2022-2023

ALL GUJARAT FEDERATION OF TAX CONSULTANTS

TAX GURJARI

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ALL GUJARAT FEDERATION OF TAX CONSULTANTS

2022-2023

TAX GURJARI

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MESSAGE JUDGE HIGHCOURT OF GUJARAT

Justice Bhargav D. Karia

JUSTICE BHARGAV D. KARIA

JUDGE
HIGH COURT OF GUJARAT
SOLA, AHMEDABAD-380 060.

MESSAGE

14TH FEBRUARY, 2023

I am very happy to learn that All Gujarat Federation of Tax Consultants which has always been a pioneer in academic pursuit, is publishing a journal "Tax Gurjari".

I am sure that the "Tax Gurjari" journal published by the Federation would keep the tax professionals updated in law and it would be an asset of their library.

I commend the efforts put on by the President Shri Hiren Vakil and special credit goes to Chairman Shri [illegible] to accomplish the task on hand.

I also congratulate the authors for their enormous efforts so as to benefit one and all with this publication.

With warm regards,

(BHARGAV D KARIA,J.)

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2022-2023

FOREWORD FROM THE CHAIRMAN

Adv. Dhinal Shah

First and foremost question which rises in the mind of taxpayer and common man is - why does the Government levy taxes? Taxes help the Government to raise revenue for infrastructure, Education and Medical facility to needy people and for overall betterment and growth of the Society.

It is not simple to set up a robust and effective tax system in a developing economy like India which wants to align itself to international standards of taxation. In developing country like India,model scheme of taxation should assist the Government in raising necessary funds for development and growth of the economy without jeopardising the functioning of businesses and without causing undue difficulty to People of the Country.

In recent times, it has been observed that the focus of tax administration is towards increasing the tax base andeffective use of Technology by tracking of financial transactions through various modes.This information captured by tax department will help the tax administration to identify the potential non-compliance and bridge the revenue gaps. Further, there has been an increase in cross movement of information amongst various departments of tax administration.

On the other hand, the tax administration is also focused towards reducing litigation by making clarificatory amendments in the Income tax Act, issuing clarifications through circulars, notifications etc. Further, the tax administration is also focused on simplifying the tax laws by introducing concessional tax regime, phasing out of income-linked deductions etc. Also, the tax administration has been actively working on moving towards faceless and contactless regime between the taxpayers and tax administration.In turn, this would provide taxpayers with access to relevant documentation on contemporaneous basis.Also, this will help to minimise the need of storing and preserving the physical papers / documentation to a large extent.

Recent times there has been litigations in relation to Reopening of Assessment under New Regime, Black Money, Alleged Accommodation entries and Penny Stock etc. Government is making best efforts to reduce this litigation so thet resources can be used more efficiently elsewhere.

Now time has come for Professionals to specialise in focussed areas practice rather than engaging in multiple compliance oriented practise. Also reasonable understanding and use of Technology is must for every professional and their client.

Considering that tax landscape in India as well as international tax space is evolving, I would request all professional members to use the publication in the best possible manner and make their professional journey more effective and successful by taking advantage of the developments and information which have been published in this material. I am sure that this publication will be very useful and will benefit our members.

Best Wishes

Dhinal Shah
Chairman

2022-2023

PRESIDENT PEN DOWN

Adv. Hiren R. Vakil

Dear Professional Brothers & sisters,

The doyens of the professioals will be cherishing two day tax conclave organized by AGFTC & ITBA.on 3rd& 4th March -2023. Any one who stops learning is old whether at an age of twenty or eighty.

The AGFTC,publishing its journal 'Tax Gurjari' covering Articles on various subjects from the stalwarts, latest reported & unreported judgments of the courts will be unveil by worthy hands of Hon'ble Miss Soniaben Gokani, Retd. Chief Justice Hon'ble High Court of Gujarat.

Time has come for all individuals and Assoications to come together, think together, work together with helping hand. Our duty as tax fraternity is to guide, Advice & work in accordance with law.

On this eventful occasion of two day tax conclave on both sides of levy of tax, I feel it a very blissful blessing to journeying with all of you. A person must be knowledgeble and enthusiastic in order to have courage.

Federation has been undisputably doing well on all fronts which is possible only because of the coherence and co operation amongst members. I express my gratitude to the entire executive body, office bearers, chairman, co chairman & members of various sub committees who have discharged their assignments sincerely and for extending their full co- operation in functioning of the federation.Achievement requires character, discipline, devoted action, and the readiness to sacrifice the individual self for the larger cause.

In this issue of AGFTC journal, esteemed professionals have contributed their articles on recent subjects and I am greatful to them for sparing their valuable time. Nothing is achieved before it is thoroughly attempted.

I extend my gratitude to Advocate Tej Deepak Shah, Sr. Advocate Tushar Hemani, Advocate & past president Shri Bharatbhai L. Sheth., CA. Parin Shah, CA Samir Chaudhari, Adv. Nipun Sanghvi, CA. Manan Doshi & CA. Jigar Shah Who ever inspired me in my endevour by extending their hands.All the authors took utmost pain & covered each & every limb on their respective subject very very exhaustively.

I put on record my sincere appreciation to Mr. Dhinal Shah to be as chairman of this publication on my personal request. I am quite confident that the compilation will be of immense help to the readers.

With warm regards,

Hiren R. Vakil
President
AGFTC

Date.:- 19/02/2023

COMMUNIQUE

Balmukund Shah
Hon. Secretary

Respected Members

A very warm greeting to all of you. I am very much delighted to serve the association as Hon. Secretary in its 31st Activity Year. All Gujarat Federation of Tax Consultants is organizing 4th Consecutive Two Day Tax conclave alongwith Income Tax Bar Association. The entire conclave which focusses on the theme that has been carefully designed and structured to meaningfully achieve the object that helps ld. Members to represent their various case before the various authority.

It is indeed a pride moment for all of us that All Gujarat federation of Tax consultants is publishing its in house journal "Tax gurjari" of the activity year 2022-23.

"Tax Gurjari" covers various issues, topics, and judgements which are beneficial to the members in their day to day practice. At All Gujarat Federation of tax consultants, we strongly believe in imparting education to the members and people at large in regard to direct, indirect and allied laws. Tax Gurjari is a very important tool to provide recent updates to members. I believe that in present times, it is very important to be updated, knowledgeable and skillful in professional practice. This is one of the ways we can provide the best service to our clients. I put on record the efforts made by President Mr. Hiren Vakil & Mr. Chairman Dhinal Shah in bringing out this issue of "Tax Gurjari".

Date: 24/02/2023

PROUD MOMENT

Dr. Adv. Dhruven Shah

President Mr. Hiren Vakil, Chairman - Tax Gurjari Mr. Dhinal Shah, Hon. Secretary Mr. Balmukund Shah, Office Bearers & members of the Managing Committee Congratulate Past President Mr. Dhruven Shah for obtaining PHD Degree in " A study of legal issues of NGSOs of Gujarat"

Dr. Adv. Kartikey Shah

President Mr. Hiren Vakil, Chairman - Tax Gurjari Mr. Dhinal Shah, Hon. Secretary Mr. Balmukund Shah, Office Bearers & members of the Managing Committee take this opportunity to Congratulate Immediate Past President Mr. Kartikey Shah for obtaining PHD Degree in " An Analytical Study on Growth And Scope of International Taxation in India".

Analysis of the new provisions of reassessment under the Income Tax Act, 1961

- TUSHAR HEMANI
Senior Advocate

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1. Introduction

1.1. Under the Scheme of the Income Tax Act, 1961 ('the Act' for short), there are various remedial measures viz. reopening, rectification and revision for taking appropriate actions to plug revenue leakages when they come to notice. Reopening is perhaps the most preferred remedial measure.

1.2. The law governing reopening has more or less remained the same since 1961. Prior to 1989 there were 3 distinct conditions which were required to be fulfilled before the assessing officer (AO for short) could exercise jurisdictionto reopen viz.

(I) AO must have reason to believe that income has escaped assessment;

(ii) AO must have reason to believe that such escapement is a result of failure on the part of the Assessee to make a return or to disclose fully and truly all material facts necessary for his assessment for the relevant year;

(iii) Reason to believe should be in consequence of information received after the original assessment.

With effect from 1989, the law has once again undergone a major change. However, the spirit and substance of the provisions were retained in as much as instead of clauses (a) and (b), entire provision was enacted as one. Under the amended provision, if the assessing officer has reason to believe that any income chargeable to tax has escaped assessment he could exercise the powers of reopening. Concept of information was discarded. Proviso was added to the main section so as to provide for further safe guard to the assessees whose assessments were framed under section 143(3) of the Act. Such assessment were allowed to be reopened beyond the prescribed period of four years from the end of the relevant assessment year if and only if an income chargeable to tax has escaped assessment by reason of failure on the part of the assessee–

(i) to make a return under section 139 or in response to the notice issued under sub-section (1) of section 142 or section 148;

OR

(ii) to disclose fully and truly all material facts necessary for his assessment for that Assessment Year

1.3. Now, with effect from 01/04/2021, the law governing the provisions of reopening has been completely overhauled. The system of writing reasons of reopening before initiating the proceedings has been done away with. Inquiries and proceedings prior to issuance of notice u/s 148 have been introduced. "Reason to believe" is omitted. Search cases are covered under the provisions of reopening. Time limit to reopen is modified in a major way and for cases involving income escaping assessments amounts to or likely to amount to Rs 50 lakh and above, are extended upto 10 years. Additional protection in the cases of scrutiny assessment not allowed to be reopened beyond a period of 4 years from the end of the relevant assessment year unless there is failure in disclosing fully and truly all material facts necessary is now taken away. Information that could trigger reopening is defined. These provisions were further modified by Finance Act, 2022 so as to expand its scope, take care of some anomalies and iron out some interpretational issues.

1.4. Law on the existing provisions of reopening is to a great extent settled. However with the introduction of completely new provisions, lot of uncertainty is now created amongst tax payers as well as tax administrators. Even Courts are finding it difficult to learn and interpret these new provisions. In this paper, we plan to discuss the new provisions threadbare and analyse the issues likely to arise in implementing and interpreting the same in times to come.

2. *Section 147: Income escaping assessment.*

If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 *to* 153*, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in* sections 148 *to* 153 *referred to as the relevant assessment year).*
Explanation.—For the purpose of assessment or reassessment or recomputation under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A *have not been complied with.*

Omission of the phrase 'reason to believe'.

2.1. If one compares old S. 147 with the new one, it will be noticed that under the old section the opening words were "If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year". As against the same now the opening words are: "If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year". So what is missing from the section is the term "reason to believe".
In other words, under the new provisions, S. 147 of the Act can be invoked *only if any income chargeable to tax has "escaped assessment"*. At this stage, I would like to invite a *striking difference* between the erstwhile provisions of section 147 of the Act and the present provisions of section 147 of the Act. The said difference is as follows:

- **Up to 31.03.21** – Section 147 could have been invoked if the Assessing Officer has *"reason to believe"* that any income chargeable to tax has *"escaped assessment"* for any assessment year;
- **W.e.f. 01.04.21** – Section 147 can be invoked *if any income chargeable to tax has escaped assessment*.

Perusal of the above would indicate that the concept of

"reason to believe" has been given a complete go-bye and the entire emphasis for invoking section 147 of the Act is on *"escapement of income"*. Thus, as per the existing provisions, an Assessing Officer has to prove beyond any shadow of doubt that there is "escapement of income". Unless *"escapement of income chargeable to tax"* is proved, provisions of section 147 of the Act cannot be invoked.

Therefore it is all the more important to understand the meaning of the phrase 'reason to believe'. In the case of **Desai Bros. (240 ITR 121)** the phrase 'reason to believe' has been explained by Hon'ble Gujarat High Court with reference to a decision of the Apex Court in the case of Barium Chemicals Ltd. v. Company Law Board AIR 1967 SC 295, whereby it is stated thus:

"Undoubtedly, the word 'reason to believe' relates to process of entertaining an opinion which is subjective in nature and is not liable to be scrutinised by the objective test of judicial scrutiny as in appeal. However, even in the case where an action is founded on subjective satisfaction, the process of entertaining such belief is not bereft of any minimum safeguard against arbitrariness.

The limitation of judicial review where the act is to be founded on subjective opinion on the part of the authority has been succinctly stated by the Apex Court in Barium Chemicals Ltd. v. Company Law Board [1966] 36 Comp. Cas. 639. The court did not approve the unbridled and unguided operation of the freedom from judicial scrutiny of acts which are founded on formation of subjective satisfaction of the authority empowered to take such action. Shelat, J. in his opinion stated (pages 688-89) :

> *'The words, 'reason to believe' or 'in the opinion of' do not always lead to the construction that the process of entertaining 'reason to believe' or 'the opinion' is an altogether subjective process not lending itself even to a limited scrutiny by the court that such 'a reason to believe' or 'opinion' was not formed on relevant facts or within the limits or . . . restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative . . .*
>
> *It is hard to contemplate that the Legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the Legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process...*
>
> *If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute'.*
>
> *Hidayathullah, J. in his concurring opinion stated (page 661) :*
>
> *'No doubt, the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is question on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. . . .'" (p. 124)*

The principle equally applies to the formation of reason to believe that income has escaped the assessment. The requirement of recording of reason before issuance of notice is to provide safeguard against the arbitrary action that may be taken by reopening the completed assessment time and again on irrelevant consideration. Recording of reasons unfolds the process by which the Assessing Officer was led to formation of his belief about escapement of income. If the action of the Assessing Officer is founded on some material or ground that has no nexus to the formation of reason to believe or is not founded on any existing material, the same is liable to be interfered with. Recording of reasons opens window to the process by which the Assessing Officer reaches his belief, in case the action is challenged, to enable the Court to find out whether he has formed his belief on the relevant material or grounds which have some nexus to the tentative opinion which he

has formed. The correctness of his tentative opinion is not be tested on the anvil of final decision which may be reached after considering the rival contentions and weighing them through the process of reasoning. But at the same time, if it appears from the reasoning which has been adopted by the Assessing Officer that no inference of escapement of income from assessment can at all be drawn therefrom, it must be held that the action is ultra vires the statute and does not confer jurisdiction on the Assessing Officer to act on that basis."

2.2. What is the significance of omission of the phrase "reason to believe."Parliament, while exercising legislative function, when omits a particular phrase, it does so consciously and presumably, intentionally and hence some meaning has to be assigned to such omission. The logical corollary is that instead of belief of the AO which could be tentative or prima facie, now escapement has to be established before issuance of notice of reopening. Belief is subjective however, based on some objective criterial. It is to a great extent a matter of perception. As against the same, escapement is a matter of fact and needs solid evidences to establish. So apparently now the burden is more on the revenue before issuance of notice u/s 148 of the Act. The distinction is aptly explained by Hon'ble Supreme Court in the case of **ACIT vs Rajesh Jhaveri Stock Brokers (P.) Ltd.[2007] 291 ITR 500 (SC)** wherein it was held thus:

"16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co. (P.) Ltd. [1996] 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC)."

Validity of other items of addition in a reassessment withoutadding the very item which was the ground for reopening.

2.3. Explanation to S. 147 gives power to AO to assess the income in respect of any issue other than what is stated in the reasons. In other words, once an assessment is validly reopened, the same would be at large before the AO and items other than subject matter of reasons can also be covered in such reassessment proceedings. An interesting issue, however, may arise with respect to fate of other additions when the very item which was the ground for reopening is not added in the final reassessment order. Under the old regime this issue is well settled [CIT vs Jet Airways (I) Ltd 331 ITR 236 (Bom)]. In order to answer this issue under the new regime, one will have to compare the provisions of S. 147 under the old and new regime:

Old Act: S.147. *If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess* ***such income and also any other income*** *chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*

Existing Act: S.147. *If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess* ***such income*** *or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).*

2.4. On first blush it seems that there is no compulsion on AO to add the item that is the subject matter of grounds for reopening and only then add other items. However, upon close scrutiny, it would be clear that if such an item is not added, there cannot be an escapement of income chargeable to tax at alland therefore, such an order must fail. As regards the absence of the phrase "*such income and also any other income"* under the new regime, the rationale is in the difference in both the schemes. As discussed hereinabove, earlier reopening power could be exercised when the AO had 'reason to believe' that income has escaped assessment. Such belief of the AO is tentative or prima facie, and therefore may not culminate into an actual addition when reassessment order is framed. Hence legislature put an additional check by inserting this conditional phrase that other additions could be made only if the item that is the subject matter of grounds for reopening is added. However, under the new regime, the factum of income having escaped assessment has to be established before issuance of notice of reopening and therefore an eventuality of that very item being not added in the final reassessment order is not contemplated by the legislature. However, if such an order is passed, the same would be treated as bad in law as there is no escapement at all.

Principles of Merger after deletion of 3rd proviso to old S.147.

2.5. 3rd Proviso to old S. 147 of the Act that provided for exclusion of matters which are subject matters of any appeal, reference or revision from the purview of reassessment, not stands deleted. There is no provision analogous to this proviso in the new scheme. However, principles of merger can be pressed into service when an issue that was the subject matter of appeal, having been decided and the same is now sought to be reopened. When an order is challenged in appeal or by way of revision, the original order merges into the order of the appellate or revisionary authority upon passing of the order by respective authority and hence beyond the scope of reopening by AO. However, mere pendency of appeal cannot be saved by principle of merger.

Effect of deletion of Explanation 2 - Deemed Escapement

2.6. Under the new scheme, there is no concept of deemed escapement as existed under Explanation 2 to S. 147 of the Act under the old scheme. This exclusion is going to create certain interesting issues. Explanation 2 defines deemed escapement of income or presumption as regards escapement where apparently there is none. Concept of escapement is sine qua non for reopening, both under the old as well as new schemes. The fact that the situations prescribed under Explanation 2 do not involve escapement is evident from the very existence of the said provision under the old Act. If those situations involved escapement, there was no need for a deeming fiction under the old Act also. Therefore, in absence of the said Explanation 2 under the new scheme, it would always remain open to the assessee to plead that there is no presumption as regards escapement under the situations prescribed therein and hence reopening is not permissible for want of escapement.

3. ***Section 148: Issue of notice where income has escaped assessment.***

Before making the assessment, reassessment or recomputation under section 147*, and subject to the provisions of* section 148A*, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of* section 148A*, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under* section 139*:*

Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing

Officer has obtained prior approval of the specified authority to issue such notice.

Provided further that no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause (d) of section 148A to the effect that it is a fit case to issue a notice under this section.

Explanation 1.—For the purposes of this section and section 148A*, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—*

(I) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or

(v) any information which requires action in consequence of the order of a Tribunal or a Court.

Explanation 2.—For the purposes of this section, where,—

(I) a search is initiated under section 132 *or books of account, other documents or any assets are requisitioned under* section 132A*, on or after the 1st day of April, 2021, in the case of the assessee; or*

(ii) a survey is conducted under section 133A*, other than under sub-section (2A) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or*

(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 *or* section 132A *in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 *or* section 132A *in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee, the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee where the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.*

Explanation 3.—For the purposes of this section, specified authority means the specified authority referred to in section 151*.*

3.1. S. 148(2) prior to its deletion wef 01/04/2021 reads thus "The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so". Now the prior requirement of recoding the reasons before issuance of notice u/s 148 of the Act is done away with. Order u/s 148A(d) of the Act itself will be treated as reasons. Other important features of the new section are as under:

- Notice u/s 148 of the Act should be served along with a copy of the order passed u/s 148A(d) if required.
- Unless there is **information** which **suggests** escapement of income chargeable to tax with the AO, he cannot issue notice u/s 148 of the Act.
- Action should be taken with prior approval of the specified authority as prescribed u/s 151 of the Act.

Meaning of 'Information' which 'suggests' escapement of income chargeable to tax.

3.2. In absence of definition of the word 'information' under the old law governing reopening, the word 'information' came up for consideration before Hon'ble Supreme Court in numerous judgments. In the case of **CIT vs. A. Raman & Co. [1968] 67 ITR 11 (SC)**, Hon'ble Supreme Court held that:

> *"The expression "information" in the context in which it occurs must, in our judgment, mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment."*
>
> *"Information in his possession that income chargeable to tax has escaped assessment furnishes a starting point, for assessing or reassessing income."*

3.3. The phrase "information with the Assessing Officer which **suggests** that the income chargeable to tax has escaped assessment" used in the first proviso to S. 148 has to be interpreted keeping in mind the implications of the word "suggests". The word 'suggest' is not defined under the Act. Therefore one has to fallback upon the general dictionary meaning of the same:

> "to call to mind by thought or association" Merriam-Webster
>
> "If one thing suggests another, it implies it or makes you think that it might be the case." Collins Dictionary

So 'suggest' *seems to be suggesting* that there should be a live and direct nexus between the information and the income chargeable to tax escaping assessment.

3.4. Explanation 1 defines 'information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment'. Originally, there were only two clauses. However, wef 01/04/2022, parliament introduced 3 more clauses so now there are 5 clauses clarifying what is information.

3.5. It may be noted that Explanation 1 does not define only 'information', it defines suggestive information as regards income chargeable to tax escaping assessment. In other words 'information' comes with built-in suggestions of escapement of income.

3.6. Clause (i) talks about information emanating from the risk management strategy formulated by the Central Board of Direct Taxes *("CBDT" for short)* from time to time. Wef 01/04/2022 the word 'flagged' has been omitted. Flagged information means only filtered information and not all information. However, omission of the term 'flagged' means every information collected as per the risk management strategy could be used to initiate reassessment. This to a great extent reduces the objectivity in the procedure.Based on the obligation cast upon various persons u/s.285BA of the Act andsuch other provisions whereby information is collected and processed for formulating dynamic risk management strategy, CBDT came out with **Instruction dated December 10, 2021 bearing no F.N0. 225/135/2021/ITA-II which is reproduced for ready reference:**

"SECTION 119 OF THE INCOME-TAX ACT, 1961 - CENTRAL BOARD OF DIRECT TAXES - INSTRUCTION TO SUBORDINATE AUTHORITIES - INSTRUCTION REGARDING UPLOADING OF INFORMATION ON VRU FUNCTIONALITY ON INSIGHT PORTAL FOR IMPLEMENTATION OF RISK MANAGEMENT STRATEGY FOR ISSUE OF NOTICE UNDER SECTION 148

INSTRUCTION F. NO. 225/135/2021/ITA-II, DATED 10-12-2021

Kindly refer to the above.

***2.** As per the amended provisions of the section 148 of the Income-tax Act,1961('the Act'), the information which has escaped assessment has been defined to include the two categories of information, i.e., (i) the information which is flagged in accordance with the risk management strategy formulated by the Board; and (ii) final audit objection raised by the C&AG.*

***3.** For effective implementation of risk management strategy, the Central Board of Direct Taxes (Board), in exercise of its powers under section 119 of the Act, directs that the Assessing Officers shall identify the following categories of information pertaining to Assessment Year 2015-16 and Assessment Year 2018-19, which may require action under section 148 of the Act, for uploading on the Verification Report Upload (VRU) functionality on Insight portal:*

(I) Information from any other Government

Agency/Law Enforcement Agency

(ii) Information arising out of Internal Audit objection, which requires action u/s 148 of the Act

(iii) Information received from any Income-tax Authority including the assessing officer himself or herself

(iv) Information arising out of search or survey action(v) Information arising out of FT&TR references

(vi) Information arising out of any order of court, appellate order, order of NCLT and/or order u/s 263/264 of the Act, having impact on income in the assessee's case or in the case of any other assessee

(vii) Cases involving addition in any assessment year on a recurring issue of law or fact:

a. exceeding Rs. 25 lakhs in eight metro charges at Ahmedabad, Bengaluru, Chennai, Delhi, Hyderabad, Kolkata, Mumbai and Pune while at other charges, quantum of addition should exceed Rs. 10 lakhs;

b. exceeding Rs. 10 crore in transfer pricing cases.

and where such an addition:

1. *has become final as no further appeal has been filed against the assessment order; or*
2. *has been confirmed at any stage of appellate process in favor of revenue and assessee has not filed further appeal; or*
3. *has been confirmed at the 1st stage of appeal in favor of revenue or subsequently; even if further appeal of assessee is pending, against such order.*

5. *As per the provisions of section 149(1)(b) of the Act, in specific cases where the Assessing Officer has in his possession evidence which reveal that the income escaping assessment, represented in the form of asset, amounts to or is likely to amount to fifty lakh rupees or more, notice can be issued beyond the period of three years but not beyond the period of ten years from the end of the relevant assessment year. Further, the notice under section 148 of the Act cannot be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit prescribed under the provisions of clause (b), as they stood immediately before the proposed amendment. As per explanation provided to section 149 of the Act, the term "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.*

5.1 *In view of the above, it is directed that the information pertaining to Assessment Year 2015-16, which requires action u/s 148 of the Act shall be identified and uploaded on the VRU functionality on insight portal only as per the provisions of section 149(1)(b) of the Act.*

6. *The above exercise of identifying and uploading the information along with the underlying documents in the above categories of cases must be completed by 20-12-2021.*

7. *These Instructions shall be applicable to the Jurisdictional Assessing Officers and Assessing Officers of Central Charges and International Taxation.*

8. *The above Instructions may be brought to the notice of the officers concerned under your region.*

9. *This issues with the approval of Chairman, CBDT.*

(Ravieder Maini)
Director (ITA-II), CBDT

■■ ''

The above instruction is indicative of the way in which 'information' is going to be collected, processed and most importantly given a very wide meaning. In times to come, based on the feedback from the field officers and analysis of the data mined with the help of artificial intelligence algorithms, CBDT will notify diverse criteria as 'information' for various years.

In view of Hon'ble Supreme Court's judgment in the case of Union of India &Ors. Vs Ashish Agarwal (Civil Appeal No.3005/2022 dated 04/05/2022, copy annexed with this paper), notice issues between 01/04/2021 to 30/06/2021 would be treated as deemed notices u/s 148A(b) of the Act. Most of these notices were issued based on information from 4 sources, viz.: (i) from other AOs, (ii) from other agencies, (iii) from investigation wing and (iv) insight portal. Other than the information received from the Insight Portal no other source qualifies for the criterion of flagged in accordance with the risk management

strategy. Would the AO be allowed to proceed in these cases where information is not flagged in accordance with the risk management strategy as the same would not be treated as 'information' at all?

1.1. Clause (ii) states that any audit objection (as against **final** audit objection and that too only by the **C&AG of India** from 01/04/2021 to 31/03/2022) to the effect that assessment has not been made in accordance with the provisions of the Act. Reopening pursuant to audit objection has always been a bone of contention between the department and assessee. However, for the first time, audit objection is part of the statutory provision to enable AO to initiate reopening based on audit objection. In the case of **Indian & Eastern Newspaper Society vs. CIT [1979] 119 ITR 996 (SC)** internal audit party of the IT Department expressed the view that income of the assessee newspaper association on account of occupation of conference halls should not have been assessed as income from business but ought to have been assessed as income from house property. ITO treated this as "information" and reassessed income. Hon'ble Supreme Court held thus:

"…when section 147(b) of the Income-tax Act is read as referring to "information" as to law, what is contemplated is information as to the law created by a formal source."

"the ITO had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him."

"Plainly, the statutory provision envisages that the ITO must first have information in his possession, and then in consequence of such information he must have reason to believe that income has escaped assessment. The realisation that income has escaped assessment is covered by the words "reason to believe", and it follows from the "information" received by the ITO. The information is not the realisation, the information gives birth to the realisation."

"…the opinion of an internal audit party of the Income-tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income-tax Act, 1961."

1.2. Now, audit objection itself is considered as 'information' based on which reopening proceedings can be initiated. However, issues with respect to live nexus between the audit objections and escapement of income, the exclusive jurisdiction of AO to reopen and legal and/or factual issues having already been examined at the original stage by the AO could still be raised as valid defenses in a challenge to reopening.

1.3. Clauses (iii), (iv) and (v) are all based on internal or external source based information which could give a fresh cause of action to reopen indiscriminately and without exception. Insertion of these additional clauses makes it obligatory on the part of the AOto reopen the cases of assessee whose reported transactions are at variance with the information available with the Department or based on any conflicting decision of the Tribunal or Court even in cases of other assessees.

When AO shall be 'Deemed' to have Information which suggests escapement of income chargeable to tax.

1.4. Explanation 2defines what is deemed information. All the cases of search u/s 132, requisition u/s 132A, survey u/s 133A (other than TDS survey u/s 133(2A) and third party search and requisition (falling under earlier provisions of S.153C of the Act) taking place after 01/04/2021 would be covered under this deeming provision enabling the AO to issue notices u/s 148 without having to bring on record any information. Here search and survey itself would be construed as information suggestive of escapement of income. The deeming fiction creates a presumption as regards existence of information suggesting escapement of income even when specific information vis-à-vis a particular Assessee or a particular Assessment year may not be available. This explanation enables the revenue to presume that there is an actionable information suggestive of escapement of income available for initiating actions under section 148 even when no such information exists.

Period of reopening – in the cases of Search & Survey

1.5. Between 01/04/2021 to 31/03/2022, such deemed information under Explanation 2 was available only for a period of 3 years immediately preceding the assessment year relevant to the previous year in which search is initiated. However, after 01/04/2022, the presumption as regards deemed information is not restricted to 3 years. It could be for as long as 10 years. What is worse is the fact that search cases are excluded from the purview of S.148A of the Act and therefore even for the years covered u/s 149(1)(b) (i.e. 4th to 10th

year), where reopening is subject to fulfilment of certain conditions, there would be automatic reopening without any order u/s 148A(d). So the assessee would not even know the reason for reopening for these years!

Inter-play between S. 147 and S. 148

1.6. S. 147 of the Act is the jurisdictional section. Fulfilment of the conditions prescribed under this section empowers the AO to assume jurisdiction to reopen. S. 148 on the other hand, is the procedural section which prescribes modalities for issuance of notice if the test of jurisdiction u/s 147 is passed.For S. 147, it is only escapement of income which is a sine qua non.However, suggestive information is not at all required for assuming jurisdiction u/s 147 of the Act.Therefore, availability of information with the AO which suggests that the income chargeable to tax has escaped assessment for the relevant assessment year is an additional condition for issuance of notice u/s 148 of the Act. The argument that "reasons to believe" has given the way to "**information with the assessing officer which suggests that the income chargeable to tax has escaped assessment"** under the new regime is fallacious. For assuming jurisdiction u/s 147 of the Act under the new regime there must be an escapement of income, not just a belief of the AO that income has escaped assessment. Escapement is further qualified u/s 148 to the effect that such escapement must emanate from information as prescribed u/s 148 of the Act. Here the derivation of escapement based on the information could be suggestive, which can be subjective. However, 'reason to believe' is not at all replaced with 'information that suggests escapement'.

Deemed Escapement vs Information which suggests that the income chargeable to tax has escaped assessment"

'

1.7. Deemed Escapement' as defined in Explanation 2 to old S.147 of the Act has the effect of presumption of escapement and since it was part of the old jurisdictional section, such presumption would confer jurisdiction on the AO. As against the same, Explanation 1 to S. 148 deals with specific information which suggests that a transaction for a relevant year vis-à-vis an assessee has escaped assessment so reopening can be initiated if suggestive information can result into escapement of income as required u/s 147 of the Act. Explanation 2 to S. 148 goes one step further and creates a deeming fiction in as much as whenever there is search/survey action, the existence of information suggestive of escapement of income would be presumed for all the years falling within the period of limitation. However, the same is not equal to deemed escapement. What is presumed by deeming fiction is availability of information suggestive of escapement of income for the entire period. But the same is not deemed escapement as existed under the old Act.

2. ***Section 148A: Conducting inquiry, providing opportunity before issue of notice under*** section 148***.***

The Assessing Officer shall, before issuing any notice under section 148*, — (a) conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment; (b) provide an opportunity of being heard to the assessee, by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under* section 148 *should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);©*

consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148*, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:Provided that the provisions of this section shall not apply in a case where,—(a) a search is initiated under* section 132 *or books of account, other documents or any assets are requisitioned under* section 132A *in the case of the assessee on or after the 1st day of April, 2021; or (b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing,*

seized in a search under section 132 *or requisitioned under* section 132A*, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or (c)*

the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 *or requisitioned under* section 132A*, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee; or (d)*

the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee.Explanation.—For the purposes of this section, specified authority means the specified authority referred to in section 151*.*

2.1. With the introduction of S. 148A of the Act, the law laid down by the decision of GKN Drive Shaft is now legislated. Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd. v. ITO 259 ITR 19 (SC)** has held that:

> *"However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order."*

This judgement was further refined and a timeline for the above stated process was laid down in Sahkari Khand Udyog Mandal Ltd. vs. ACIT [2015] 370 ITR 107 (Guj). Now this whole process has been made a part of S.148A of the Act.

Procedure under clauses (a) to (d) of section 148A of the Act

2.2. Clause (a) to S.148A contemplates pre-notice inquiry if required, with respect to the information which suggests that the income chargeable to tax has escaped assessment with the prior approval of specified authority specified.

2.3. As per clause (b) to S.148A, assessee concerned must be given an opportunity of hearing. A show cause notice is required to be served upon the assessee giving him at least 7 days to respond to the proposed action of reopening.

Notice under clause (b) needs to be served properly

"Show cause notice" under "clause (b)" of "section 148A" of the Act is required to be "served" upon the assessee in accordance with the scheme of the Act. Mere "issuance" of such show cause notice is not sufficient since Legislature has consciously provided for "service" of show cause notice as against mere "issuance" of notice. Further, service of any notice, including notice under clause (b) of section 148A of the Act, must be effected in accordance with the provisions of section 282 of the Act read with Rule 127 of The Income Tax Rules, 1962. Since faceless reassessment Scheme as notified on 29/03/2022 states that provisions of S.144B of the Act to the extent provided for are also applicable, it is necessary to examine the provisions of service under the said Scheme. Section 144B (viz. Faceless Assessment) provides that "every notice or order or any other electronic communication" shall be delivered to the assessee concerned in the manner prescribed therein and followed by a real time alert.

The term "real time alert" means any communication sent to the assessee, by way of –

- Ø short messaging service on his registered mobile number; or
- Ø update on his mobile app; or
- Ø an email at his registered email address;

so as to alert him regarding delivery of an electronic communication.

2.4. A conjoint reading of the above discussed provisions would indicate that notice under clause (b) of section 148A of the Act has to be served upon the assessee concerned in the manner prescribed in the scheme of the Act. If such notice is not served in the said manner, then such notice is not tenable in the eye of law. Accordingly, all the consequential proceedings would also not be tenable in the eye of law.

2.5. Another facet of principles of natural justice is also worth discussing here. Reasonable time has to be granted to the assessee to furnish reply in response to the show cause notice under clause (b) of section 148A of the Act. Legislature has prescribed "minimum period of 7 days" and "maximum period of 30 days" for furnishing reply to the show cause notice issued under clause (b) of section 148A of the Act to begin with.

Maximum time of 30 days can be extended in an appropriate case by the AO is application to that effect is filed by the Assessee.

2.6. After considering material available on record including reply of the assessee, the AO may pass an order under clause (d) of S.148A of the Act by passing a speaking order within a period of one month from the end of the month in which reply of the assessee is received by him determining whether or not it is a fit case to issue a notice for assessment / re-assessment / re-computation. When no reply is furnished, AO should pass an order under cluse (d) with a period of one month from the end of the month in which time to furnish reply as per clause (b) expires. These time limits are mandatory and any deviation from the same would vitiate the proceedings.

2.7. This process of enquiry and adjudication u/s 148A shall not apply to any issue which comes to the notice of the AO subsequently in the course of reassessment proceedings u/s 147 of the Act.

Exception to procedure prescribed u/s 148A

2.8. Proviso to S. 148A carves out exceptions to applicability of S. 148A procedure. As per the proviso all the cases of search u/s 132, requisition u/s 132A, third party search and requisition (falling under earlier provisions of S.153C of the Act) taking place after 01/04/2021 and cases of AO receiving information pursuant to scheme notified u/s 135A would be covered under this exception and the procedure of S. 148A of the Act is not required to be fulfilled for those cases. S. 135A provides for faceless collection of information under specified sections within the department. No scheme has been notified so far and it is unclear as to what incremental information the department would have u/s 135A when the same is available in Insight portal. What is more disturbing however, is the fact that initiation of reassessment on the basis of information available u/s 135A of the Act is not subject to the provisions of S. 148A which provides an opportunity to the assessee to defend the initiation of proceedings at the outset by making necessary submissions. Even the order u/s 148A(d) of the Act would not be passed in such cases resulting into depriving the assessee of the reasons for reopening.

It may be noted that this proviso does not cover survey cases and therefore 148A procedure needs to be followed in case of reopening as a result of survey.

Challenge to order u/s 148A(d) read with notice u/s 148 of the Act.

2.9. Since order u/s 148A(d) is not an appealable order, only writ can be filed against such order if assessee is aggrieved by such order and consequential notice u/s 148 of the Act. Delhi High Court in the case of Gulmuhar Silk Pvt. Ltd. (W.P.(C) 5787/2022) dismissed the writ petition filed by the assessee challenging reopening under the new regime on the ground of availability of alternate remedy.However, when an order is passed in gross violation of principles of natural justice or not in accordance with law or the same is patently bad, illegal and without jurisdiction, Hon'ble High Court under Article 226, can certainly entertain writ petition even if alternate remedy of appeal is available. An assessee cannot be made to go through the entire gamut of appellate proceedings when a jurisdictional notice is inherently illegal and without jurisdiction. Under such circumstances, the alternate remedy though available, is not an efficacious remedy. (Reference: Calcutta Discount Co. vs ITO [41 ITR 191 (SC) @ 207-208, para 26-27-28] & Whirlpool Corporation vs Registrar of Trade Marks [(1998) 8 SCC 1, para 14 & 15].

3. *Section 148B: Prior approval for assessment, reassessment or recomputation in certain cases.*

No order of assessment or reassessment or recomputation under this Act shall be passed by an Assessing Officer below the rank of Joint Commissioner, in respect of an assessment year to which clause (i) or clause (ii) or clause (iii) or clause (iv) of Explanation 2 to section 148 applyexcept with the prior approval of the AdditionalCommissioner or Additional Director or Joint Commissioneror Joint Director.".

3.1. In the casesrelated to Search and Survey as mentioned in Explanation 2 to S.148 of the Act, assessment order should be passed by an officer in or above the rank of Jt. Commissioner that too with the prior approval of Additional Commissioner or Additional Director or Joint Commissioner or Joint Director. It goes without saying that if the order in question itself is passed by the sanctioning authority mentioned hereinabove or any higher authority, no approval as contemplated u/s 148B would be required.

4. *Section 149: Time limit for notice.*

(1) No notice under section 148 *shall be issued for the relevant assessment year,— (a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);(b) if three years, but not more than ten years, have elapsed from the*

end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of—

(i) an asset;

(ii) expenditure in respect of a transaction or inrelation to an event or occasion;or

(iii) an entry or entries in the books of account,

which has escaped assessment amounts to or is likely toamount to fifty lakh rupees or more:Provided that no notice under section 148 *shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if a notice under section 148 or section 153A or section 153C could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section or section 153A or section 153C, as the case may be, as they stood immediately before the commencement of the Finance Act, 2021:*

Provided further that the provisions of this sub-section shall not apply in a case, where a notice under section 153A*, or* section 153C *read with* section 153A*, is required to be issued in relation to a search initiated under* section 132 *or books of account, other documents or any assets requisitioned under* section 132A*, on or before the 31st day of March, 2021:*

Provided also that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A *or the period during which the proceeding under* section 148A *is stayed by an order or injunction of any court, shall be excluded:*

Provided also that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A *is less than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.*

Explanation.—For the purposes of clause (b) of this sub-section, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.

(1A) Notwithstanding anything contained in sub-section (1), where the income chargeable to tax represented in the form of an asset or expenditure in relation to an event or occasion of the value referred to inclause (b) of sub-section (1), has escaped the assessment and the investment in such asset or expenditure in relation to such event or occasion has been made or incurred, in more than one previous years relevant to the assessment years within the period referred to in clause (b) of sub-section (1), a notice under section 148 shall be issued for every such assessment year for assessment, reassessment or recomputation, as the case may be.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

4.1. S. 149 of the Act prescribes time limits for issuance of notice u/s 148 of the Act. Here the legislature uses the word 'issued' and not served. In interpreting the word “issued' courts have held that notice can be said has been issued when the same is given to independent agent for service. Section prescribes that notice must be issued before Limitation; not necessarily served before limitation. Gujarat High Court in the case **of Kanubhai M. Patel HUF vs. Hiren Bhatt 334 ITR 25 (Guj)** has held that if notice is not given to post department for service before expiry of limitation period, the same is time barred.

Reopening beyond 3 years – various conditions

4.2. S. 149(1)(a) restricts issuance of notice beyond a period of 3 years from the end of the relevant assessment year unless the case falls under clause (b). S. 149(1)(b) extends the limitation upto 10 years from the end of the relevant assessment year if the AOhas in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, expenditure in relation to a transaction or event or occasion or an entry in the books of account giving rise to escapement of income in excess of Rs.50.00 lacs.

Asset criteria

Between 01/04/2021 to 31/03/2022, reopening for extended period beyond 3 years from the end of the relevant assessment yearwas permissible when escaped income represented in the form of 'asset' is revealed from books of accounts or other documents or evidence in possession of AO in excess of Rs.50.00 lacs. 'Asset' was defined in an inclusive manner toinclude immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account. Resultantly, many transactions involving cash credit, fictitious loss and unaccounted expenditure etc. could not be subjected to reopenas they do not fall within the definition of asset. Legislature having realised this, amended the law to take care of these situations. However, the law is amended prospectivelywef 01/04/2022 keeping the old law in force for AY 2021-22.

Is reopening permissible for escaped income not represented in the form of asset, expenditure or entry?

4.3. However, the amended section 149(1)(b) is not happily worded. Even after the amendment, what can trigger reopening under clause (b) would be only that income in excess of Rs.50.00 lacs which is revealed from books of account or other documents or evidence and represented in the form of an asset, expenditure in respect of transaction or in relation to an event or occasion or an entry or entries in the books of account and that has escaped assessment.There are many incomes which may not be represented in the forms as stipulated and hence they may not trigger reopening!. Suppose in a search at builder's premises, a diary is found out containing details about 'on money' for various years far in excess of Rs.50.00 lacs falling within the years contemplated under clause (b). 'On money' recorded in a diary would fall within the other documents or evidence in possession of the assessing officer. Diary also reveals income chargeable to tax in the form of 'on money'. However, what is important is whether such income can be said to be represented in the form of an asset, expenditure, or an entry in the books of account. 'On money' is certainly not an asset as asset is defined to mean to include immovable properties, being land or building or both, shares securities, loan and advances and deposits in bank account. 'On Money' would not fall under any of these classes of assets nor can it be called in general an asset. It is certainly not an expenditure. Since 'on money' is not recorded the books of account, therefore, the same cannot be termed as an entry or entries in the books of account. Therefore, in case of a builder even if evidences are found as regards escapement of income in the form of 'on money' charged from the customers, since the same is not represented in the form of an asset, expenditure, or book entry, the same cannot trigger the criteria prescribed under clause (b) to section 149(1) of the Act.

Years where limitation has expired under the old regime cannot be reopened under the new extended time limit

4.4. 1st proviso to S. 149 provides that the years which have already become time barred under the old regime, cannot be reopening due to change in the law and extended limitation period. Originally, when the proviso was introduced reopening under the new regime was not allowed to go back beyond 6 years as contemplated u/s 149(1)(b). However, now S. 153A and S. 153C limitations are also inserted with retrospective effect so the extended limitation of these sections would apply in cases of search taking place after 01/04/2021 and to other appropriate cases where action u/s 153A or 153C could have been taken for a longer period under the old regime.

4.5. Recently Hon'ble Delhi High Court in the case of Touchstone Holdings Private Limited Vs. ITO (WPC 13102/2022) dated 09.09.2022 has taken a view that limitation has not expired in so far as reopening for A.Ys. 2013-14 & 2014-15 are concerned. However, that the said judgement does not laydown the correct law for the following amongst other reason:

I. The judgement proceeds on the footing that notice dated 29.06.2021 issued under section 148 of the Act at the original stage was issued within the permissible extended time by virtue of operation of TOLA and notifications issued thereunder. The Hon'ble Court has passed its entire judgement on this premise that notice dated 29.06.2021 was a legal and valid notice having been issued within the permissible time limit. This fundamental premise itself is wrong. The notice for reopening of those years could not have been issued after 01.04.2021. Hon'ble the Supreme Court in the case of Ashish Agarwal (supra) has held that the notices issued under section 148 of the Act between the period of 01.04.2021 to 30.06.2021 were illegal and could not have been issued. Hon'ble the Supreme Court duly noted that with effect from 01.04.2021, the new scheme of reopening inserted by the Finance Act, 2021 came into operation. Once the new scheme comes into operation, there is no question of extension of

period for issuance of notice under section 148 of the Act under the old scheme. Hon'ble Supreme Court itself has noted in Paragraph No.8 of the said judgement as follows:

> "It is true that due to a bonafide mistake and in view of the subsequent extension of time vide various notifications, the Revenue issued the impugned notices under section 148 after the amendment was enforced w.e.f. 01.04.2021, under the unamended section 148. In our view, the same ought not to have been under the unamended Act and ought to have been issued under the substituted provisions of section 147 to 151 of the IT Act as per the Finance Act, 2021. There appears to be genuine non-application of the amendments as the officers of the Revenue may have been under the bonafide belief that the amendments may not yet have been enforced."

In view of this specific observation, the basic premise adopted by Hon'ble the Delhi High Court that the notice issued on 29.06.2021 was legal, valid and within time was incorrect. Even otherwise, if the notice issued on 29.06.2021 was valid and legal, there was no need for Hon'ble the Supreme Court in the case of Ashish Agarwal (supra) to convert such a legal and valid notice issued under section 148 of the Act to notice under section 148A(b) of the Act.

II. Hon'ble the Delhi High Court further observed that as per the judgement of Hon'ble Supreme Court in the case of Ashish Agarwal (supra), the notices issued between 01.04.2021 to 31.06.2021 will be deemed as notices under section 148A of the Act and thereafter, the notice dated 29.06.2021 issued to the petitioner stood revived. Consequently, the first proviso to section 149 of the new reopening provisions would not be applicable. As stated hereinabove, the notices issued under the old regime between 01.04.2021 to 30.06.2021 were declared as invalid and illegal. Hon'ble Supreme Court has merely converted those notices into fresh notice under section 148A(b) of the Act. Section 148A(b) is a show cause notice under the new scheme. Such a show cause notice thereafter as per the direction of Hon'ble the Supreme Court, has to pass the tests of section 149 of the Income Tax Act as per the directions issued by the Hon'ble the Supreme Court in the judgement of Ashish Agarwal (supra). In fact, Hon'ble the Supreme Court has gone to the extent of saying that **"all defenses"** which may be available to the assessee **"including"** those available under "section 149" of the Act shall be continued to be available. In other words, the conclusion of the Hon'ble Delhi High Court to the effect that because Supreme Court has converted notices issued under the old Act under section 148 into show cause notices under section 148A(b) of the new Act, the limitation will stand revived is completely against the scheme of the Act and also against the explicit directions of Hon'ble Supreme Court. The Delhi High Court therefore was not correct when it held that the first proviso to section 149 is not attracted.

Search related cases – only 'asset' criteria for reopening beyond 6 years

4.6. However, it may not be lost sight of the fact that even under the provisions of section 153A or 153C governing the searches taking place prior to 01.04.2021, reopening of 6th to 10th year prior to the date of search could be possible only if the assessing officer has in his possession the books of account or other documents or evidence which revealed that the income represented in the form of asset in excess of 50,00,000/- or more in any one or in aggregated of more than one Assessment Years has escaped assessment. The definition of asset has remained the same even for the period prior to 01/04/2021. Therefore, even for the searches taking place after 01.04.2021, reopening can take place for the years beyond 6 years only if the escaped income is represented in the form of an asset. The other two criteria as appearing in the existing 149(1)(b) viz. expenditure and book entry cannot be pressed into service for these years as the same were absent under S. 153A and 153C of the Act.

4.7. 2nd proviso states that searches taking places on or before 31/03/2021 would be continued to be governed by S.153A and 153C of the Act and these new provisions would not apply to such cases.

4.8. 3rd proviso is an exclusion clause. While calculating the limitation period as per section 149, the time allowed to respond u/s 148A(b) (7 to 30 days or extended time) is required to be excluded. Also, if the proceedings u/s 148A are stayed by any Court, period of operation of such stay is also to be excluded while

calculating the limitation period. S. 149 opens with a negative covenant to the effect that no notice u/s 148 shall be issued beyond the period prescribed u/s 149 unless conditions stipulated u/s 149 are fulfilled. Therefore, this proviso extends the time to issue notice u/s 148 of the Act by the period allowed to the assessee to respond u/s 148A(b) of the Act.

4.9. Section (1A) is newly inserted wef 01/04/2022 which expands the scope of applicability of extended period of limitation under clause (b) of S. 149(1) of the Act. S. 149(1)(b) states that where income chargeable to tax in excess of Rs.50.00 lacs is represented in the form of an asset or expenditure in relation to an event or occasion, then reopening can take place upto 10 years from the end of the relevant assessment year. S. 149(1A) provides that when such sum of Rs.50.00 lacs is incurred in more than one year, all such year or years could be covered in the extended limitation period. Law is silent as regards what is an event or occasion and how the expenditure of Rs.50.00 lacs in relation to such an event or occasion is to be calculated.

5. ***Section 151: Sanction for issue of notice.***

Specified authority for the purposes of section 148 *and* section 148A *shall be,—(i) Principal Commissioner or Principal Director or Commissioner or Director, if three years or less than three years have elapsed from the end of the relevant assessment year;(ii) Principal Chief Commissioner or Principal Director General or where there is no Principal Chief Commissioner or Principal Director General, Chief Commissioner or Director General, if more than three years have elapsed from the end of the relevant assessment year.]*

5.1. S. 151 defined specified authority referred to in other sections. If reopening is beyond a period of 3 years, sanction of higher authority is contemplated. If such a sanction is by an authority not specified under this section, such reopening is bad in law and illegal.

Other legal arguments

6. Havinganalysed the scheme of the new provisions of reopening, I now, propose to discuss some basic principles laid down under the old regime still holding the field and can be pressed into service while challenging the action of reopening under the amended provisions.

6.1. **Escapement of Income:**

"The result of this exercise would be that even if the expenditure of the so called bogus purchases is disallowed, the only effect it could have is to increase the profit of the assessee which in any case is exempt under section 10AA of the Act. Section 147 of the Act would be applicable where the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. When this fundamental requirement fails, power of reopening cannot be exercised – Sajani Jewels vs DCIT 241 taxman 383 (Guj)."

6.2. **Change of Opinion:**Concept of change of opinion is a facet of absence of powers of review under the scheme of the Act. Hon'ble Supreme Court in the case of **CIT vs. Kelvinator of India Ltd. [2010] 187 Taxman 312 (SC)**explained this as under:

"4. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987 , re-opening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1-4-1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post 1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen."

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"We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989 , Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion

that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."

6.3. **Reopening not permissible for roving and/or fishing inquiries:**

"For a mere verification of the claim, the power of reopening of assessment could not be exercised. …… Assessing Officer under the guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims, as if it were a scrutiny assessment - ***KrupeshGhanshyambhai Thakkar vs DCIT 77 taxmann.com 293 (Guj)***

6.4. **Live nexus- Cause and Effect relationship between reasons and income escaping assessment:** Where Assessing Officer merely mentioned about transaction in notice for reassessment and nothing more and, thus, he had not stated how he had arrived at reason to believe that income had escaped assessment, such notice lacks validity.

7. Conclusion

When the Finance Act, 2021 introduced an entirely new set of provisions governing the law on reopening with an intent to reduce timelines and to provide for much needed certainty, it was welcomed by one and all. The new provisions broadly prescribed only 2 time limits viz. 3 years and 10 years for reopening. The information-based reopening proceedings so introduced had only two sets of information defined viz. information based on risk management strategy formulated by CBDT from time to time and final objections raised by the Comptroller and Auditor General of India. Even the assessments sought to be reopened beyond a period of 3 years from the end of the relevant assessment year were also qualified by the "Asset" criteria and that too only in the cases of involving an amount in excess ofRs.50 lacs. All these amendments indicated in no uncertain term that reopening is going to be an exception and that too in a rare case which satisfies the tough criteria.

However, these intentions lived a very short life. The tone of amendments brought in by the Finance Act, 2022 seems far from providing certainty. Amendments widening the scope of "Information", providing for automatic reopening of search related assessments for 10 years, doing away with the requirement of conducting an inquiry and providing opportunity under section 148A of the Act before issue of notice under section 148 with respect to the cases covered under section 135A of the Act and widening the scope of reassessment beyond a period of 3 years by including apart from the existing asset criteria, criteria with respect to expenditure incurred in a transaction, event or occasion and also including book entries under clause (b) of section 149(1) of the Act, made it more than clear that there is no certainty and finality in so far as reopening is concerned. These amendments brought in by theFinance Act,2022 have defeated the very objects with which the original section was introduced. Apparently, instead of earlier 6 years, now almost in all cases, reopening can be carried out for earlier 10 years. It seems now, reassessment proceedings are being used as a parallel to assessment proceedings which is not a healthy sign. For any tax system to work efficiently, certainty is a crucial element. Without certainty, the taxpayer would always remain at the mercy of tax administrators.

We are not sure whether the new provisions relating to reopening will bring in certainty and finality as intended. However, one thing that we are certain about is the increase in tax litigation with respect to reopening under this new regime. The new provisions have created more doubts and unsettled the settled position of law with respect to a large number of issues. Therefore, in the coming days, the Courts would be flooded with tax litigation relating to reopening. Taxpayers would certainly be at the receiving end till the dust settles.

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REOPENING OF ASSESSMENT UNDER THE AMENDED PROVISIONS - PROCEDURE AND TIME LIMIT IN LIGHT OF THE DECISION OF THE HON'BLE SUPREME COURT IN THE CASE OF ASHISH AGARWAL

Adv. Tej D. Shah

1. The Finance Act of 2021 brought with itself a barrage of amendments. The most notorious of them was the replacement of the existing and settled provisions of reassessment with a completely new one, leaving the tax fraternity completely befuddled. Although the intent of the amended law was to streamline the process of reassessment, in practice, it has only opened fresh doors of confusion and litigation. In this article, I will discuss the procedure and time limit for reopening as per the amended law in light of the decision of the Hon'ble Supreme Court in the case of Ashish Agarwal dated 05-05-2022.

2. **Procedure for reopening** - As per the amended provisions, before issuing notice of reopening u/s 148, the AO has to conduct an inquiry u/s 148A (wherever required) on the basis of information available with him as per the 1st proviso to S. 148. Explanation 1 to 148 provides that such information shall be on the basis of the Risk Management Strategy (RMS) formulated by the board interalia other conditions. If these conditions are not satisfied, then reopening is not permissible for any other reasons. Once the assessee furnishes his reply under clause (c), the AO has to pass an order under clause (d) on the basis of material in his possession and such reply (with the approval of the specified authority) that whether or not it is a fit case for reopening.

Inquiry and Information vis a vis Reason to Believe – As per the old law, the AO had to conduct an inquiry by independent application of mind on the basis of tangible material that income chargeable to tax has escaped assessment. A live link was required to be established between the material in his possession and the formation of belief that income chargeable to tax has escaped assessment. Now, as per the amended law, such tangible material has been replaced with "information" which forms the basis of conducting inquiry. In essence, such inquiry could be interpreted as independent application of mind by the AO to form a reasonable belief as to income escaping assessment. However, inquiry is to be conducted only if required, meaning thereby, if the information available with AO leads to an indelible conclusion regarding income escaping assessment, then no inquiry is necessitated. For example, DDIT investigation report in the case of a party with whom the assessee has contracted and he has given a statement that he has provided accommodation entries to the assessee. However, if such party has not given a specific statement related to the assessee but has only confessed to providing accommodation entries in general, then the AO has to conduct an inquiry so as to establish a link between the information in his possession and the assessee's income escaping assessment. In that sense, it can be definitely said that even as per the amended law, information and inquiry are pari materia to Reason to believe as per the erstwhile law.

Coming to information, as mentioned above, it is in accordance with the Risk Management Strategy (RMS) formulated by the Board from time to time. However, what is such RMS has not been defined anywhere in the act. What are the criteria or checks and balances mentioned in the RMS is also not forthcoming? In absence of that, the AO gets a carte blanche to consider anything and everything as "information". In most cases it is seen that the department is considering AIR information as per S. 285BA as the major ingredient of RMS and notice u/s 148A(b) is being issued on the basis of the said AIR information. The bottom line is that if the AO does not apply his mind pursuant to such information and merely issues notice under S. 148A(b), then an objection can be raised in that regard by the assessee. For example, if an assessee receives cash and the same is regularly deposited in his bank a/c

during the year, which is over and above amount deposited by way of cheques, then the AO has to first conduct an inquiry and come to a prima facie conclusion that such cash is received from undisclosed sources or the assessee is transacting with someone who is engaged in providing accommodation entries. Without undergoing this exercise, the AO cannot issue a notice u/s 148A(b) and place burden on the assessee to prove the source of this cash. Furthermore, if the assessee demonstrates that such cash is out of business sales and provides requisite evidence like cash book, cash register, bank book, stock tally etc., then the onus is upon the AO to bring contradictory material to prove that such cash is obtained out of bogus sources. A reasoned speaking order to this effect has to be passed u/s 148A(d), failing which various courts have held such action as bad in law and remanded for fresh consideration. **Reliance is placed on the decision of Gujarat HC in the cases of Shrenik Vimalwala (140 taxmann.com 236) and Studio Virtues (140 taxmann.com 73)**.

One more question which arises is **whether AO can proceed to issue notice u/s 148A(b) under the amended law on the basis of change of opinion**? As per the erstwhile settled provisions of reopening, the AO cannot reopen a concluded assessment if an opinion was formed by the AO in the form of scrutiny assessment. However, if the AO is subsequently in possession of new evidence, then reopening was permissible if such evidence had a direct bearing upon the assessee's income escaping assessment. Under the amended provisions, even though the concept of change of opinion has no where been mentioned in the act, it can safely be construed that if an assessment is already concluded in the form of scrutiny but, if the AO is in possession of new "Information" linking the assessee to it, then he gets powers to issue notice u/s 148A(b). Reliance is placed on the **Delhi HC in the case of Ester Industries (144 taxmann.com 196)**.

3. **Time limit for reopening** – As per the amended provisions of S. 149, the earlier time limit of 4/6/16 years have been replaced with an outer limit of 3 years from the end of the relevant A.Y. It can be further extended upto a period of 10 years if the AO has in his possession, books of a/cs, or other documents or evidence which reveal that income chargeable to tax amounting to 50 lakhs or more, represented in the form of an asset, is escaping assessment. Two more conditions - expenditure in respect of a transaction or in relation to an event or occasion and; credit in the books of accounts have been brought into effect from 01-04-22. Since these 2 conditions were inserted w.e.f. 01-04-22, it cannot be applied to notice issued u/s 148A(b) issued in the year 2021 for the reason that the validity of notice has to be seen as per the law prevailing as on the date of issue of such notice.

Asset has been defined in the Exp to S. 149 which includes immovable property, land or bldg., shares and securities, loans and adv, dep in bank a/c. Therefore, the income should be represented in the form of such asset and not merely income or expenditure recorded in the books. For example, difference in share valuation, bogus purchases, 14A disallowance etc. are not asset based. However, if there is an undisclosed investment u/s 69, it becomes asset.

Effect of the decision of the Hon'ble SC vis a vis limitation for issuance of notice u/s 148 –The Taxation and Other Laws Amendment Act (TOLA) extended the time limit for issuance of notice u/s 148 upto 30-06-2021. Even after the amended provisions coming into effect from 01-04-2021, the department continued to issue notice of reopening under the old law. All such notices were challenged before various High Courts, which were struck down unanimously. The Department appealed to the Supreme Court wherein it was held by the top court that all such notices issued between 01-04-2021 to 30-06-2021 (under the erstwhile provisions) were to be converted into show cause notices issued under S. 148A(b) of the amended provisions. However, there was absolutely no direction or even a veiled reference that the time limit for issuance of such notices shall stand extended as well. On the contrary,

in Para 8 of the judgment, it upheld the findings of all the HCs and it was categorically held that all defences that may be available to the assessee under section 149 to 153 shall be kept open.

If this finding is read with the 1st proviso to S. 149, then it states that no notice u/s 148 shall be issued for any A.Y. prior to 01-04-2021, if the time limit for issuance of such notice has already expired under the old law. The time limit of 6 years for A.Ys. 2013-14 and 2014-15 expires on 31-03-2020 and 31-03-2021 respectively. Therefore, even if the conditions of S. 149(1)(b) are met with, then also the same is barred by limitation as per the proviso (supra). Coming to A.Ys. 2015-16 to A.Y. 2017-18, the time limit of 3 years ends on 31-03-2019 to 31-03-2021 respectively. Since reopening notices u/s 148 for these years are issued after 01-04-2021, they shall be considered as being beyond a period of 3 years but outside the ambit of the 1st proviso (supra). However, conditions prescribed u/s 149(1)(b) shall continue to apply. Lastly, A.Y. 2018-19 and onwards shall be considered as falling within a period of 3 years and the only condition precedent is that requirements of S. 148A(a) to (d) as discussed above, are met with.

Fortifying the above view, the CBDT had issued an **Instruction F.No. 225/135/2021 dated 10-12-2021** interpreting the time limit for issuance of notice u/s 148. It was stated in that Instruction that the said notice under section 148 of the Act cannot be issued at any time in a case for the relevant assessment year beginning on or before 01-04-2021 if such notice could not have been issued at that time on account of being beyond the time limit prescribed under clause (b) of erstwhile section 149 of the Income Tax Act, 1961. Thus, by virtue of the CBDT's own instruction, assessments for A.Ys. 2013-14 and 2014-15 were barred by limitation and A.Ys. 2015-16 to 2017-18 could be reopened only if the conditions prescribed under clause (b) of sub section (1) of new/substituted section 149 of the Income Tax Act, 1961.

Subsequent CBDT Instruction construing the judgement of the Hon'ble SC – To much shock and surprise of the assessee and with an intent to protect the vested interests of the department, the CBDT issued another **Instruction No. 1 of 2022 dated 12-05-2022**, arbitrarily interpreting the judgement of the SC. Notices for A.Ys. 2013-14 and 2014-15 were no more barred by limitation and these 2 years plus A.Y. 2015-16 were brought within the ambit of S. 149(1)(a) with a condition that if the income escaping assessment is likely to be more than 50 lakhs, notices for these 3 years, can be issued. It also held that notices for A.Ys. 2016-17 and onwards shall be held to be issued within a period of 3 years. The surmise adopted by the CBDT for bringing A.Ys. 2013-14 and 2014-15 outside the ambit of the 1st proviso (supra) i.e. within a period of 10 years and beyond 3 years and; A.Ys. 2016-17 and onwards within a period of 3 years, was on the basis of the time extension granted by TOLA. This is not only in stark contrast to what was laid down in its earlier instruction but also against the decision of the SC wherein it was nowhere mentioned that the time limit to be calculated as per S. 149 shall be coupled with the extension granted by TOLA. The only reason given by the SC to convert old notice u/s 148 into notice u/s 148A(b) under the amended law was that the revenue should not be rendered remediless.

This wayward interpretation of the SC's judgment by the CBDT qua the 1st proviso (supra) was challenged before the Gujarat HC and all notices have been stayed with a direction not to pass the final assessment order. The Hon'ble court is also considering all those cases for A.Ys. 2015-16 to 2017-18 in which income is not represented in the form of an asset as per S. 149(1)(b) but is in the form of expenditure or entries in the books of a/c and; for A.Y. 2018-19 and onwards for the ground of information not linking the assessee's income escaping assessment.

I can't say with certainty whether the above interpretation will find favour until the outcome of the High Courts' decision. Regardless of it, I can certainly humour that in this cat and mouse situation, it is definitely the man in the black robe who will benefit.

Section 14A Expenditure incurred in relation to income not includible in total income

CA Parin Shah

Introduction:

❖ Section 14A is always a matter of controversy. It was inserted by Finance Act, 2001 w.e.f. 01.04.1962. After introduction by Finance Act, 2001, revenue reopens completed assessments to unsettle the settled one.

❖ Thereafter, CBDT came with circular (Circular No. 11/2001 dated 23.07.2001) which says that assessment which attains finality before 01.04.2001 should not be reopened through amendment by Finance Act, 2001.

❖ Another amendment was brought by Finance Act, 2006 w.e.f. 01.04.2007 by introducing sub-section (2)& (3) which gives power to AO to determine disallowance.

❖ Further amendment in Income Tax Rules, 1962 by Income Tax (Fifth Amendment) Rules, 2008 w.e.f. 24.03.2008 by introduction of Rule 8D for determining disallowance u/s 14A of the Act.

❖ The latest on the list is by Finance Act, 2022 by introducing explanation to Section 14A.

❖ Considering the above, I have summarized relevant judgments which shall be useful for arguments before various authorities.

1. 14A – Introduction of Explanation after proviso to Section 14A applies prospectively from 01.04.2022 i.e. from A.Y. 2022-23.
Note: Explanation to Section 14Ahas been introduced to apply provisions even if there is no exempt income earned by assessee.
[Era Infrastructure (India) Ltd. 448 ITR 674 - Date 20.07.2022]

2. 14A– Disallowance computed u/s 14A cannot exceed exempt income.
[Vision Finstock Pvt. Ltd. Tax Appeal No. 486 of 2017- Date 31.07.2017]
[Vision Finstock Pvt. Ltd.SLP No. 13152 of 2018- Date 07.05.2018]

3.14A rws 115JB–Disallowance u/s 14A could not apply for determination of book profit u/s 115JB of the Act. The view of Hon'ble Special Bench in case of Vireet Investment (P.) Ltd reported in 165 ITD 27(SB) has been approved by Hon'ble Karnataka High Court.

[J.J. Glastronics (P.) Ltd.–446 ITR 712 (Karnataka) Date 13.04.2022]

4. 14A– AO cannot invoke provision of section 14A mechanically when assessee has computed amount disallowable u/s 14A of the Act with some scientific formula. AO has to record satisfaction that disallowance computed by Assessee is not sufficient then and then only he can invoke provision of Section 14A.

[Shreno Ltd.–409 ITR 401(Gujarat)Date 27.08.2018]
[TV Today Network Ltd.–141 taxmann.com 275(Delhi))Date 27.07.2022]

5. 14A– While computing average investment for disallowance u/s 14A, only those investment will be required to be considered which yielded exempt income. The view of Hon'ble Special Bench in case of Vireet Investment (P.) Ltd. Reported in 165 ITD 27(SB) has been approved by Hon'ble Delhi High Court.
[Cargo Motors (P.) Ltd.–145 taxmann.com 641(Delhi)Date 07.10.2022]

Analysis of Taxation on Transaction related to Crypto-Currency

(As Enacted as per Finance Act, 2022)

CA SAMIR CHAUDHRY

The current fiscal year, which ends in March 2023, is the first year in which Indian Crypto-currency users will be taxed for their Crypto trades and gains. In a nut shell, we can say that – any Indian resident who transacts Crypto, whether as a trader, miner, or yield farmer, is required (by the new Finance Bill of 2022) to declare their crypto assets and pay taxes on the gains. Let's find out the complications of Crypto taxes in India in this article.

Crypto Basics

Crypto is an emerging asset class with its own benefits. Security and privacy top the list. To secure Crypto transactions, a technique known as Cryptography is taken into use. To put it simply, Cryptography is a technique of converting understandable data into complicated codes that are highly difficult to crack. Furthermore, Crypto operates on decentralized networks that function on block chain technology.

Cryptocurrency has been in the air for long time and people have gained interest in this new field of investing which in some cases have resulted into multi-bagger investments with people earning huge chunk of gains out of it. But with such massive earnings, arises the question of taxes to be paid by the crypto holder on such gains and treatment of losses if any, arising out of such transactions.

Despite having the term “currency” in their name (generally), Cryptocurrencies are not yet a legal tender in India. However, they can be held as assets in the same way that stocks, gold, real estate and bonds are held.

Crypto Tax in India: An Overview

To bring crypto under the purview of Indian taxation system, a new section 115BBH was introduced in the 2022 budget. This section enforces a 30% tax (plus applicable surcharge and 4% cess) on profits made from Crypto trading (starting from April 1, 2022). This rate is at par with India's highest income tax bracket (excluding surcharge and cess). Private investors, commercial traders, and anyone else who transfers Crypto assets in a given fiscal year are subject to this newly introduced tax (subject to conditions).

Additionally, the 30% tax rate will apply regardless of the nature of the income earned. So it makes no difference if it is investment income or business income, and there is no distinction between short-term and long-term gains.

Here, the points to be remembered are:

- There are no expense deductions allowed.
- Only the acquisition cost is allowable as a deduction.
- Crypto losses cannot be deducted from Crypto gains.
- There is no set-off allowed for loss from any other source of income (business income or salary income or house property income etc.)
- There is no carry forward of Crypto losses allowed to future years to set off against Crypto income.

Let's take an example. If an investment of INR 2,00,000 was made in Crypto assets at the beginning of FY 2022, and by the end of FY 2022, the Crypto was sold for INR 2,50,000, a flat 30% Crypto tax is applicable on the gain generated (INR 50,000). The investor will be liable to pay INR 15,000 (plus surcharge and cess) as the tax on Crypto income in that specific financial year.

It should be noted that any income or gain derived from Crypto transactions is taxed only at the time of transfer; if a person continues to hold the asset, the unrealized gains generated are not taxable. Moreover, except for the cost of acquisition, which is the purchase price, no other costs are allowed, such as platform fees, broker fees, and internet charges, these are to be deducted as expenses from profit. This is permitted in the trading of stocks and derivatives. Moreover, any other income cannot offset a loss incurred from Crypto trading. Overall, it can be said that the Government has neither legalized nor prohibited the use of Cryptocurrencies. However,The Government has taken steps to discourage short-term trading.

In addition to the above, 1% **TDS** (Tax Deductible at Source under section 194S of the Income Tax Act) on Crypto transactions was also introduced. This is applicable to all Crypto transactions undertaken on and after July 1, 2022.
Assume you want to buy INR 5,000 worth of Crypto from a vendor. Due to the new TDS provisions, you will now pay (5,000-1% TDS) = INR 4,950 to secure the trade. The balance of INR 50 will have to be paid to the Government. Crypto exchanges will deduct this TDS on buyers behalf and deposit it to the Government (subject to conditions).
TDS will have to be charged on all Crypto transactions, including Crypto-to-Crypto transactions.

Crypto Tax in India: Recent Updates

In June 2022, the CBDT amended the Income Tax rules in an official notification to specify how firms will comply with the new rules and also the reporting format for the same. The new rules require exchanges to deduct tax from the Crypto buyer under Section 194S of India's Income Tax Act. These taxes must also be paid to the Government within 30 days of the end of the month in which they are deducted. According to the rules, a TDS certificate must be issued to the payee within 15 days of the due date for reporting the tax to the Government. These certificates are required for users to claim a tax refund from the Government.

On December 13, 2022, the Government published that an amount of INR 60.46 crore had been collected in tax from entities for transactions in virtual digital assets (VDAs), including Cryptocurrencies, since the implementation of TDS provisions in July. In a written response to a question in the Rajya Sabha, Minister of State for Finance Pankaj Chaudhary stated that the CBDT conducts outreach/awareness programs for deductors/taxpayers and also takes appropriate actions, such as search and seizure operations, surveys, and inquiries, as needed.

E-Rupee-India's take on virtual money

So, what is digital Rupee exactly? Well, many may link it to cryptocurrency, but there's no direct connection between the two. Crypto operates on Block chain technology, while digital Rupee is a form of digital token that represents legal tender.
In contrast to cryptocurrencies, the digital Rupee or e-Rupee is issued in the same denominations as paper currency and coins. The value of crypto including Bitcoin is unstable, but digital Rupee's value remains the fixed all throughout. While users can invest in crypto, in the case of digital Rupee banks assign them to customers. Theexact process of assigning digital Rupee to customers is not completely clear yet.

How to use digital Rupee

So, how will digital Rupee work? Will users be able to transact using digital Rupee? Answer is: Yes, users will be able to use digital Rupee to make purchases and shop even from their nearest kirana stores. The transaction in digital Rupee can happen between Person to Person (P2P) and Person to Merchant (P2M). “The e-Rupee would offer features of physical cash like trust, safety and settlement finality. As in the case of cash, it will not yield any interest and can be converted to other forms of money, like deposits with banks,” the central bank stated.

The RBI said that digital Rupee will be made available through intermediaries like banks to customers and merchants.RBI had previously clarified that users will be able to transact with e-Rupee through a digital wallet offered by the eligible banks and stored on mobile phones or devices of the customers. Customers will then be able to make payments with E-Rupee using QR codes displayed at merchant locations, just like online transactions are done.

Conclusion

The Indian Government's tax measures on Cryptocurrency are comprehensive, and tax evasion is not possible. Crypto exchanges have been working towards a Government-compliant hassle free environment in which all trades and investments within the domain will be visible to the tax department transparently. Investors who wish to invest or trade in virtual digital assets should become acquainted and educated with the new tax regime and, ideally, consult a tax advisor before beginning their crypto investment journey.

- Tushar Hemani
Senior Advocate

- ReshamThakkar
Advocate

- Kushal Fofaria
FCA, M.Com.

- **Notice of reopening assessment in the name of amalgamating company cannot be issued after its merger into new company.**

Assessee filed ITR on 28.09.2012. Assessee Shahlon Industries Pvt.Ltd merged with the petitioner Shahlon Silk Industries Pvt. Ltd vide order dated 27.08.2014. Case of the petitioner was selected for scrutiny and assessment order was passed u/s.143(3) making a disallowance u/s.14A.Assessee on 30.09.2015 vide letter informed the concerned authority that it had been amalgamated with the petitioner.Notice u/s.148 dated 13.12.2017 was issued in the name of assessee.Petitioner vide reply dated 09.08.2018 informed about assessee and petitioner's merger.Petitioner requested to supply reasons for reopening, which were supplied on 06.08.2018. Petitioner on 24.09.2018 raised objections against the reopening,which were disposed of vide order dated 30.11.2018. Notice u/s.148 was challenged along with order disposing of the objections. Held,the impugned notice was issued only on the ground that income chargeable to tax has escaped assessment on account of claim of deduction granted for Keyman policy anddisallowance u/s.14A. Before passing assessment order dated 16.03.2015, the assessee and the petitioner had amalgamated vide order dated 27.08.2014 and therefore, the notice u/s.148 had been issued in the name of amalgamating company instead of new company. AO even after examining the issue in detail, reopened the assessment merely on change of opinion, in spite of such issues being considered during the assessment proceeding. AOdid not have jurisdiction to issue notice to reopen assessment for such year specifically when reopening is beyond four years. Hence, impugned notice u/s. 148 as well as order disposing of objections being not tenable in law, were quashed and set aside.

[Shahlon Silk India Pvt Ltd vs. The Assistant Commissioner of Income Tax – SCA No.20436 of 2018 – Judgement dated 06/01/2023 – Gujarat High Court]

- **Reassessment powers can be invoked only when escapement of income chargeable to tax takes place and not due to mere error in computation of tax.**
  Assessment cannot be reopened in a matter which is already a subject matter of appeal.

Petitioner filed his ITR on 30.09.13. Case was selected for scrutiny. Assessment Order u/s.143(3) was passed on 30.03.2016 wherein addition of loss of Rs.4,55,56,032/- was made. Petitioner preferred appeal against such order which is pending. Petitioner's case was reopened on the ground that there was mistake in computation of tax on assessed income. Notice was issued u/s.148 dated 30.03.2018 with reasons to believe that income had escaped assessment as per S.147. Held, case was reopened on audit objection that assessed income was worked out at Rs.9,62,11,400/- but while computing tax, assessed income was taken as Rs.5,06,45,370/- which resulted into escapement of income. To compute tax, less income was adopted instead of actual assessed income by the AO. The pre-requisite for invoking the power of reassessment is that income must have escaped assessment of tax. A mistake in computation of tax on assessed income cannot result into escapement of income.Action of AO resorting to S.147 was erroneous in law, as a recourseto S.154 could be properto cure the error.
Another aspect taken into account was that appeal against the assessment order was also pending. Third proviso to S.147 clearly states that AO cannot reopen case to examine an issue which is pending before an appellate authority and is a subject matter of appeal.Doctrine of merger would come into play in such circumstances rendering the recourse to reopening impermissible. Held, the impugned notice was set aside.

[Anil Satyanarayan Roongta vs. The Assistant Commissioner of Income Tax – SCA No.21016 of 2018 – Judgement dated 19.07.2022 – Gujarat High Court]

- **Finalizing the assessment after passage of time requested in adjournment application does not in itself amount to acceptance of adjournment application.**
  Communication of disposal of adjournment application to assessee is mandatory.

AO issued SCN along with draft assessment order for AY 2018-19 on 23.04.2021 requiring assessee to reply by 26.04.2021. Assessee requested for adjournment on 26.04.2021 for 20 days. Assessee waited for AO's reply to

adjournment application or issuance of fresh notice. On 16.06.2021, AO directly passed the assessment order u/s.143(3) r.w.s. 144B without communicating about acceptance or rejection of adjournment application. Assessee challenged the assessment order before the Hon'ble High Court as being passed without disposing of the adjournment application which is in violation of principles of natural justice. Department produced before the Hon'ble High Court an order sheet maintained by AO to which assessee do not have any access whereby adjournment was granted to assessee up-to 10.05.2021. It was also argued that the order was passed after 50 days of adjournment application i.e., much after time requested in adjournment application, which is deemed acceptance of adjournment application. Held, assuming that 10.05.2021 was the date granted, there is nothing on record to indicate that the assessee has been communicated the grant of adjournment on that particular date. Once there is a request made to the respondent authority by any assessee for adjournment, it is expected always and a must that the same is responded to, more so, when there is a faceless assessment. Petitioner was rightly under a bona-fide belief that fresh notice for fixing date of hearing shall be issued. Hence, the assessment order was held to be quashed.

[Dangee Dums Limited v. NFAC – SCA No.14461 of 2021 – Judgement dated 20.12.2022 – Gujarat High Court]

- **Reopening cannot be based on change of opinion**

Assessee sold various shares including 72000 shares of Mittal Securities in AY 2012-13 for Rs. 20,80,800/-. Sale of shares was duly reflected in Schedule 5-Sales forming part of the audited annual accounts. Case was selected for scrutiny. Details like contract notes, etc. of shares sold during the year including 72000 shares of Mittal Securities were furnished to AO. AO passed the order u/s.143(3) without making any addition w.r.t. sale of shares of Mittal Securities. Assessment was reopened on ground that assessee failed to disclose LTCG of Rs. 20,80,800/- on sale of shares of Mittal Securities. Assessee filed its objections to reopening which were rejected by AO. Assessee challenged the reopening notice and order rejecting the objections before the Hon'ble High Court. Held, in the reopening proceedings, the Assessing Officer is not permitted to change opinion about manner of taxability of income, which he had already examined and dealt with at the time of original assessment. In the present case, the details of the sale of shares, as stated above, were disclosed before AO and income on the count of sale of shares by the petitioner was duly accounted for. If AO was of the view that such income is to be taxed as LTCG by virtue of the said transaction, it could have dealt with the same accordingly to tax the said transaction as LTCG. It could not be said that there was tangible material available to permit the act of reopening as it would be nothing but change of opinion, which is not permissible. Hence the reopening notice and order rejecting the objections were set aside.

[Rushivan Enterprise v. PCIT – SCA No.20420 of 2019 – Judgement dated 02.08.2022 – Gujarat High Court]

- **Interior expenditure incurred on business premise does not amount to capital expenditure.**

Assessee claimed interior expenses of Rs.15,51,1331/- as revenue whereas according to the AO those expenses incurred by Assessee are of enduring benefit, so the same was treated as capital in nature and added to total income. Assessee preferred appeal before CIT(A). CIT(A) held that Assessee is going to take benefit of such expenses over a period of time as the lease agreement was executed for 22 months with the liberty to renew it, subject to lock in period of 60 months. CIT(A) while confirming AO's decision statedthat such expense was capital in natureallowing depreciation on the same. CIT(A) agreed with AO's view that renovation expenditure incurred by the assessee on business premise would generate benefit over a long period due to which it was treated as capital in nature on account of enduring benefit expected to arise. Assessee further appealed before ITAT. The issue was whether the expenses incurred by the assessee on the interiors of the business premises amount to capital expenditure in the given facts and circumstances. ITAT held that there is not ambiguity that assessee shall gain benefit out of interior expenses, but such benefit is in nature of smooth and efficient running of business. It was further held that even if such expense was enduring in nature, it is not on capital transaction but relates directly to revenue transaction of assessee. Thus, interior expenses cannot be categorised as capital in nature as no fixed assets come into existence out of such expenditure. Order of CIT(A) was set aside and AO was directed to delete the addition of treating interior expenditure as capital in nature on rented premise.

[Ved Indian Heritage Haat Foundation vs. ITO – ITA No.1583/AHD/2019 – Order dated: 21.12.2022 - ITAT Ahmedabad]

- **It is assessee's prerogative to show land property purchased as stock-in-trade orinvestment.**

Assessee is a real estate developer. In FY.2006-07 assessee purchasedland for constructing hotel for which it entered into agreement with another company that provided some advance money for construction. Assessee classified the land as fixed asset. Such agreement was cancelled by end of FY.2007-08 and assessee returned the advance money. Assessee continued to show such land as fixed asset. Assessee also borrowed funds for purchasing such land and interest on such borrowing was capitalised. Other expenses incurred for such land were also capitalised. Assessee sold such land in FY.2016-17 and declared long term capital losson such sale. According to AO, such sale is a business transaction holding that such land was acquired for sale in future and its classification as fixed asset to facilitate business is against accounting practices. AO disallowed the loss and made addition of business income on sale of land. On appeal to CIT(A), the addition got deleted. Revenue filed an appeal before ITAT. Held, there is no prohibition in the statute that a real estate developer cannot hold property as investment and cannot acquire the same using borrowed funds. AO did not dispute the fact that assessee suo-moto treated interest and other expenditure as capital expense even if revenue can disallow expenditure of interest. Revenue cannot sit in the chair of business and decide particular transaction whether it is revenue or capital in nature or the particular asset should be held as stock-in-trade or investment.It is the prerogative of assessee whether to hold particular asset as investment or stock-in-trade. Likewise, assessee throughout the holding period (i.e. almost 10 years), showed the land as investment. Hence, Revenue's appeal was dismissed.
[DCIT vs. DRV Builders Pvt. Ltd. – ITA No.1273/AHD/2019 – Order dated: 23.12.2022 - ITAT Ahmedabad]

- **House property let out in preceding or succeeding year but lying vacant throughout the year under consideration, despite efforts made by the assessee, is eligible for vacancy allowance u/s. 23(1)(c) of the Act.**

AO observed that assessee has shown income from house property from various properties in different years, however in some years, income was shown as Nil. For AY 2013-14, AO found certain house properties which remained vacant throughout the year. Hence addition was made of notional annual lettable value u/s.23(1)(a). Assessee before CIT(A) contended that properties were not capable for being let out for various reasons beyond his control like lack of parking space, global recession and non-availability of tenant despite best efforts put by the assessee and hence vacancy allowance u/s.23(1)(c) is available to assessee. CIT(A) accepted the assessee's contention and deleted the addition. Revenue filed an appeal before Hon'ble ITAT Ahmedabad contending that S.23(1)(c) cannot be made applicable when property has not been let out at all during the year under consideration. Held, S.23(1)(a) can be invoked in the event the properties are lying vacant all throughout and have not been let out either in the prior or succeeding assessment years and also the assessee has made no effort to let out the same. Further, notably the words used in S.23(1)(c) are “the property is let and was vacant during the whole…of the year”, which necessarily implies that the same property cannot be “let out” and yet remain “vacant” during the same assessment year. Hence, the Revenue's appeal was dismissed.
[DCIT v. Shri Dhaval D. Patel - IT(SS)A No.207/AHD/2018 – Judgement dated 10.11.2022 - ITAT Ahmedabad]

- **Late filing of Form 10B and Audit Report cannot solely deny the exemption u/s 11 of the Act.**

Assessee is a trust registered u/s 12AA. ITR for AY 2014-15 was filed on 18.01.2015. Form 10B was filed belatedly on 14.04.2015. Case was selected for scrutiny. Assessment was framed ex-parte u/s 143(3) r.w.s. 144 making addition of Rs. 7,19,210/- in respect of gross receipt as per income and expenditure account. CIT(A) dismissed the assessee's appeal on the ground that necessary statutory conditions were not fulfilled and trust is not eligible for exemption u/s.11. Appeal was filed before Hon'ble ITAT Ahmedabad. Held, The Tribunal, in the case of Audyogik Shikshan Mandal clearly observed that if Form No.10B is available on record, the same should be taken into account and exemption cannot be denied to the assessee u/s.11. In the present case also, the assessee has fulfilled all the relevant conditions which are required for claiming exemption except filing Form No.10B and Audit Report at the relevant time but the same was filed at a later stage and was available with the CIT(A) as well as before the Assessing officer. Therefore, AO and CIT(A) were not right in denying the exemption u/s.11. Appeal of the assessee is, therefore, allowed.
[Purvanchal Lokhit Mandal v. ITO - ITA No.966/AHD/2019 – Judgement dated 30.11.2022 - ITAT Ahmedabad]

- **No disallowance u/s 40A(3) of the Act can be made separately for purchases when income is computed applying rate of gross profit or net profit.**

Assessee's case was reopened u/s 147 based on information received regarding undisclosed bank account maintained with ICICI Bank. During the reassessment, AO rejected the books of accounts and estimated business income by applying net profit rate of 8% to the total turnover of Rs.3,38,12,073/- including turnover of Rs.3,00,35,190/- as reflected in ICICI bank account. Additionally, AO also disallowed cash payments exceeding Rs. 20,000/- made for purchases by assessee aggregating to Rs. 40,89,100/- u/s.40A(3). CIT(A) upheld the additions made by AO. Assessee filed an appeal before Hon'ble ITAT. Held, addition as per estimated net profit of 8% of turnover is upheld. As regards addition of purchases u/s.40A(3), said purchases were pertaining to undisclosed business transactions and profit of the said undisclosed business transactions was already estimated by applying a net profit rate, hence the same purchases cannot be disallowed separately u/s.40A(3). Reliance was placed on Madhya Pradesh High Court decision in case of CIT Vs. Hindustan Equipment (P.) Ltd., [2013] 30 taxmann.com 295 (MP), wherein it was held that when profit was estimated by applying net profit rate, there was no scope for further disallowance u/s.40A(3) separately in respect of purchases. Reliance was also placed on Allahabad High Court decision in case of CIT Vs. Banwari Lal Banshidhar, [1998] 229 ITR 229], wherein it was held that where income of the assessee was computed applying gross profit rate and when no deduction was claimed by the assessee in respect of purchases, no disallowance u/s.40A(3) could be made by the Assessing Officer. Accordingly disallowance of Rs.40,89,100/- u/s.40A(3) was deleted.
[Dipika Kishorkumar Patel v. ITO - ITA No. 2153/AHD/2018 – Judgement dated 30.09.2022 - ITAT Ahmedabad]

- **Mark-to-market loss on foreign currency derivative contracts is not a notional loss and allowable as a business expense.**

Assessee company is engaged in business of energy and power generation. To refinance it project, assessee availed external commercial borrowing at LIBOR+4.4% during the year under consideration. To hedge itself from fluctuating interest rate, assessee entered into derivative contract in the nature of interest rate swap with Standard Chartered Bank on which it incurred loss of Rs.91.91 crores. The loss comprises Rs.40.62 crores realized loss and Rs.51.30 crores mark-to-market loss as on balance sheet date. AO after marking reference to CBDT Instruction No.03/2010, disallowed the mark-to-market loss by holding it as notional loss for the reason that there was no actual transaction carried out by the assessee. CIT(A) deleted the addition made by AO by relying on the case of Veer Gems v. ACIT-(2017) 77 taxmann.com 127 (Ahmedabad-Trib.) wherein it was held that "theassessee has admittedly made the impugned provision in view of differencein exchange rate as on the date of booking of its forward contract vis-à-visexchange rate prevailing as on 31.03.2008. It has fortified its claim in viewof ABN Amro Bank's MTM certificate forming basis of the impugned provision. The Revenue fails to dispute that the assessee has followed mercantile system of accounting instead of cash system and it is accordingly supposed to account for all expenses/gains in the Profit and Loss account on the said basis. It thus emerges that assessee had sufficient reason to treat the impugned liability arising on account of foreign exchange rate difference so as to make the impugned provision as per relevant accounting standard issued by ICAI. We thus find no reason to restore the impugned disallowance." Revenue filed an appeal before the Hon'ble ITAT which got dismissed on similar reasons.
[DCIT v. Adani Power Maharashtra Ltd. - ITA No.242and283/AHD/2020 – Judgement dated 30.11.2022 - ITAT Ahmedabad]

- **Capital gain generated by the assessee cannot be held bogus only on the basis of modus operandi, generalisation and assumptions of certain facts.**

Assessee earned LTCG of Rs.39,37,423/- u/s.10(38)on shares of M/s. Shree Nath Commercial and Finance Ltd. During the assessment, AO observed that the share price of company increased in short span of time without having any financial base. Assessee purchased these shares at a low price, kept it as it is for lock-in-period of one year and sold when there was sudden increase in price. AO found that the entire flow of transaction is similar to modus operandi of penny stock and made an addition by treating such LTCG as bogus. The assessee before CIT(A) contented that the shares were dematerialised, were purchased and sold on stock exchange, and entire transaction was carried out through banking channel. CIT(A) deleted the addition made by AO. Revenue filed an appeal before Hon'ble ITAT Ahmedabad. Held, the allegation by the AO has not made reference to any report of investigation wing of IT department or any proceeding

carried out by Revenue or other agencies except merely a bald statement recorded in the assessment order. What has been adopted by the AO for making the addition was the modus of operandi. The income generated by the assessee cannot be held bogus only on the basis of the modus operandi, generalisation, and assumptions of certain facts. In order to hold income earned by the assessee as bogus, specific evidence has to be brought on record by the Revenue to prove that the assessee was involved in the collusion with the entry operator/ stock brokers for such an arrangement. In the absence of such finding, no adverse inference can be drawn against the assessee.

[ITO vs. Smt. Mamta Rajivkumar Agarwal - ITA No.1788/AHD/2019 - Judgement dated 11.11.2022 - ITAT Ahmedabad]

- **Condition precedent to deduction of housing loan interest u/s.24(b) is the borrowing of interest-bearing funds by assessee and not thepayment of interest thereon by assessee.**

Assessee claimed deduction of interest on housing loan of Rs. 1.5 lakh u/s.24(1)(vi). However, payment of the same was made from the account of her husband. AO disallowed the same. The addition was deleted by CIT(A) observing that "the assessee's name is in co-borrower, means loan has been taken in joint name. S.24(1) also uses the word interest payable meaning thereby that interest can be paid from any account and the only condition is interest should be payable on such capital borrowed from bank, etc. I have perused S.24(b) and conclude that incidence of interest payment on borrowed capital which has been utilised for acquisition of asset, is of prime importance for allowability of impugned claim. The payment source has been fully explained by the appellant. The interest payment has come through the husband's account which is not illegal. At the most, it could be considered as gift from husband to wife and will not have any tax implication." Revenue filed an appeal before Hon'ble ITAT. Held, on perusal of S.24(b), we note that there is no mention about the payment of interest cost on the housing loan. In other words, it is not necessary to make the payment by the assessee on the money borrowed by him for acquiring the housing loan. What is necessary is that the money should have been borrowed by the assessee for the purchase of the property on which the interest is payable. As far as, borrowing and the interest thereon is concerned, there is no dispute that the interest-bearing fund has been used by the assessee for acquiring the house property. Thus, the provisions of S.24(b) have been duly complied with as source of payment for the interest is known i.e., the husband of the assessee. Hence, the Revenue's appeal is dismissed.

[ITO vs. Smt. Mamta Rajivkumar Agarwal - ITA No.1788/AHD/2019 - Judgement dated 11.11.2022 - ITAT Ahmedabad]

COMPOSITE SUPPLY AND MIXED SUPPLY UNDER GST LAW.

PREAMBLE

Adv. Bharat L. Sheth

Supplies of two or more goods or services can be either 'composite supply' or 'mixed supply'. The concept of composite supply in Goods and Service Tax is similar to the concept of naturally bundled services under Service Tax Law. However, the concept of mixed supply is entirely new.

SUPPLY

Section 7 of the CGST Act, define scope of supply. Supply includes-all form of supply of goods and services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

- Schedule I specifies the activities to be treated as supply even if without consideration.
- Schedule II specifies the activities or transactions to be treated as supply of goods or supply of services.
- Schedule III specifies activities or transactions which shall be treated neither as a supply of goods nor a supply of services.

Section 7

(1) For the purposes of this Act, the expression "Supply" includes-

(a) all forms of supply of goods and services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(aa) the activities or transaction, by a person, other than individual, to its member or constituents or vice versa, for cash, deferred payment or other valuable considerations. (Inserted w.e.f. 1-1-2022).

Explanation: For the purpose of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its member or constituents shall be deemed to be separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another:

(b) Import of service, for a consideration whether or not in the course or furtherance of business; and

(c) The activities specified in Schedule I, made or agreed to be made without consideration;

(d) The activities to be treated as supply of goods or supply of services as referred to in Schedule II. (omitted w.e.f. 1-7-2017)

(1A) Where certain activities or transactions constitutes a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in schedule II (Inserted w.e.f. 1-7-2017)

(2) Notwithstanding anything contained in sub-section(1),-

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any other local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3)Subject to the provisions of sub-sections (1), (1A) and (2), the Government may. On the recommendations of the Council, specify, by Notification, the transactions that are to be treated as-

(a) a supply of goods and not as a supply of services;

or

(b) a supply of services and not as a supply of goods.

Certain activities listed in Schedule 1 of the GST Act also come under the purview of supply.

Schedule I:

(ACTIVITIES TO BE TREATED AS SUPLY EVEN OF MADE WITHOUT CONSIDERATION) .

1. Permanent transfer or disposal of business assets for which input tax credit has been availed on such assets.

2. Supplies of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business

PROVIDED that gifts not exceeding fifty thousand

rupees in value in a financial year by employer to employee shall not to be treated as supply of goods or services or both

3. Supply of goods-

(a) by a principal to his agent where agent undertakes to supply such goods on behalf of the principal; or

(b) by an agent to his principal where agent undertakes to receive such goods on behalf of the principal.

4. Importation of service by a person from a related person or from any of his other establishments outside India, in the course or furtherance of business.

Concept of composite supply and mixed supply

Composite and mixed supplies are a relatively new concept introduced in GST Law, which covers supplies made together, even if they are related or not.

- Supplies that are part of two or more goods or services can be either composite supply or mixed supply.
- The concept of composite supply in GST is similar or akin to naturally bundled services under the Service Tax Law.
- However, the concept of mixed supply is new.

Section 2 (30) define "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combinations thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Illustration: Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

Section 2 (90) define "principal supply" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

Section 2 (74) define "mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in the conjunction with each other by a taxable person for a single price where such supply does not constitutes a composite supply.

Illustration: A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be mixed supply if these items are supplied separately;

Rate of Tax on composite supply and mixed supply was provides in Section 8 of The Central Goods and Services Tax Act, 2017.

The tax liability on composite or a mixed supply shall be determined in the following manner, namely:-

(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply if such principal supply; and

(b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax.

What is a bundled supply?

A combination of goods or services is a bundled supply. The concept of supply of two or more taxable supplies naturally blended and supplies is called bundled supply. The concept was mainly found in Service Tax.

Education Guide issued by CBEC (now CBIC) in the year 2012 defines– 'Bundled service' means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. The rule is – 'If various elements of a bundled service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle its essential character'

How does one determine if the supply is naturally bundled or cannot be separated?

The answer depends on the normal course of business and the normal practices followed in the industry. Here are a few ways to identify them:

1. If buyers expect services to be provided as a package, then they will be treated naturally. For example, business conventions look for a combination of hotel accommodation, food, and convention centre.
2. If most of the service providers in the industry offer a package of services, then it can be considered blended naturally. For example, food provided with an air ticket is common in most airlines. The nature of the services offered may differ in bundled supply. If there is the main service and an ancillary to it, then it is a bundled service. Another example is five-star hotels or resorts often provide complimentary breakfast during the length of stay. Renting a room is the primary service, and breakfast is ancillary.
3. Other indicators that could point towards

determining if the service is bundled or not are:

- A single price for the package even if customers opt for less.
- The components are advertised as a package as the different components are not available together.

Para 9.2.4 of Education Guide issued by CBEC (now CBIC) in the year 2012 mentions "Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate.

Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below-

- Perception of the consumer or the service receiver
- Majority of service providers in the in a particular area of business provide similar bundle of services
- The nature of various services
- Advertised as a single package
- Single Price
- different elements aren't available separately
- different elements are integral to one overall supply

No straight jacket formula can be laid down to determine whether a service is naturally bundled in the ordinary course of business.

What is Composite Supply?

Composite supply means a supply that comprises more than one goods or services that are logically bundled and supplied with each other during the ordinary course of business. One of them will be the principal supply. The items cannot be sold separately. A composite supply is two or more goods or services sold in a pair or set and cannot be sold individually. Every composite supply will comprise a principal supply which is the main product or service intended to be bought by the customer. The rest is made of additional elements that add to the value of the principal supply. A composite supply under GST carries the same tax rate as the GST rate of the principal supply.

An example of composite supply- A box of sweets that is gift-wrapped. The sweets are the principal supply, while the gift box, wrapping for the gift and card in the form of a gift-wrapping service by the shopkeeper are the supporting elements. These cannot be sold or delivered individually without the sweets. This is a composite supply, and the rate of GST will be similar to the rate for the sweets.

Another example of composite supply in GST- A seller sells a brand-new car with the insurance, tool kit, seat upholstery, and registration and maintenance services. This is an example of composite supply as the insurance, registration, seat upholstery, and maintenance services cannot be offered without the vehicle, which becomes the principal supply.

Abbott HealthCare Private Limited V/S. Commissioner of State Tax, (Kerala High Court) Order No. W.P(C).No.17012 OF 2019(B) ; Date Jan 7, 2020. (2020-VIL-08-KER)

Abbott Health Care gives medical equipment to hospitals and labs to be used without consideration. For this Abbott has signed an agreement with these hospitals and labs. These hospitals and labs, in turn, are bound to procure specified quantity of medical products such as reagents, calibrators, and disposals etc through distributors of Abbott for consideration till the tenure of agreement. Under GST, medical equipment draw 18 per cent rate, while products such as medicines and drugs attract five per cent rate.

Authority of Advance Ruling (AAR) Kerala, ruled that the supply of both -- equipment and products-- are composite. It said equipment is the principal supply and products are just incidental and hence higher rate of 18 per cent would apply. Bagri said the tax department typically chooses the supply which attracts higher rate as a principal supply in the composite supply and apply that rate. The appellate authority in the state upheld the ruling.

The company went to the Kerala high court against the judgment. The high court wondered as to how AAR came to the conclusion that it was a composite supply. The high court said there are two suppliers and one supplier is not making both the supplies. Besides, it was not even concluded that the supply of equipment without consideration is a taxable supply. Also, it said in case of two supplies it is a question of valuation. In this case it was to be figured out whether value of equipment is included in the value of reagent to classify it as a composite supply. AAR had also said that supply of medical products is incidental to the equipment.

The High Court has made the following observation in its order:

- The findings of the AAR (i.e. two supplies constituting as composite supply) are without jurisdiction. The AAR did not go into the real issue for which the application was filed by Abbott Healthcare i.e. whether the supply of medical instrument would constitute supply or whether it constitutes movement of goods otherwise than by way of supply.
- The supplies are made by two different taxpayers, i.e. medical instruments by Abbott Healthcare and supply of reagent, calibrators, disposables, and related products by their distributor (who purchases it from Abbott Healthcare on a principal-to-principal basis).
- There is no material to suggest that the two supplies are bundled and supplied in conjunction with each other in the ordinary course of business. The business model for supply of reagent, calibrators, disposables, and related products through distributors has been followed by Abbott Healthcare since many years, and it shows that providing of

medical instrument is not bundled with sale of reagent, calibrators, disposables, and related products in the ordinary course of business.

Based on the above observations, the High Court remitted the matter back to the AAR for fresh consideration.

What is Mixed Supply?

A mixed supply is one or more independent services or products offered together as a package but can also be sold separately. Under GST, in a mixed supply, the service or item with the highest GST rate is taken as the principal supply. The mixed supply is taxed at the same GST rate as the principal supply.

An example of mixed supply- A restaurant sells combo of Pizza, garlic bread and cold drinks at single price. When sold separately, the food items will incur a certain GST rate, and the cold drinks will incur a different rate. When offered together as a bundle of services, the whole service will incur a higher rate.

Another example of mixed supply- A boxed gift set for Dewali contains dry fruits, aerated drinks, canned foods, sweets, cakes and chocolates supplied at a single price is a mixed supply. Each of these can be sold separately. Whichever product in this box of goods has the highest GST rate will be considered the principal supply, and the same rate will apply to the whole box of goods.

Sarj Educational Centre. Order No.: 42/WBAAR/2018-19 dated 26/02/2019 Authority: AAR (West Bengal)

Whether his service to the students for lodging along with food is a composite supply within the meaning of section 2(30) of the GST Act, and whether supply of such service is eligible for exemption under Sl. No. 14 of Notification No. 12/2017–CT (Rate) dated 28/06/2017."

The bundle of services offered to the recipients, consists of both taxable and nontaxable supplies. It is also evident that although the services are offered in a bundle, they are not indivisible, and different considerations are paid for different packages of such services offered to the recipients, depending upon their requirement for lodging facility. For example, laundry service is not offered to the day boarders. These are not, therefore, bundles of taxable supplies that are inseparable and supplied only in conjunction with one another in ordinary course of business. The services the Applicant supplies are not, therefore, composite supply, as defined under Section 2(30) of the GST Act.

It is evident from the above discussion that the Applicant is offering several individual services in two different combinations to the recipients, depending upon their need for lodging facility. Each of the recipients, however, is charged a consolidated amount for the combination of services he wants to enjoy. The combination of services is, therefore, offered as a mixed supply within the meaning of Section 2(74). In accordance with Section 8(b) of the GST Act it is stated that, "a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax."

Each of the combinations includes services taxable at 18% rate, which is the highest rate applicable to the services being offered vide Section 8(b) of the GST Act. Being mixed supply, value of the entire combination of services offered is taxable at 18% rate. They are mixed supplies within the meaning of section 2(74) and taxable in accordance with section 8(b) of the GST Act. Being mixed supply, value of the entire combination of services offered is taxable at the applicable rate.

What is the difference between composite supply and mixed supply?

In the first instance, composite supply and mixed supply may look very similar. The primary aspect is the supply of goods or services as a bundle for a common or single price in both cases. But then, what is the difference?

In a composite supply, one item or service is the key or main part of the supply. In a mixed supply, no one part is the main or key. However, in a mixed supply, the item or service with the highest GST rate is treated as the principal supply.

If the items or services cannot be sold separately and need to be bundled with a principal item or service, then it is a composite supply.

If the goods or services are not bundled ordinarily in the normal course of business, it would be classified as a mixed supply.

Conclusion

Every transaction needs to be reviewed closely to examine and determine the classification of the supply. Post scrutiny, it can be determined whether it will attract composite supply or mixed supply. Even though the determination applies to subjective and objective tests, the entire exercise of classification makes it a complex task. Suppliers are expected to appreciate the nuance in the concepts and then undertake appropriate classification of supplies and goods.

BHARAT SHETH.

Now : Insolvency by FC is 'May' and not 'Shall'
Financial creditors 'May' trigger Insolvency

Adv. Nipun Singhvi

With the advent of Insolvency and Bankruptcy Code, 2016 [hereinafter"the Code"] the financial creditor got a boost up in the recovery as the Code helped in quick and faster recovery. Though the Code was always meant for resolution and not recovery, but the by-product was always resolution. In fact, RBI pushed the banks for filing Section 7 application for triggering insolvency in case where huge debt was outstanding popularly called as 'dirty dozen'. With the passage of time the yardsticks prescribed were limited to ascertaining the 'debt' and 'default' whereas the previous laws especially for banks it was task to prove the amount of default by adducing evidence before Debt Recovery Tribunal and in case of excess amount charges the matters were stuck, further the procedure of trial before DRT use to take lot of time. Though the law for initiation of insolvency by financial creditors empowers all lenders but majority of the case are filed by banks and financial institutions.

This article attempts to discuss the pathbreaking judgement of '***Vidarbha Industries Power Ltd.*** **v.** ***Axis Bank***' wherein Hon'ble Supreme Court has held that the insolvency proceedings can be deferred or rejected, if the company is financially healthy and viable.

Ascertaining 'Debt' and 'Default'.

The framework of the Code is designed to facilitate the assessment of viability of anenterprise at a very early stage, and to ensure the resolution of insolvent entity. Section 6 of the Code provides that a Financial Creditor, an Operational Creditor or theCorporate Debtor ('CD') itself can file an application for initiation of Corporate Insolvency Resolution Process ('CIRP') if default is committed by the CD. When an application is filed for initiation of CIRP theAdjudicating Authority (NCLT) should ascertain that an amount is due from the CD and CD is defaulted in making payment of such due amount from the evidences provided in the application and as per Section 7(5)(a) of the Code once debt and default is ascertained Adjudicating Authority may admit the insolvency application.

Admission of Insolvency: Discretionary or Mandatory

Section 7(5) of the Code provides situations in which Adjudicating Authority can accept or reject application for initiation of Corporate Insolvency Resolution Process ('CIRP'). It read as:

> *'5) Where the Adjudicating Authority is satisfied that—*
>
> *(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or,*
> *(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.'*

In both the clauses stated above word 'may' is used that in these situations Adjudicating Authority can admit the application so this provision provides discretion to the Adjudicating Authority to reject or accept Section 07 of the

Code application.Hon'ble Apex court in *Vidarbha* (supra) enquired that whether Adjudicating Authority was onlyrequired to see whether there had been a debt, and the CorporateDebtor had defaulted in making the repayments on in Section 7(5) is the expression 'may' to beconstrued as 'shall' and held that '*the existence of afinancial debt and default in payment thereof only gave the financialcreditor the right to apply for initiation of CIRP. The AdjudicatingAuthority (NCLT) was require to apply its mind to relevant factorsincluding the feasibility of initiation of CIRP, against an electricitygenerating company operated under statutory control, the impact ofMERC's appeal, pending in this Court, order of APTEL referred toabove and the over-all financial health and viability of the CorporateDebtor under its existing management*'.

Cash flow to Balance Sheet 'Test'.

Two major tests for the determination of solvent status of a company are: 1) Cash Flow Test provides that to figure out the solvent status of any company one should check that such company is in a position to meet out its current debts from its realizable assets or not. If company is able to meet its current debts from its realizable assets then it is a solvent company. However, on the contrary balance-sheet test is a broader test it requires court to consider the balance-sheet of the company to determine financial position of a company and check twhether there are other available assets of the company which may be utilized for repayment of debt at a later stage. In pre- Vidarbha period Adjudicating Authority mostly applied Cash Insolvency Test to analyse the solvent status of an entity however,Hon'ble Apex court through *Vidarbha* (supra) shifted approach to Balance-sheet test to determine default or solvency.

Parameters considered

Hon'ble Apex court in *Vidarbha* (supra) laid down that discretionary power of Adjudicating Authority under Section 7 (5)(a) of the code cannot be exercised arbitrarily or capriciously and further suggested various parameters that can be considered except debt and default to admit, to reject or to keep in abeyance insolvency application under the Code such as financial health and viability of the Corporate Debtor, existence of any award or a decree in favour of the Corporate Debtor, Profit earned by company in previous financial years, Any suit or litigation pending.

Review Rejected

A review petition was filed by Axis Bank Ltd. bearing Review Petition No. 1043 of 2022 in Civil Appeal No. 4633 of 2021 against the decision of Apex court in *Vidarbha* (supra) contended that certainobservationscould be interpreted in a manner that might be contrary to the aimsand objects of the Code and render the law infructuous. The said review petition was rejected by Apex Court and observed that to interpret words and provisions of a statute,it may become necessary for the Judges to embark uponlengthy discussions. The words of Judges interpretingstatutes are not to be interpreted as statutes.

Conclusion

The Code is evolving day by day through various amendments and precedents to achieve its main objective of resolution of the Corporate Debtor. The decision of the Supreme Court in *Vidharbha* try to loose the water tight compartment of debt and default, to fit various relevant factors that are require to be consider to determine solvency of an entity. This judgment tried to prevent the entities that are tied up in legal proceedings and otherwise financially sound and put faith on judiciary to use its wisdom to balance the interest of creditors as well as of Corporate Debtor.

Transfer of title and handover of society under RERA

CA Manan Doshi

Section 17 of The Real Estate (Regulation and Development) Act, 2016 deals with transfer of title which states that:

17. *(1) "The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:*

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate."

The first and foremost question arises that when to form a co-operative housing society:

According to Proviso to section 11(4)(e) association of allotees shall be formed within three months of the "majority" of allotees having booked their plot/apartment/building in the project. Further according to Section 11(4)(e) the promoter shall enable theformation of an association or society or co-operative society, asthe case may be, of the allottees, or a federation of the same, under the lawsapplicable.

This shall mean that as soon "majority" of allotees have booked their apartment/plot in the real estate project, the allotees and the promoter shall jointly work to register association of allotees under the applicable laws.According to Order 13 and Order 18 as issued by Gujarat RERA authority the association of allotees could be formed by way of society under Gujarat Co-Operative Society Act, 1961 or as a company under Section 8 of the Companies Act, 2013.

Once an association of allotees have been formed it is important to understand that when the handover shall take place:

According to section 17(1) in absence of local law conveyance deed in favour of association of allotees shall be carried out by the promoter within three months from the date of issue of occupancy certificate. This obligation has to be read in in conjunction with section 19(11) of act which casts a reciprocal duty on the allotee to participate towards registration of the conveyance deed as provided in section 17(1) of the Act. However, section 17(1) read with section 19(11) fail to adequately provide for a practical problem faced by most of the promoters and allotees. Very often, the allotees seek time for registering the conveyance deed due to lack of funds for payment of registration fees and stamp duty and in some cases lack of funds even for the last payment due under the agreement for sale. Further, sometimes allotees do not want to get conveyance deed registered in their name as they book unit for investment purpose only and subsequently sale the said unit to third party.

In such scenarios act does not provide for an extension of time to the promoter for execution of registered conveyance deed on account of delay made by allotees, for any reason whatsoever, and the promoter would become a defaulter under the at as soon as the period of three months from the date of occupancy certificate expires. Thus, the promoter shall be liable to pay compensation under section 18(3) of the Act and for default under section 61 of the act. The promoter will have to demonstrate to the authority that the promoter took all reasonable steps for execution of conveyance deed in favour of allotees and association of allotees within prescribed time limit.

Subsection 2 of section 17 of the Act says that after obtaining

occupancy certificate & handing over possession to the allotees in terms of sub section 1 to section 17 it shall be the responsibility of the promoter to hand over the necessary documents to the association of allotees. The proviso to sub section 2 of section 17 says that Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent
authority, as the case may be, within thirty days after obtaining the occupancy certificate.

It is equally important to understand what are the documents that are required to be handed over by the promoter. Illustrative list is provided below as to what documents are required by society to be taken from promoter:

Plan & related documents:

a. Approved building plan
b. Completion certificate
c. NOC's received from Fire, Airport, Environment, Railway, High tension line, gas line etc.

Financial documents:

a. Insurance policy in respect of title of the land, building and construction of the project
b. Receipts of payment made to statutory authority which is required before receiving occupancy certificate
c. Audited account statement in respect of maintenance charges/deposit and its utilisation before receiving occupancy certificate

Handover may seem to be a straight forward process however it actually entails a wide range of inventories and technical manuals for which society should have to take care of:

a. Annual Maintenance Contracts (AMCs) and vendor information along with bills and service records of the purchased equipment, such as generators, gym equipment, sewage and water treatment plants, etc.;

b. Manual drawings, technical details and specifications of sewage and water treatment plans;

c. List of all amenities and assets in the building including movable and immovable ones;

d. Detailed and approved compounding layouts of convenience stores, offices, etc that constitute the building premises;

e. Piped gas systems diagrams (if applicable) along with approval from relevant authorities, inspection records;

f. CCTV Access Control System (if applicable) with user manuals, technical warranty, contracts and inspection report;

g. Drawings of electrical wiring with earthing points, instructions on safety measures, generator set configurations and diesel storage facility;

h. Water piping diagrams, lab tests of water quality, overhead tanks' technical documentations, borewell yield report, and documented evidence of rain-water harvesting compliance;

i. Fire/ emergency detectors and alarm systems with technical documents and instructions on resident alert protocol, panic button systems, inventory of hoses, hydrants and fire extinguishers;

j. Automobile parking with layout and numbering;

k. Layout and drawings of common areas including community hall, playground, and others;

l. Lift license documents, clearance to operate them, safety manuals, warranty documents and details of renewal;

m. Approval, specifications and vendor agreements for multi-utility pre-paid meter with validated software and tariff rates;

n. Records of existing maintenance/service staff and their detailed work schedule.

Amendment in CGST Act, 2017 through Finance Bill 2023 for restriction on availment of ITC on CSR expenditure

CA Jigar Shah

1. As per the provisions related to Companies Act, 2013 certain assesses have to mandatorily incur expenditure on Corporate Social Responsibility.

2. The said rules also suggest that the expenditure so to be incurred should not be related to business of the assessee.

3. Section 16 of the CGST Act, 2017 states eligibility and conditions for availing the input tax credit. One of the salient feature of Section 16 is that any supply of goods or services received by the registered person to be used or intended to be used for business purposes is eligible to claim input tax credit. However, the provisions of Section 17(5) of CGST Act, 2017 would prevail over the provisions of Section 16 of the CGST Act, 2017.

4. Many assessees have approached AAR on the issue of eligibility of input tax credit of expenses incurred on CSR activities.

5. AAR Uttar Pradesh in case of **Dwarikesh Sugar Industries** reported in **2021 (53) GSTL 482 (AAR-UP)** held in favour of assessee and held that input tax credit of GST paid on CSR expenditure is eligible to the assessee.

6. However, in case of **Adama India** reported in **2023 (3) CENTAX 183 (AAR – Gujarat)** it is held against the assessee/ applicant and ITC of expenses incurred on CSR Activities is held as ineligible.

7. Now, the Finance Bill 2023 has proposed to insert one more clause (fa) in Section 17(5) of the CGST Act, 2017 to specifically hold that ITC of GST paid on expenses incurred after CSR activities would not be eligible.

8. A question has now arose that since the Finance Bill 2023 has proposed to insert the clause (fa) in Section 17(5) of CGST Act, 2017 with prospective effect whether the ITC was eligible for the past period.

9. Let us take an example of a company where it has purchased cement to be used for construction of a school building. If the Company treat this as business expenditure and avails the ITC then it is relevant to see the provisions of Schedule I of CGST Act, 2017 which reads as under:

SCHEDULE I

[See section 7]

ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION

1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.

10. In other words, what Schedule I intends to give effect is if the company treat the CSR expenses as eligible expense to claim ITC then by virtue of Entry No. 1 of Schedule I of CGST Act, 2017 it would be treated as permanent transfer or disposal of business asset and GST would be payable on such transfer even the said transfer is obviously without any consideration. In a nutshell, if the assessee claims ITC then consequent to such transfer without consideration it is treated as deemed supply and GST would be payable leaving any benefit to the assessee.

11. Another view could be that even if the said CSR expenses are treated as business expenditure but Section 17(5) of CGST Act, 2017 would prevail over the provisions of Section 16. In other words, if the said expenditure is specifically treated as ineligible for availing the ITC as per Section 17(5) of CGST Act, 2017 then despite of the fact that it was for business purposes the ITC would not be available to the assessee.

12. The revenue department can contend that since as per Section 17(5)(h) since the goods are distributed or supplied as gift free of costs the ITC would not be eligible.

13. Now the specific amendment is being introduced to state that expenses incurred on CSR activities are not eligible. However, as mentioned above such amendment would be prospective in nature and would apply to future period only.

14. For the past period the controversy would remain considering the above statutory provisions. It is better that revenue department comes with clarification for the past period to avoid unnecessary litigation which is otherwise there in present form of GST.

GLIMPSES OF GEMS

President Shri Hiren Vakil presenting memento to lexpert Sr. Advocate Tushar P Hemani at Budget Meeting.

President Mr. Hiren Vakil Honouring Past President Mr. Dhiresh T. Shah by presenting appreciation memento, at Mofussil Programme held at Halol,
Also seen Mr. Praful Shah - Chairman Mofussil Committee

Past President Harish N. Shah, President Shri Hiren Vakil, Mr. Aniruddh Zala- Chairma Bar Council of Gujarat, Mr. Ramesh Trivedi V.P. AGFTC- Saurashtra zone lighting the lamp at mofussil programme at Bhavnagar.

President Advocate Hiren Vakil &
Sr. VP CA Ravi Shah felicitating &
Honouring Past President CA Bhailal K Patel
with memento at Mofussil Programme held at Nadiad.

President ITAT Bar Association - Sr. Advocate Shri Saurabh Soparkar and Mrs. Annapurna Gupta - Member ITAT lighting the lamp at moot Court held by AGFTC & ITAT Bar Association - Ahmedabad. also Seen President AGFTC - Hiren R. Vakil & President ITAT Mr. G.S. Pannu Sir.

President Hiren Vakil, Hon. Secretary Balmukund Shah, Past President D.T. Shah, Past President Dhruven Shah , Co opt Member Dhruvin Mehta in programme to bid farewell to Mr. Ravindrakumat on his retirement as Pr. CCIT.

Vice President CA Vishves Shah(AZ) Felicitating CA Vimal Parikh
President Taxation Practitioner's Association Panchmahal Godhra

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*Data as on 31st December 22