2008/S.2(23)(2)-Th dated 16-5-2008, deleted entry No. 5 (i.e., installation, fabrication, assembling, commissioning or repairs of lift, elevators or escalators) from the schedule appended to the notification dated 31-3-2006.

Definition of works contract

The Central Sales Tax Act, 1956 and various State VAT Acts have defined the term 'works contract'. To understand the term 'works contract' in a better way, definitions of 'works contract' under various Acts are reproduced hereunder.

The Central Sales Tax Act, 1956

Sec. 2 (ja) **"works contract"** means a contract for carrying out any work which includes assembling, construction, building, altering, manufacturing, processing, fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property.

The Delhi Value Added Tax Act, 2004

Section 2(zo) **"works contract"** includes any agreement for carrying out for cash or for deferred payment or for valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, repair or commissioning of any moveable or immovable property;

The Karnataka Value Added Tax Act, 2003

Section 2(37) **'Works contract'** includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting ut, improvement, modification, repair or commissioning of any movable or immovable property.

The Uttar Pradesh Value Added Tax Act, 2008

Section 2(au) **"works contract"** includes any agreement for carrying out, for cash, deferred payment or other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property.

The Tamil Nadu Value Added Tax Act, 2006

Section 2(43) **"works contract"** includes any agreement for carrying out for cash, deferred payment or other valuable consideration, building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning, of any movable or immovable property

The Punjab Value Added Tax Act, 2005

Section 2(zu) **"works contract"** includes any agreement for carrying out, for cash, deferred payment or other valuable consideration, building construction, manufacturing, processing, fabrication, erection, installation, fitting out, improvement, modification, repairs or commissioning of any movable or immovable property.

The Haryana Value Added Tax Act, 2003

Section 2(zt) **"works contract"** includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the assembling, construction, building, altering, manufacturing, processing, fabrication, installation, fitting out, improvement, repair or commissioning of any moveable or immovable property.

All the definitions of 'works contract' are inclusive and almost similar. The explanation (ii) of the definition of 'sale' in the Gujarat Value Added Tax Act, 2003 states that 'works contract' means a contract for execution of works and includes such works contracts as the State Government may by Notification in the Gazette specify.

The Supreme Court has interpreted the word 'includes' in the case of Rajasthan Taxchem Ltd., 5 VST 529 (SC) and Karnataka Bank Ltd. 12 VST 459 (SC). The Supreme Court held that the word 'includes' in a definition gives wider meaning to the words or phrases in a statute. When the word 'includes' is used it must be construed as comprehending not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include.

Works Contracts and Builders/Developers

The construction contract carried out within the State are subject to charge of Value Added Tax in the State. Inter-State construction contracts are subject to charge of Central Sales tax. The judgements of Supreme Court and various High Courts are discussed here under.

In the case of State of UP V/s. Kone Elevators (India) Ltd., 140 STC 22 (SC), the Hon'ble Supreme Court observed as under:

"There is no standard formula by which one can distinguish a "contract for sale" from a "works contract". The question is largely one of the facts depending upon the terms of the contract on proper construction of terms and conditions of contract between the parties, including the nature of the obligation to be discharged thereunder and the surrounding circumstance. If the intention is to transfer for a price a chattle in which the transferee had no previous property, then the contract is contract for sale. Ultimately, the true effect of an accretion made pursuant to the contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract for sale" the main object is the transfer of property and delivery of the possession of the property, whereas the main object of "contract for work" is not the transfer of the property but it is one for work and labour.

Another test often applied is; when and how the property of the dealer in such a transaction passes to the customer: is it transfers at the time of delivery of the finished article as a chattle or by accession during the possession of the work on fusion to the movable property of the customer? If it is the former, it is a "sale", if it is the latter; it is a "works contract". The predominant object of the contract, the circumstances of the case and custom of the trade provides guide in deciding whether the transaction is a "sale" or a "works contract". Ultimately, the terms of a given contract would be determinative of the nature of transaction, whether is a "sale" or a "works contract"."

In the case of Akta Offset Works (2007 GSTB Part-1, page-1), Hon'ble Gujarat VAT Tribunal has held that contract for printing

and supply of ballot paper, question paper, LIC policy forms are held not amount to sale. The case of Sarvodaya Printing Press 114 STC 112 (SC) is followed.

In the case of Unique Offset Works (2008 GSTB Part-II, page-258), Hon'ble Gujarat VAT Tribunal has held that printing of a medical literature for a particular customer is a works contract.

In the case of Maruti Sales Corporation (2010 GSTB Part-II Page 682), Hon'ble Gujarat VAT Tribunal has held that fabrication and manufacture of iron waste garbage containers is a works contract and not sale.

In the case of Commissioner of Sales tax V/s. Matushree Textiles Ltd., 139 STC 539 (Bom.), the Hon'ble Bombay High Court held that to constitute a sale under Works Contract Act, the test is, whether the property in materials used in the execution of a works contract pass to the contractee either in its original form or in some other form? If the property passes, then there are deemed sales of materials used in the execution of the works contract even if there is no specific agreement between the parties for sale of materials and even if the price for such sale is not agreed between the parties and even though the materials are not delivered as materials.

In the case of K. Raheja Development Corporation V/s State of Karnataka, 141 STC 298 (SC), the Hon'ble Supreme Court while interpreting the provisions of the Karnataka Sales Tax Act, 1957, has held as follows:

"Sections 2(1)(v-i) 'work contract' includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property."

It is thus to be seen that under the Karnataka Sales Tax Act the definition of the words 'work contract' is very wide. It is not restricted to a 'works contract' as commonly understood, i.e., a contract to do some work on behalf of somebody else. It also includes 'any agreement for carrying out either for cash or for deferred payment or for any other valuable consideration, the building and construction of any movable and immovable property.' The definition would, therefore, take within its ambit any type of agreement wherein construction of building takes place either for cash or deferred payment, or valuable consideration. It is also noted that the definition does not lay down that the construction must be on behalf of an owner of the property. Thus, if an owner of property enters into an agreement to construct for cash, deferred payment or valuable consideration a building or flats on behalf of anybody else, it would be a works contract within the meaning of the term as used under the VAT Act, when owner builds as developer for the prospective purchaser. Such consideration/ development are to be on payment of a price in various installments set out in the agreement and they have right to terminate the agreement and to dispose off the unit if a breach is committed by the purchaser. It was clear that the Appellant was undertaking to build as developers for the prospective purchaser. Such development was to be on payment of a price in various installments set out in agreement. As the Appellant was not the owner, it claimed a "lien" on the property, have right to terminate the agreement and dispose off the unit if a breach is committed by the purchaser. However, merely having such a clause does not mean that the agreement ceases to be a 'work contract' within the meaning of the term in the VAT Act. If there is a termination and that particular unit is not resold but retained by the appellants, there would be no works contract to that extent."

In the case K. Raheja Development Corporation V/s State of Karnataka,141 STC 298 (SC), the agreement provided that K. Raheja Development Corporation, as developer on its own behalf and as developer of such person, would construct the flats as a unit, ultimately to belong to such person. K. Raheja Development Corporation was constructing the unit for and on behalf of the person who had agreed to purchase the flats.

In Assotech Realty Pvt. Ltd. V/s State of U.P 8 VST 738 (All.) the Hon'ble Court found that the petitioner is constructing the flats/apartments not for and on behalf of the prospective allottees but otherwise. The payment schedule would not alter the transaction.

The right, title and interest in the construction continue to remain with the petitioner. It cannot be said that constructions were undertaken for and on behalf of the prospective allottees and, therefore, the constructions in question undertaken by the petitioner would not fall under section 2 sub-clause (m) definition of 'works contract' read with 3-F (tax on the right to use any goods or goods involved in the execution of work contract) of the Act and outside the purview of the provisions of the said Act. In other words, they cannot be subject to tax under the Act and the action in imposing tax on such constructions treating them to be works contract is wholly without jurisdiction.

Composition scheme

Section 14A of The Gujarat Value Added Tax Act, 2003 provides for composition of tax on works contract.

As per sub-section (1), the Commissioner permits every dealer referred to in sub-clause (f) of clause (10) of section 2 [i.e., any person who transfers property in goods (whether as goods or in some other form) involved in the execution of a works contract] to pay at his option, in lieu of the amount of tax leviable from under this Act, in respect of any period, a lump sum tax by way of composition at such rate as may be fixed by the State Government by notification in the official gazette.

As per sub-section (2), the provisions of sub-section (3) and (4) of section 14 shall apply, mutatis mutandis, to a dealer who is permitted to pay lump sum tax. Sub-section (3) of the section 14 states that a dealer who is permitted to pay lump sum tax shall not,-(a) be entitled to claim tax credit in respect of tax paid by him on his purchases, (b) charge any tax under this Act in his sale bill or sales invoices in respects of sales on which lump sum tax is payable and (c) issue tax invoices to any dealer who has purchased the goods from him.

Sub-section (4) of the section 14 states that a dealer who is permitted to pay lump sum tax shall be liable to pay purchase tax in addition to the lump sum tax.

As per sub-section (3), where any dealer has opted for composition of tax under the earlier law, i.e., The Gujarat Sales Tax Act, 1969 and commenced the work prior to appointed day, i.e., before 1-4-2006, and such work is not completed before 1-4-2006, such dealer shall pay the tax for the remaining work in accordance with the provisions of this Act.

Rate of lump sum tax

The State Government vide Notification No.(GHN-88) VAT-2006/S.14A(4)-Th dated 17-8-2006, fixed the lump sum tax. The State Government vide Notification No.(GHN-106) VAT-2006/S.14A(5)-Th dated 11-10-2006 added entry no. 3, the details of which are

Sr. No.	Description of Works Contract	Rate of lump sum tax
1	All kind of works contract other than specified in any of the following entries of this Schedule	Two percent of total value of the works contract.
2	Processing of polyester textile fabrics including bleaching, dyeing and printing thereof	One half percent of total value of the works contract.
3	I. Works of roads of all kinds including work of paving, mixing, metalling, asphalting and earth work. ii. Works of building construction including reinforced cement concrete and masonry work but excluding air conditioning, fire fighting, interior works and electrical works, if its total value exceeds ten per cent of total value of works contract. iii. Works of cross drainage structure and bridges. iv. Works of digging and laying of pipelines of all kinds. v. Works of dams, check dams, weirs, protection walls, canals and head works, vi. Works of excavation. vii. Works of construction of jetty port and break water. viii. Works of construction of airport runways and landing strips. ix. Works of water storage structures including underground and over head storage tanks.	Zero point six percent of total value of the works contract.

Application for Composition Scheme

Rule 28(8) of The Gujarat Value Added Tax Rules, 2006 provides for application and permission for payment of lump sum tax on works contracts. The dealer can opt for composition of tax either contract-wise or year-wise.

The dealer has to make application in Form 214 to pay a lump sum tax by way of composition within thirty days from the beginning of the contract. The Commissioner shall, after making such inquiry as he thinks fit, grant permission in Form 215 within fifteen working days from the receipt of application. Such permission is effective from the date of the beginning of the contract and till its conclusion. The option exercised shall be final and irrevocable.

If the dealer has paid tax along with the returns for any period prior to the date of application and the tax paid with the return is less than the amount of composition payable for the particular period, the dealer shall pay the difference along with interest at the rate of one and one half percent per month. The dealer shall pay the tax before making an application. The permission will be granted only if no tax credit is claimed and allowed in the returns or assessment and only on the production of proof that no amount has been collected by the applicant.

The dealer has to make application in Form 214A to pay a lump sum tax by way of composition for ongoing as well as new works contract to be executed by him during the year, within thirty days before the commencement of the year. The Commissioner shall grant permission in 215A within fifteen working days from the receipt of application. The permission shall be effective from the beginning of the year. The dealer to whom permission to pay lump sum tax is granted in earlier year, shall not file a fresh application. The permission granted in earlier year shall continue. The option exercised shall be final and irrevocable.

The dealer, who gets new registration during the year, shall apply within ninety days from the date of effect of such registration. The permission shall be effective from the date of receipt of such application. As per the principles of natural justice, when application is filed within prescribed time, i.e., within ninety days, the permission shall be effective from the date of effect of such registration. If the permission is effective from the date of receipt of such application, the time limit of ninety days is redundant and the rules require amendment.

If the dealer contravenes the provisions of the Act or the rules, permission will be cancelled from the date of the event concerning such contravention. The order of cancellation of permission shall be made after giving reasonable opportunity of hearing to the dealer. If the amount of lump sum tax for the remaining works is more than the tax payable under section 7, the dealer shall require paying lump sum tax for the remaining work.

Conditions for composition

1. The dealer to whom permission to pay lump sum tax is granted shall not use the goods in the execution of works contract, if such goods are-
    i. purchased in the course of inter-state trade or commerce or imported from outside the territory of India, or
    ii. received from his branch situated outside the State or from his consigning agent outside the State;

2. If such dealer uses any taxable goods in the execution of works contract covered under the permission to pay lump sum tax, such goods ought to have borne the tax payable under the Act;

3. If such dealer has already claimed the tax credit for the goods held in the stock on the date of effect of permission and such goods are going to be used in the works contract for which permission to pay lump sum tax is sought for, he shall reverse such tax credit; and

4. If the permission to pay lump sum tax is granted under clause (bb) of sub-rule (8) of rule 28, the dealer shall not dispatch the goods to his branch situated outside the State or to his consigning agent outside the State;

    Provided that where a dealer who has been granted the permission to pay lump sum tax prior to the commencement of Gujarat Value Added Tax (Seventh Amendment) Rules, 2006 shall have option to get cancelled such permission.

Payment of composition tax

The dealer shall pay composition money on the full amount received by him at any time in respect of those contracts for which permission of composition has been granted. If any sub-contract is given by the dealer, the entire amount of sub-contract is deductible from the full amount of the contract.

The contract amount shall be considered to have been received as under:-

i. from the date on which it becomes due as per schedule of payment in respect of contracts which provided for a schedule of payment,
ii. the date on which the bill is prepared or the amount is received whichever is earlier in respect of contracts, which do not provide for schedule of payment.

The composition money shall be paid in the manner in which the tax is payable under rule 26 of the Gujarat Value Added Rules, 2006. The dealer shall be required to file the returns in accordance with the provisions of section 29 of the Gujarat Value Added Tax Act, 2006.

Summing up

The dealer who wants to opt for composition scheme shall first ascertain as to whether the business transaction is works contract or not. If it does not fall in the purview of works contract, he will not get permission for payment of composition scheme. The composition scheme for works contractor is beneficial in the case of works contract in which labour portion is very much less than consumption of material portion. Moreover, the dealer who opts for composition scheme is not required to give details of stock. The calculation of determination of deemed sales in the case of normal dealer are very difficult. So far as financial aspect is concerned, the composition scheme is not beneficial at all.

SPARK

"If you look at what you do not have in life,
you don't have any thing;

If you look at what you have in life,
you have everything"

INTRODUCTION AND A JOURNEY AHEAD TO GST REGIME

CA Bihari B. Shah
Past President of AGFTC
biharishah@yahoo.com

[1] INTRODUCTION:

[I] Introduction of VAT at the Central and State level has been considered to be a major step. An important breakthrough in the sphere of Indirect Tax reforms in India. Keeping this objective in view, an announcement was made by the Union Finance Minister in the Union Budget of 2007-2008 to the effect that GST would be introduced with effect from April 1, 2010 and Empowered Committee was requested to prepare a road map for introduction of GST in India.

[ii] The Empowered Committee had set up a Joint Working Group and the Joint Working Group had submitted report to Empowered Committee on 28th November, 2008.

[iii] The Committee of Principal Secretaries/Secretaries of Finance Ministry had been set up to consider the comments and the said Committee submitted its report. The report of the said Committee has been accepted in principle by the Empowered Committee on 21st January, 2009.

[iv] Final version of the views of Empowered Committee prepared on 30th April, 2009 has been sent to the Government of India.

[v] The interaction has taken place between Honorable Union Finance Minister and the Empowered Committee on 19th October, 2009 on the issue of compensation for loss to the States on account of introduction of GST.

[vi] The first discussion paper, containing recommendations of the Working Group were presented on 10th November, 2009 along with an annexure to F.A.Q. and its answers on GST for having trade and industries view.

[vii] The Honorable Finance Minister has given a speech at a meeting of Empowered Committee of State Finance Ministers on GST, at the time of release of first discussion paper on 10th November, 2009 and spoke that -

The GST will redistribute the burden of taxation equitably between manufacturing and services bringing out a qualitative change in tax system, with the minimization of exemption, it will broaden the tax base and lower the tax rate.

By switching to the destination principle, the distortion will be reduced fostering a common market across the country.

The compliance cost will come down and our trade and industry will become more competitive leading to an increase in exports and lower prices for domestic consumers.

[2] LATEST POSITION ON INTRODUCTION OF GST:

[1] Constitution Amendment Bill introduced by the Union Finance Minister in the Lok Sabha is in the process of being enacted shortly.

[2] It appears that the Centre and States have agreed for GST and SGST to be levied respectively and getting ready to utilize the existing tax administration to collect the proposed levies.

[3] In order to administrate SGST, every state is going to legislate its own separate statute on the basic features of law such as chargeability, taxable event and taxable person, measure of levy including valuation provisions, basis of classification, etc. as far as possible and practicable.

[4] It appears that the Union Ministry of Finance has given two options to settle the Centre–States dispute over the levy of GST. One is to add another list of the products / services to exclude the items like alcohol used for human consumption, natural gas, diesel, petrol, crude oil, aviation turbine fuel (ATF), etc. from GST. The second option is to reach to an agreement by which the Centre will allow States to tax specified service hitherto taxed by it and States will

allow the Centre to levy taxes imposed by the States. Final decision as to selection of particular option is yet to be taken by the Empowered Committee of State Finance Ministers based on the Supreme Court judgement.

[5] Various areas such as common classification of products / services, jurisdiction, tax credits and rates, legal aspects, etc. are being debated.

[6] However, the relevant rules for procedures are yet to be framed.

[3] OBJECTIVES:

[i] To remove the short comings of current tax structure both at the state and central level.

[ii] Additional customs duty, cess, surcharge, which were not forming part of the Cenvat Credit, will be entitled for tax credit in new regime.

[iii] GST will remove the cascading effect between central and state level.

[iv] CST will be phased out.

[v] Dual GST Model is expected with Central GST and State GST and Integrated GST.

[vi] GST will remove the rate war as the rates were different in different states for the same commodity.

[4] REQUIREMENT OF CONSTITUTIONAL AMENDMENT AND DRAFT LEGISLATION:

As India moves towards a dual GST regime, a hoard of changes would be required in the system. To begin with, the Constitution of India would need to be amended. Thus, it becomes imperative that the GST is implemented within the regime of the Constitution.

Currently, the Centre is precluded from taxing purchase or sale of goods. This power has exclusively been preserved in the Constitution for the states. In turn, the states are precluded from taxing services.

Article 265 of the Constitution of India lays down that no tax shall be levied or collected except by the authority of law.

Schedule VII to the Constitution divided this subject in to three categories, viz,

a. Union list – article 246(1)
b. State list – article 246(3)
c. Concurrent list – article 246(2)

There have been suggestions from various fronts that concurrent powers be given to both levels of government to tax all suppliers, whether goods or services.

Based on the above, it clearly emerges that proposed GST would require certain constitutional amendment to enable the Centre and States to levy, administer and legislate the GST. To meet the above objectives, Working Group has been constituted on 30th September, 2009 and has been given specific mandate to prepare draft legislation for GST. The constitutional amendment has not been done so far.

[5] SALIENT FEATURES OF THE GST MODEL:

[i] The GST shall have two components; one levied by the Centre (hereinafter referred to as Central GST) and the other levied by the States (hereinafter referred to as State GST). Rates for Central GST and State GST would be prescribed appropriately reflecting revenue considerations and acceptability. This dual GST model would be implemented through multiple statutes.

[ii] The basic features of chargeability, taxable event, taxable person, valuation provisions and classification would be uniform.

[iii] The Central GST and the State GST would be applicable to all transactions of goods and services made for a consideration except the exempted goods and services and those below the threshold limits.

[iv] The Central GST and State GST are to be paid to the accounts of the Centre and the States separately. It would have to be ensured that account head for all services and goods would have indication as to whether it relates to Central GST or State GST.

[v] Since the Central GST and State GST are to be treated separately, taxes paid against the Central GST shall be allowed to be taken as Input Tax Credit (ITC) for the Central GST and could be utilized only against the payment of Central GST. The same principle will be applicable for the State GST. A tax payer or exporter would have to maintain separate details in his books of account for utilization or refund of credit. Further, the rules for taking and utilization of credit for the Central GST and the State GST would be aligned.

[vi] Cross utilization of ITC between the Central GST and the State GST would not be allowed except in the case of inter-state supply of goods and services under the IGST model.

[vii] In case of credit accumulation on account of exports, purchase of capital goods, input tax at higher rate than output tax, etc., the refund/adjustment should be completed in a time bound manner.

[viii] Uniform procedure for collection of both Central GST and State GST would be prescribed in the respective legislation for Central GST and State GST.

[ix] The administration of the Central GST to the Centre and for State GST to the States would be given. This would imply that the Centre and the States would have concurrent jurisdiction for the entire value chain and for all tax papers on the basis of thresholds for goods and services prescribed for the States and the Centre.

[x] The present threshold prescribed in different State VAT Acts below which VAT is not applicable varies from state to state. A uniform State GST threshold across the states is desirable and therefore, it is considered that a threshold of gross annual turnover of Rs. 10 lakh, both the goods and services, for all the States and Union Territories may be adopted.

Keeping in view the interest of small traders and small scale industries and to avoid dual control, the States also considered that the threshold for Central GST for goods may be kept at Rs. 1.5 crore and the threshold for Central GST for services may also be appropriately fixed. It may be mentioned that even now there is a separate threshold of services (Rs. 10 lakh) and goods (Rs. 1.5 crore) in the Service Tax and CENVAT.

[xi] The States are also of the view that Composition/Compounding Scheme for the purpose of GST should have an upper ceiling on gross annual turnover and a floor tax rate with respect to gross annual turnover. In particular, there would be a compounding cut-off at Rs. 50 lakh of gross annual turnover and a floor rate of 0.5% across the States. The scheme would also allow option for GST registration for dealers with turnover below the compounding cut-off.

[xii] The tax payer would have to submit periodical returns, in common format as far as possible, to both the Central GST authority and to the concerned State GST authority.

[xiii] Each tax payer would be allotted a PAN-linked tax payer identification number with a total of 13/15 digits. This would bring the GST PAN-linked system in line with the prevailing PAN-based system for Income Tax, facilitating data exchange and tax papers.

[xiv] Keeping in mind the need of taxpaper's convenience, functions such as assessment, enforcement, scrutiny and audit would be undertaken by the authority which is collecting the tax, with information sharing between the Centre and the States.

[6] <u>TAXES TO BE SUBSUMED:</u>

On application of the above principles, it is recommended that the following Central Taxes should be, to begin with, subsumed under the Goods & Services Tax.

[i] Central Excise Duty

[ii] Additional Excise Duties
[iii] The Excise Duty levied under the Medicinal and Toiletries Preparation Act
[iv] Service Tax
[v] Additional Customs Duty, commonly known as Countervailing Duty (CVD)
[vi] Special Additional Duty of Customs – 4% (SAD)
[vii] Surcharges, and
[viii] Cesses

Following State taxes and levies would be, to begin with, subsumed under GST;

[i] VAT/Sales Tax
[ii] Entertainment Tax (unless it is levied by the local bodies)
[iii] Luxury Tax
[iv] Taxes on lottery, betting and gambling
[v] State Cesses and Surcharges insofar as they relate to supply of goods and services
[vi] Entry Tax not in lieu of octroi.

[7] TAXES WHICH MAY NOT BE SUBSUMED ARE:

[i] Basic Customs duty
[ii] Export duty
[iii] Road and Passenger tax
[iv] Toll tax
[v] Environment tax
[vi] Stamp duty
[vii] Purchase tax.

[8] A JOURNEY AHEAD TO GST REGIME:

PAN WILL BE UNIQUE IDENTITY:

Technology framework, already launched in 11 states, to treat PAN as the unique identity for all taxes paid:

In a big break through for the proposed Goods and Service Tax (GST), the states have agreed to roll out the IT frame work for the new indirect taxes regime even before they build a consensus on its roll out.

This will ensure expeditious roll out of the tax regime once it is approved.

"States have been in principle nod to launch of the IT frame work ahead of schedule", said Sushil Modi, Bihar Deputy Chief Minister and Chairman of the Empowered Committee of State Finance Ministers.

The roll out of IT frame work will allow traders all over the country to use their permanent account number as the tax identification number for all direct and indirect taxes in the country. "For the first time PAN will become a kind of unique identity for all taxes paid across the country", Nandan Nilekani, Chairman of the Empowered Group on IT Infrastructure for GST told Economic Times.

Having a common identification number has benefits not just for the taxpayers but also helps tax authorities in keeping tab on transactions by establishing links with other tax payments.

Taxpayers, all over the country, would be able to register using the PAN and also be able to file a common return form.

Industry says that robust IT frame work under GST could help curb tax evasion.

"If somebody has to evade taxes under GST, buyer and seller both have to connive. Moreover, with effective IT framework keeping a tab on all transactions the avenues for tax evasion will be much lesser," said Sachin Menon, Co-Chairman, FICCI Task Force on GST.

Nilekani said a pilot project of IT frame work had already been launched in 11 states including Maharashtra, Karnataka and Gujarat and it would be taken up in remaining states after the final approvals.
However, he declined to give exact time frame for the roll out saying it will be done once all the approvals are in place.

The IT infrastructure is crucial for the success of the proposed Goods and Service Tax, which will replace plethora of indirect taxes including excise duty, service tax, value added tax, octroi, etc.

"Without a well designed and well functioning IT system, the benefits of GST will remain elusive," the Empowered Group had said in its report.

Nilekani said this would ensure smooth migration to GST.

[9] BUILD CONSENSUS ON GST, HON. F. M. TELLS INDUSTRY LEADERS:

The Finance Minister, Mr. Pranab Mukherjee urged leaders of apex industry associations to do their bit in building consensus on goods and service tax (GST). He was addressing a post budget interactive meeting with the members of the three apex industry associations – FICCI, CII and Assocham – in the Capital. Currently, there is no consensus between the Centre and the States on the design of the proposed GST system. There is still uncertainty on this major tax reform becoming a reality although both the Centre and the States have been discussing it for the last four years. The Finance Minister, in his budget speech, said that he would, in the current Budget session, introduce the constitutional amendment bill, which could pave the way for GST introduction in the country. Mr. Mukherjee also said that he had an opinion to roll back the Central Excise duty to levels prevailing in November, 2008, "I have chosen not to do so and retain the rates at 10 per cent for two reasons. I would like to see improved business margins translated into higher investment rates. I would also like to stay my course towards GST", he said. The Finance Minister said that his budget was focused on conveying a sense of continuity and stability in the Government's approach to policy management of the economy.

[10] CONCLUSION:

Various key aspects pertaining to GST have been clubbed in the discussion paper, however, there are still a plenty of issues which require pragmatic solution. Let us hope that this new regime establishes confidence between the tax payer and tax collector, thereby resulting in removal of cascading effect and minimization of revenue leakages.

The tax payers and tax advisors have to work hard to understand the complexity of the new regime in its proper perspective.

The GST is likely to be introduced in the month of August, 2012 as per announcement by Hon'ble Finance Minister in the Parliament.