

# CORPORATE PROFESSIONALS TODAY

A WEEKLY ON GST | INCOME TAX | COMPANY LAW | ACCOUNTS & AUDIT

## CBDT sounds alarm bells for salaried employees raising fraudulent claims



- Canteen facilities extended to employees to be deemed as taxable services under GST - AAR
- 57 years old Income-tax law due to be revamped soon
- MCA simplifies signing requirement of share certificates
- Commission paid by Prasar Bharti to advertising agencies now liable to TDS u/s 194H
- MCA clarifies accounting procedure for foreign currency transactions and advance consideration under Ind AS
- Education Cess and Anti-profiteering: An impending tussle?
- Ind AS Implementation

**PLUS**

• A Weekly Review on GST/Income-tax/Corporate Laws • Your Queries

[www.taxmann.com](http://www.taxmann.com)

VOLUME 41 ■ ISSUE 17 ■ APRIL 28, 2018 TO MAY 4, 2018

PRICE : ₹ 150

TOTAL NO. OF PAGES 60

# taxmann.com

## Income Tax Module\*



Committed to  
Excellence, Authentic &  
Customized Database  
on Income Tax

- ◆ taxmann.com has the largest database of Income-tax
- ◆ 77,000+ Case laws with Headnotes and Digests drafted by tax experts
- ◆ Have access to almost all cases reported in all leading journals
- ◆ 14,400+ Circulars and Notifications
- ◆ Always Amended database of Acts, Rules, Circulars, Notifications and DTAAs
- ◆ 7,200+ Experts' Opinions on all crucial tax matters
- ◆ **All About™ Income-tax Act** : A unique tool to carryout research on all connected data in one go. It gives you access to latest provision of law and legislative history of all amendments including rationale behind that amendment.
- ◆ All documents have been tagged with various parameters to quickly fetch the relevant records
- ◆ Covers more than 11 Commentaries on varied topics of Income-tax
- ◆ **Research Box**: Create your personal online library where you can bookmark and save any type of document for a later reference. Synch data from your research box with Dropbox.com to access it anywhere.

[ Income Tax Module\* with All About™ Income Tax Act ]  
**Subscription : ₹ 9900<sup>†</sup>**

### SUPER SAVER COMBO\*

<b>4 Modules Plan</b> Income Tax Module + GST Module (Including Indirect Tax Module) + Company Law Module + Indian Acts	18,999 <sup>†</sup>
<b>5 Modules Plan</b> Income Tax Module + GST Module + Company Law Module + Indian Acts Module + Accounts and Audit Module	22,999 <sup>†</sup>

\* FREE : 3 Daily e-mail Services : Daily Tax & Corporate Laws Digest, Taxmann Daily & GST Daily. † GST @18% extra

**Call your book seller today or visit [www.taxmann.com/bookstore](http://www.taxmann.com/bookstore)**

FOUNDER EDITOR :  
U.K. BHARGAVA

EDITOR :  
RAKESH BHARGAVA

HON. EDITORS :  
VINOD K. SINGHANIA (DR.)  
V.S. DATEY

COORDINATING EDITOR :  
NAVEEN WADHWA

Annual subscription from January - December 2018  
is ₹ 5600. Single copy ₹ 150 only.

Corporate Professionals Today is published on  
every Saturday. Non-receipt of part must be notified  
within 60 days of the due date.

Address your editorial and subscription  
correspondence to :

**TAXMANN ALLIED SERVICES (P) LTD.,**  
59/32, New Rohtak Road, New Delhi-110 005.  
Phones : +91-11-45562222  
Fax : +91-11-45577111

**PRINTED AND PUBLISHED BY :**

**ANSH BHARGAVA** on behalf of Taxmann Allied  
Services (P) Ltd. and Printed at Tan Prints (India)  
Pvt. Ltd., 44 Km. Mile Stone, National Highway,  
Rohtak Road, Village Rohad, Distt. Jhajjar, Haryana  
(India) and Published at 59/32, New Rohtak Road,  
New Delhi-110 005 (India).

**EDITOR : RAKESH BHARGAVA**

Material published in this part is the exclusive  
copyrighted property of Taxmann Allied Services  
(P) Ltd. and cannot be reproduced or copied in any  
form or by any means without written permission  
of the Publisher.

Editors do not necessarily agree with the views  
expressed by authors of articles/features. Views  
so expressed are the personal views of author(s).

This publication is sold with the understanding that  
authors/editors and publishers are not responsible  
for the result of any action taken on the basis of  
this work nor for any error or omission to any  
person, whether a purchaser of this publication  
or not. All disputes are subject to jurisdiction of  
the Delhi High Court.

Email : sales@taxmann.com  
Website : http://www.taxmann.com

**MODE OF CITATION : [2018] 41 CPT. . .**

**TOTAL PAGES 60**

# Contents

Volume 41 | Issue 17 | April 28 To May 4, 2018

## Direct Tax Laws

- 883** CBDT sounds alarm bells for salaried employees raising fraudulent claims
- 889** 57 years old Income-tax law due to be revamped soon - PRABHAKAR K S
- 899** Commission paid by Prasar Bharati to advertising agencies now liable to TDS u/s 194H - MEENAKSHI SUBRAMANIAM

## GST

- 885** Canteen facilities extended to employees to be deemed as taxable services under GST - AAR - N.K. GUPTA
- 905** Education Cess and Anti-profiteering: An impending tussle? - ARPITPUSHP CHATURVEDI

## Corporate Laws

- 895** MCA simplifies signing requirement of share certificates - NIKITA SNEHIL

## Accounts & Audit

- 908 MCA clarifies accounting procedure for foreign currency transactions and advance consideration under Ind AS - SANTOSH MALLER
- 911 Ind AS Implementation

## Your Queries

- 917 Goods and Services Tax
- 919 Income-tax
- 922 Corporate Laws
- 922 Accounts and Audit

## Weekly Review

- 924 Goods and Services Tax
- 927 Income-tax
- 931 Corporate Laws

VOLUME 41 ENDS WITH THIS ISSUE

TAXMANN®

# Don't Miss any Updates on GST

Register\* Now for 'GST Daily'



\*Log on to [taxmann.com](http://taxmann.com) (Goods and Services Tax)

# STOP PRESS

## AAR hits on luxury goods sold by duty-free shops

As per old sales tax regime, a sale or purchase of goods was to be deemed to have taken place in the course of export, if trade took place after the goods had crossed the Customs Frontier of India. Since the sale of goods from duty free shops at International Airports was considered as export, State Governments couldn't levy tax on such goods. The duty-free shops at international airports had also been exempted from levy of VAT in the old regime.

However, no such exemption has been given in the GST regime for the sale of goods by the duty-free shops. If sale of goods by these shops is considered as export because goods are sold beyond the customs frontier of India, no GST can be levied on such sale. This issue was raised before the Authority for Advance Ruling in the case of *Rod Retail (P.) Ltd. In re. [2018] 92 taxmann.com 317*.

In the instant case the applicant had a retail outlet for sale of sunglasses at Terminal 3 (International Departure), Indira Gandhi International Airport, New Delhi. The applicant was of view that sale of goods to international outbound passengers holding international boarding pass was taking place beyond

Customs Frontiers of India as defined under section 2(4) of the IGST Act, 2017. Therefore, such supply had to be considered as zero rated supply under GST.

The AAR ruled that the supply of goods to international passengers by the applicant from its retail outlet situated in the security-hold area may be taking place beyond customs frontiers of India, but the outlet could not be deemed to be outside India. Thus such supplies will not be treated as exports and therefore, the applicant would be required to pay GST at the applicable rates. The authority also added that when goods are exported by air, the export will be completed when goods cross airspace limits of its territory or territorial waters of India.

It is pertinent to mention here that this situation has arose due to the definition of exports in the CGST Act and this issue had to be addressed by the GST Council. It is also noteworthy that an advance ruling pronounced by AAR is binding only on the applicant who has sought the advance ruling. However, the Dept. may *suo-motu* initiate the proceedings against other duty-free shops located at International Airports.

● ● ●

# **CBDT sounds alarm bells for salaried employees raising fraudulent claims**

In the budget speech, the Finance Minister has appreciated the contribution of salaried taxpayers towards annual tax revenues by way of taxes. As per the statistics presented by Mr. Jaitley, in the Assessment Year 2016-17, the salaried individuals had paid average tax of ₹ 76,306, in contrast to average tax of ₹ 25,753 paid by the individual businessmen including professionals. The salaried taxpayers are always considered as honest taxpayers. However, the recent advisory issued by the CBDT to salaried taxpayers is in contradiction with this impression.

The CBDT has issued the advisory to the employees to warn them against using any fraudulent practices of inflating the income-tax refunds by filing wrong claims in the Income-tax returns. The advisory issued by the CBDT is a clear message that the Dept. is aware of all fraudulent practices adopted by them. The Dept. has advised the salaried taxpayers not to fall prey to false promises or wrong advice of tax professionals, otherwise it would be treated as a case of tax evasion.

How the amount of tax-refund is inflated?

Income under the head salary is subject to TDS under section 192. Tax to be deducted per month from the salary of the employees is calculated by dividing the amount of total tax by the total number of months of employment with current employer. An employee is given an option to declare all other income and deductions to the employer, who shall calculate the annual tax liability and tax to be deducted per month from the salary of the individual.

The CBDT has observed that salaried employees are claiming refund of tax deducted from salary income by reducing their income-tax liability. The income-tax refund is wrongly generated due to under-reporting the income by inflating the tax deductions or by wrongly claiming the tax-free allowances. Tax consultants are misguiding the employees to lodge the false claims in income-tax return or if returns are already filed, they are advising them to revise the returns with false claims so as to get the refund of tax deducted by the employer.

The CBDT has claimed that all the ITRs are processed by the Centralized Processing Center (CPC), Bangalore without any interaction with or enquiry from the taxpayers. The processing of ITR by CPC-Bangalore is done by an automatic programme to ensure hassle-free services and timely issuance of refunds. CPC just validates ITRs and points out apparent mistakes in the ITRs, *i.e.*, calculation mistakes, income found in Form No. 26AS but not reported in ITR, etc.

CPC-Bangalore doesn't have any mechanism to detect any under-reporting of income or inflated claims made. Thus, if ITR is complete in all respect, even though with fraudulent claims, the CPC will issue the tax refunds.

In contrast the CBDT has an extensive risk analysis system aimed at identifying the persons who are non-compliant or tax evaders. In case any fraudulent claim is noticed, Income-

tax dept. may initiate penal and prosecution provisions of the Income-tax Act, 1961 against taxpayer. The Dept. may also prosecute the tax professionals who are advising taxpayers on various fraudulent activities.

Section 270A of the Income-tax Act deals with penalty provisions in case of under-reporting of income that will attracts penalty of 50% of the tax payable on under-reported income. However, if under-reported income is in consequence of any misreporting by the taxpayer, the penalty shall be equal to 200% of the amount of tax payable on under-reported income.

Beside this taxpayer are also be liable to be prosecuted under section 276C for a period of 6 months to 7 years in case tax sought to be evaded exceeds ₹ 1 lakh and 3 months to 3 years in all other cases.

...

TAXMANN®

# e-Newsletters

GST Daily | Taxmann Daily | Daily Tax Digest

**GST Daily**

- ◆ A Daily GST email Service to provide analysis of all important happenings of the Day.

**Daily Tax Digest**

- ◆ A Daily Bulletin for all Case Laws and Statutory Updates reported at [www.taxmann.com](http://www.taxmann.com)
- ◆ In just 5 minutes, one can read all the updates on:
  - Income-tax
  - GST
  - International Taxation
  - Companies Act
  - SEBI Laws
  - Banking Laws
  - Accounts & Audit
  - Indirect Taxes
- ◆ A section-wise digest is provided to help one in keeping himself abreast with all such updates.
- ◆ Around 300 bulletins are issued in a year.

**Taxmann's Daily**

- ◆ A Daily email service to provide the analysis of most important story of the day
- ◆ Around 300 bulletins are issued in a year.

# Canteen facilities extended to employees to be deemed as taxable services under GST - AAR

## Introduction

1. Authority for Advance Ruling, Kerala has recently clarified that recovery of food expenses from the employees for the canteen services provided by company would come under the definition of outward supply defined in section 2(83) of the Act, 2017 and, therefore, would be taxable as a supply of service under GST. The interpretations done by the advance ruling authority have caused apprehensions regarding the taxability of other reimbursements, as such reimbursements may face the GST heat. The ruling, though solely based on the interpretation of the expressions 'business', 'composite supply' & 'consideration', nevertheless, the views taken in this advance ruling are worth discussions.

## Brief facts of the case

2. M/s. Caltech Polymers Pvt. Ltd., Malappuram (hereinafter referred to as the 'Applicant') was engaged in the manufacture and sale of footwear. The applicant provided canteen facility to its employees wherein actual expenses incurred in running a canteen were recovered from employees as a deduction from their monthly salary in proportion to the foods consumed by them. The Contention put forth by the applicant was that it was only facilitating the supply of food to the employees which was a statutory requirement and was recovering only the actual expenditure incurred in connection with the food supply without making any profit, thus, such activity would not fall within the scope of supply as the same was not in the course or furtherance of its business.

## The Ruling

3. The question before the Advance Ruling authority (AAR) was whether reimbursement of food expenses from employees for the canteen services provided by company would come under the definition of outward supplies as taxable under GST Act?



**N.K. GUPTA**  
Sr. Executive Director,  
S.S. Kothari Mehta & Co.

**DIMPLE BHASIN**  
CA

AAR was of the view that the activity of providing a canteen facility wherein the company is recovering the canteen running expenses from its employees without any profit margin is well covered within the expression 'business' defined in section 2(17) of the GST Act, thereby treating it as a transaction incidental or ancillary to the main business.

The authority also observed that the activity of providing a canteen facility is a composite supply in view of clause 6 of schedule II to the CGST Act which lays down the activities to be treated as supply of goods or supply of services. Further, the authority is of the view that since the applicant recovers the cost of food from its employees, there is a consideration as defined in section 2(31) of the CGST Act, 2017. Hence, the recovery of food expenses from employees is a taxable service, thereby attracting goods and service tax.

### Some unanswered questions

4. In order to impose GST it is necessary that such transaction should fall within the scope of supply defined in section 7 of the CGST Act. The relevant extract of section 7 is reproduced below:

7. (1) For the purposes of this Act, the expression "supply" includes—

- (a) .....
- (b) .....
- (c) .....
- (d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

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

- (a) activities or transactions specified in Schedule III; or
- (b) .....

**shall be treated neither as a supply of goods nor a supply of services.**

Entry 1 of Schedule III to the CGST Act, 2017 reads as follows:

**ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES**

*"1. Services by an employee to the employer in the course of or in relation to his employment."*

The Advance Ruling Authority did not view the transaction from the angle of provisioning of services by employees in the course of or in relation to his employment. Needless to say the canteen facility is provided to employees in the course of performing their official duties for which subsidized price is charged. Now in order to trigger the applicability of Entry 1 of Schedule III, it is necessary that such services are linked with the terms of employment as envisaged in the employment contract or form part of the general policy of the company. Now if deductions of food expenses incurred by employer are made from the employee's salary it is clear that it forms part of the employment contract.

Advance ruling authority treated such transaction as a composite supply mentioned in clause 6 of schedule II to the CGST Act, 2017 which reads as follows:

The following composite supplies shall be treated as a supplies of services, namely:—

- (a) .....
- (b) **supply**, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

Now the clause 6(b) at the outset clearly says "supply, by way....", thus, it can be said that in order to bring any transaction under such clause, there has to be a supply. With the conjoint reading of Entry 1 of schedule

III and clause 6 of Schedule II, it can be succinctly derived that any supplies made which are not in the course or in relation to employment can fairly be covered under clause 6 of schedule II.

The view taken in the ruling pronounced by the authority, that since the employer recovers cost of food expenses from employees, there is a consideration as defined in section 2(31) of the CGST Act, 2017. On the similar analogy, does that mean there is no supply if the employer does not recover any cost of food expenses from employees? Going by the view taken in the ruling, if the element of consideration is taken as one of the sole basis to tax such transaction then it is pertinent to mention here that there will be a supply even if no cost is recovered from employees owing to Entry 2 of Schedule 1 and will give opportunity to government authorities to tax the transaction other way round. The relevant extract is reproduced below:

**ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION**

*"2. Supply 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."*

Further, as per the *Explanation* to section 15, *For the purposes of this Act*,--

(a) *persons shall be deemed to be "related persons" if—*

(i) .....;

(ii) .....;

(iii) *such persons are employer and employee;*

If the aspect of schedule III is not to be considered relevant by the tax authorities, then recourse to presence of consideration cannot be taken when such transaction is declared as supply, irrespective of the fact that consideration is received or not. Further, before ascertaining the element of consideration it is necessary that such transaction falls

within the domain of supply. It is pertinent to mention here that sub-section 2 of section 7 overrides the sub-section 1 of section 7 of the CGST Act, 2017 which specifies the activities which shall neither be treated as supply of goods nor supply of services. Further, the advance ruling authority has treated such transaction as a supply under section 7(1)(a) on the pretext that it is a composite supply mentioned in the clause 6 of Schedule II to the CGST Act, 2017. If a transaction is covered within the ambit of Schedule III to the CGST Act, 2017 then it is straightway out of the domain of supply, irrespective of the fact that it is declared service or whether consideration is received or not.

Services provided by employees to employer in the course of or in relation to employment are out the GST ambit. On the other hand supply of food as envisaged in clause 6 of schedule II to the CGST Act, 2017 which is a declared supply of service attracting Goods and Services tax. There is a contradiction in the GST law itself. Had the intention of the law maker been to tax the employer and employee transactions, services provided by employees to employer would not have been kept out of the tax net.

Where the Advance ruling authority has brought the recovery of food expenses by employer under the GST ambit, several ambiguities have arisen regarding the admissibility of input tax credit to the employer on the procurement of such food items. It is a well-settled position that input tax credit is not admissible on foods and beverages owing to restriction capped by section 17(5) of the CGST Act, 2017 which reads as follows:

*(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—*

(a) .....;

(b) *the following supply of goods or services or both—*

(i) *food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;*

On careful reading of the sub-clause (i) above, it can be concluded that input tax credit shall be available where food and beverages procured are used by a registered person for making outward supply of food and beverages or as an element of a taxable composite supply.

### Concluding Remarks

5. This advance authority ruling has revived the disputes over the taxability of employer-

employee transactions. Most of the transactions between employer and employee can be brought under the ambit of GST on the similar view taken in the ruling. This may lead to greater challenges for the employers, so far as the valuation of such supplies is concerned, since employer and employee are related persons. Now ambiguities are revolving around the rate of tax to be charged on such supplies. In order to minimize the litigation and avoid disputes over such transactions, it would be in the interest of the industry to seek exemptions on such supplies akin to erstwhile taxation regime. In light of the view taken by the advance ruling authority and in order to avoid compliance burden, it would be in the interest of the corporates not to recover such food cost from their employees and restructure their employment contracts accordingly.

...

SUBSCRIBE NOW

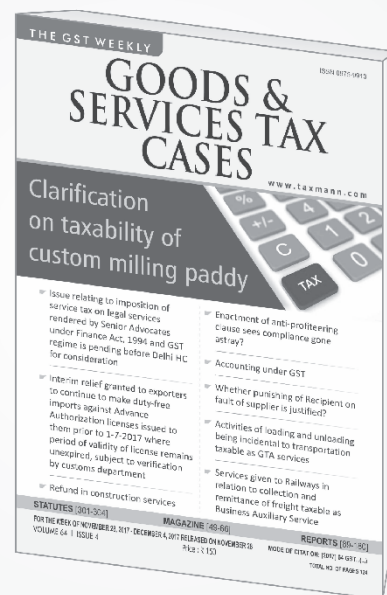
TAXMANN®'S

# GOODS & SERVICES TAX CASES

An Indirect Tax Law Weekly Covering  
Service Tax | Central Sales Tax & VAT  
Central Excise & Customs

with 3 Daily e-Mail Services

Price : ₹ 6975



# 57 years old Income-tax law due to be revamped soon

*The hardest thing in the world to understand is the income tax. -  
Albert Einstein, Theoretical Physicist*

*If the Lord loveth a cheerful giver, how he must hate the taxpayer!-  
John Andrew Holme, Poet & Critic*

## Introduction

1. One more attempt...!! Our 57 years old Income-tax Act, 1961 is all set for an overhaul. During November 2017, the Central Government has set-up an eight-member task force of experts to draft a modern tax law. The taskforce shall submit its report in six months' time. India's Income Tax law has 150 years old history and records go back to 1860s. The first Income-tax Act was introduced in the year 1860 to overcome financial stress due to 1857's mutiny but that law was in force just for a period of five years. In 1867, the said Act was revived as 'License Tax' to levy tax on the trade and professions. Again, in 1868 the Legislature replaced the 1867 Act with 'Certificate Tax'. Under both the statutes agricultural income was excluded. In 1877, Licence Tax with 'Cess on land' was introduced. During same period, local Acts were introduced in the erstwhile Presidencies such as Madras, Bombay & Bengal. Before the Current Act, 1961, three more Acts including one thoroughly amended Act had been introduced, namely, "*The Indian Income-tax Act, 1918, The Indian Income-tax Act, 1922 and The Indian Income-tax (Amendment) Act 1939*". Following paragraphs will throw some light on previous attempts on much-debated overhaul of existing Act, 1961, latest initiative and issues connected therewith.

## Previous attempts

2. The Income-tax Act, 1961 received the assent of the President on 13-9-1961 and became a law with effect from 1-4-1962. The current Act replaced the 'Indian Income-tax Act, 1922' which was in force for almost 40 years. The said Act also applied to all incomes such as



**PRABHAKAR K S**  
Proprietor,  
Shree Tax Chambers

'accruing or arising or received in erstwhile British India. One of the salient features of the previous Act was adopting a new way of fixing tax rates vide Finance Acts, annually, which is even continuing in the current regime. During 1961 to 1994, substantial changes were made to the 1961 Act to meet the changing scenario. Almost all Finance Acts brought one or the other changes to the Act and to the Income Tax Rules 1962. In 1991, the Government set-up one more "Tax Reforms Committee" under the Chairmanship of Raja J. Chelliah to examine the then tax structure and suggest changes therein. The Committee made several recommendations such as lowering the tax rates, avoiding double taxation, differentiate corporate tax between domestic and foreign companies, rationalization of capital gains taxation, the introduction of Value Added Tax or VAT, etc. Major recommendations were accepted. In 1997, another 'expert group' was appointed to submit a report on simplification of Income Tax Law. The committee submitted its report, however, the Bill never became law due to the dissolution of the Parliament. Thereafter, acceptance of recommendations made by "Kelkar Committee Report, 2003" impacted the current tax regime to certain extent.

While presenting the Union Budget for 2007-08, the then Finance Minister said that a comprehensive review was under consideration. The Central Government introduced a new 'Direct Taxes Code' in the Parliament during the same year. Again, after two years later, i.e., in August 2009, the Central Government released draft Direct Tax Code along with a discussion paper for public comments. On 27-8-2010, the Direct Tax Code 2010 was introduced in the Lok Sabha. However, the Code was referred to a Parliamentary Standing Committee'. The committee submitted its report with certain recommendations during March 2012. It was decided to implement the Code with effect from 01.04.2011 and thereafter was postponed to 01.04.2012, however, both deadlines were missed. The previous

Government again put a revised Direct Tax Code in the public domain for stakeholders' comments. Thus, Direct Tax Code stretched over the years 2007 to 2014. The final draft was cleared all ministries but it lapsed due to the dissolution of the 15<sup>th</sup> Lok Sabha in 2014. The new government, instead of reconsidering the Code, adopted few provisions such as General anti-avoidance rule (GAAR), Transfer pricing guidelines among others. The Government is now revisiting the Code.

### Latest attempt

3. During the 'Rajaswa Gyan Sangam', an annual conference of senior officials of the Central Board of Direct Taxes (CBDT) and the Central Board of Excise & Customs (CBEC) or the Central Board of Indirect Taxes and Customs (CBIC), was held on 01.09.2017. The Hon'ble Prime Minister opined necessity of redrafting of Income Tax law. Accordingly, to review and draft a new Direct Tax Law in consonance with the economic needs of the country, the Central Government constituted the task force. The Terms of Reference of the Task Force were as under -

- ◆ Study of the direct tax system in various countries,
- ◆ Prevailing international best practices.
- ◆ Economic needs of the country; and
- ◆ Any other matter connected thereto.

In that direction, the Task Force, on 21.03.2018, sought feedback and suggestions from stakeholders and the general public in the form of a questionnaire. *Suggestion and feedbacks sought on –*

- ◆ Filing of income-tax returns
- ◆ Grant of tax credits
- ◆ Processing/scrutiny of returns
- ◆ Litigation and recovery of disputed tax demand
- ◆ Penalties and prosecution

According to latest media reports, the task force will submit its initial draft report at any time.

## Issues - Requiring urgent attention

4. Making of any Taxing Statute is a Parliamentary Proceeding and has nothing to do with the budding tax law professional's likings or disliking. However, as a responsible and law-abiding citizens, it is our duty to draw the attention of the lawmakers on certain key issues and list them as Specific and General Issues.

### 4.1 Specific Issues :

**4.1-1 Domestic Taxation** - The Taskforce may consider the following issues while framing its draft on Tax Law.

#### 4.1-1-1 Tax Holidays, Deductions and Exemptions

- The Act provides for tax incentives, holidays, deductions and exemptions to promote exports, create infrastructure, rural development, scientific research and development, encourage savings by individuals and donations for charity. Accelerated depreciation is also provided as an incentive for capital investment. The said tax incentives can be availed by both corporates as well as by non-corporate assesseees.

Revenue Forgone - *On account of*

- ◆ Revenue forgone due to major tax Incentives for corporate taxpayers during financial years 2016-17 and 2017-18 (projected) stands at Rs. 86,144.82 Cr. and Rs. 85,026.11 Cr. respectively.
- ◆ Revenue forgone due to tax Incentives for non-corporate, i.e., Firms/AOPs/BOIs taxpayers during the same period stands at Rs. 4,847.28 Cr. and Rs. 5,995.22 Cr. respectively.
- ◆ Revenue forgone due to tax Incentives for individual/HUF taxpayers during the same period stands at Rs. 64,847.93 Cr. and Rs. 76,581.41 Cr. respectively.

Since huge revenue is forgone, the Taskforce must revisit all or a few provisions and

their relevancy in present-day context such as Section 10AA, Section 32, Section 35 (1), (2AA) & (2AB), section 35AC, section 35AD, section 80G, Section 80GGB, section 80-IA, section 80-IB, Section 80JJA, section 80LA, Section 80-ID, Section 80P, Section 80U, Section 87A and Deduction on account of MAT. As a positive note, from financial year 2015-16, the government has been reducing exemptions for corporates along with reduction in corporate tax rate.

**4.1-1-2 REVISIT EQUALISATION LEVY** - It is a right time to revisit the said levy and to take some corrective measures in the interest of Revenue. The Central Government, during 01.06.2016 to 31.03.2017, has earned a meager amount of Rs. 300 Crores (Approx.) as equalization levy. Key issues may be summed up as -

*Suitable amendments to the Chapter VIII of Finance Act, 2016* - Definition of 'Online and specified services' is inclusive in nature but same as defined in a narrow sense which requires to be defined more precisely, so same will avoid future litigations.

*Review of equalization levy rate* - Since the low yield (as on 31<sup>st</sup> March, 2017) and the Committee's recommendation to consider the levy up to 8 per cent, the Government may increase the rate up to 8 per cent or even up to 10 per cent in the interest of revenue.

*Enable provision to claim Foreign Tax Credit (FTC)*: A suitable provision to address issues relating to double taxation requires to be provided, which enables Foreign Service provider or non-resident service providers to avail of 'FTC' 'in his/their home country.' The levy has been imposed on non-resident companies without a permanent establishment (PE) for income exceeding Rs. 1 Lakh a year, but same may be revised. Services utilized for carrying the business or profession outside India may be exempted from the purview of the levy.

**4.1-1-3 AMENDMENTS/RETROSPECTIVE AMENDMENTS** - The Act, religiously, changes every year with additions and deletions brought through Finance Acts and Taxation Law (Amendment) Acts. As on 31.03.2017, the 1961 Act has been amended one hundred and eighteen (118) times. In addition to Amendments, the Act also tried to accommodate court ruling, notifications, circulars which turned the Act into one of the most complex statutes on the Earth and difficult to interpret and understand. Recently, the Central Government has adopted even more fictitious practice of bringing 'Retrospective Amendments' to the Act. The Government has brought about a number of retrospective amendments w.e.f 01.04.1961. This makes interpreting the tax law even more difficult and affects the foreign investors' confidence and much needed foreign direct investments.

#### **4.1-1-4 INTERNATIONAL TAXATION :**

##### **4.1-1-4-1 REVAMP OF AAR MECHANISM -**

The Authority for Advance Ruling has been constituted from 01.06.1993 to determine such question of law or to obtain an advance ruling with respect to tax liability arising from a transaction proposed to be undertaken by or with a non-resident. During 2014, the facility of obtaining an advance ruling was extended to specified domestic transactions made by residents. In spite of its initial success, Advance Rulings became a dead letter. The reason was lack of public confidence in the selection procedure for constituting Authority. Rulings are no longer a preferred method to have certainty in relation to cross-border transactions. The Central Government *vide* Finance Act (No.2) of 2014 has inserted a provision for increasing the number of benches. However, no such benches have been constituted so far. The Taskforce should study the prevailing international standards/practices and suggest a suitable model to revamp the whole AAR Mechanism.

**4.1-1-4-2 SPEED-UP OF ADVANCE PRICING AGREEMENTS** - Advance Pricing Agreement Programme (APAs) is a watershed programme,

successfully completing its six years term this July. In 2016-17 and 2017-18 fiscal, India has entered 88 APAs and 67 APAs, respectively, with taxpayers, which shows that APA Programme is emerging as an alternative dispute resolution mechanism as far as Transfer Pricing related issues are concerned.

#### **Agreements Signed: Year-wise :**

S. No.	Financial Year	Unilateral APAs	Bilateral APAs	Total
1.	2013-14	05	00	05
2.	2014-15	03	01	04
3.	2015-16	53	02	55
4.	2016-17	80	08	88
5.	2017-18	58	09	67
<b>Total</b>		<b>199</b>	<b>20</b>	<b>219</b>

According to CBDT, last financial year started with a pendency of 644 APAs. During the year, only 67 APAs were signed. With no input on fresh applications received during the year, one can conclude that pending applications lay with Indian authorities were 577. It is reported that India has taken 29 months on an average to conclude unilateral APAs. Similarly, 39 months to conclude Bilateral APAs. Presently, two Advance Pricing Official teams have been duly constituted. The three Advance Pricing Agreement Offices are located in Delhi, Mumbai and Bengaluru. To clear all backlogs, fresh applications and speed-up its process, the Central Government shall constitute more APA Offices with sophisticated teams and infrastructure at various cities such as Chennai, Hyderabad, and Calcutta. Nevertheless, the role of APAs cannot be overlooked.

**4.1-1-4-3 REVISIT OF DTAA TREATIES** - India must wake up to the reality of the abuse of the Double Taxation Avoidance Agreement (DTAA) provisions. Treaty shopping, a way of tax avoidance, has become the order of the day. The Act has provided that in case of conflict of provisions, the treaty will prevail over the Act. Having treaties with the rest

of the world is highly impossible. There are signs of formidable changes occurring in recent times such as revised DTAA with Mauritius, Singapore, Cyprus and other tax heavens. However, a complete revamp of the Double Taxation Avoidance mechanism is need of the hour. The Taskforce, after consultation with OECD countries, can suggest suitable measures.

**4.1-1-4-4 OVERHAUL OF GAAR** - There is no lack of bright Tax officers in the Country. GAAR must equip with brilliant honest officers to curb tax avoidance. Onus also lies on the CBDT to bring rules and best practices effectively. The CBDT can use latest OECD Guidelines with minimal modifications according to country's requirement. GAAR provisions should be drafted in such way where GAAR provisions should not overrule the treaty arrangements.

**4.2 General Issues** - The Taskforce may consider the following issues while framing its initial draft on Income Tax Law.

**4.2-1 Stakeholders Consultation** - In India the Central Government, States and the bureaucracy consult on all taxing reforms with minimal or no stakeholders' participation. It is expected that as far as concerned overhauling of Income Tax law, the government should involve large taxpayers, industry experts and tax professionals/advocates through a detailed consultative process. Unlike Goods and Services Tax, the Government should place a realistic roadmap on proposed Income Tax Act overhaul as every developed country and their modernized tax administration does before introducing such major tax reforms.

**4.2-2 Tax Administration** - The revival of Large Taxpayers Units (LTUs) and Centralised Processing Centre (CPC) are need of the hour. LTUs provide a single window to large taxpayers to pay all central taxes. LTUs were introduced in 2006 which is in dormant status now. The Government must redevelop them as in developed countries. In the light of recent tax refund scams, the CPC is also

required to be upgrade its technology backed administration to avoid such scams in future.

**4.2-3 Litigation** - According to Economic Survey - 2018, the country's biggest litigator is the Tax Department...!! If unambiguously losses 65 per cent of ....!! The Survey reports that the total number of direct tax cases pending at Income Tax Appellate Tribunals, High Courts at 83 per cent and the Supreme Court at 88 per cent. The Survey also reveals that the Departmental appeals constitute around 85 per cent of the total number of appeals filed. The petition rate at the Supreme Court is 87 per cent, while as the success rate is only 27 per cent. Similarly, at High Courts the petition rate is 83 per cent and the success rate is merely 13 per cent as far as Direct Taxes are concerned and indirect taxes speak different story but in a better position when compared, where the petition rate is 39 per cent and the success rate is 46 per cent. At present, tax arrears arising out of individual assesseees are estimated at Rs. 2.77 Lakhs crore. The Survey also suggests that several steps to overcome the litigation burden such as expanding judicial capacity in lower courts, reducing the existing burden on the High Courts and the Supreme Court, tax department can self-restrain by limiting appeals, modernization and digitization of Tribunals, imposing stricter timelines to dispose of pending or stayed appeals, etc.

**4.2-4 Simple language** - Mark Twain, an American writer, in one of his letters to a twelve-year-old boy, 'I notice you use plain, simple language, short words and brief sentences. That is the way to write English - it is the modern way and the best way, stick to it, don't let it fluff and flowers and verbosity creep in'. Law Reform Commission of Victoria rightly said "The language of the law has been a source of concern to the community". It is sad that the legal language has always remained the language of the few. Unfortunately, in India also there is no change in drafting statutes, especially taxing statutes which are still plagued by

jargons, legalize and archaic words/phrases. The Central Government shall give a try to draft the proposed law on simple language which will save cost and valuable time of the Hon'ble Supreme Court and the High Courts who spend most of their time to unearth the Legislators' intention, interpreting the provisions, pronouncing judgments and more importantly, voluminous Commentaries by tax experts in the domain.

**4.2-5 No hurried Implementation, please...!!** The country is yet to regain its composure on hurried implementation of Goods and Services Tax or recent indirect tax reforms. Hope, the Government has learnt one or two lessons and gives sufficient time to Taskforce to draft the Law, stakeholders and largely, Tax professionals and general public to understand its implications.

precious words on taxing statutes, "the tax laws, like all other laws, to be respected, must be made respectable. Revenues rise with tax cuts, when income-tax is scaled up, income is scaled down. If there is widespread tax evasion, it may be more meaningful to search for the cause in the tax system than in the taxpayer". Three works on simplifying of Tax law, such as Report of Tax Administration Reforms Commission (TARC), Dr. Parthasarathi Shome Committee and Justice R V Easwar (Retd.) Committee will come in handy while formulating the new draft. However, examining the current Act's each Chapter, detailed consultation with stakeholders and adopting the new legislation, no doubt, a gigantic task which is unlikely to reach its final stage before May, 2019 General Elections.

...

## Concluding Remarks

5. It would be appropriate to recall Sri. Nani Palkhivala, the greatest jurist and economist's

SUBSCRIBE TODAY

# taxmann.com

## Indian Acts

More than 364 Acts with 866 Rules and Forms

Covering\*

55 Banking/Insurance and Financial Laws	7 Foreign Exchange Laws
94 Civil & RERA Laws	32 GST
12 Commercial & Mercantile Laws	6 Intellectual Property Laws
21 Company/Corporate & SEBI Laws	37 Labour Laws
12 Criminal Laws	23 Personal Laws
8 Environment Laws	55 Tax Laws

Annual Subscription : ₹ 5100

\* No. of Acts

# MCA simplifies signing requirement of share certificates

## Introduction

1. After a long period of almost two years of enforcing the Companies (Amendment) Act, 2015 and barrage of amendments brought in the Companies (Share Capital and Debentures Rules), 2014, in order to align with policy initiatives or as a corrective measure in response to practical difficulties faced by corporates, the Ministry of Corporate Affairs (MCA) has once again revisited the said rules. However, this time the changes brought in through the Companies (Share Capital and Debentures) Amendment Rules, 2018<sup>1</sup> ('Amended Rules') are to simplify the signing requirements of physical share certificates. Further, the said simplification which is mainly due to the omission of the requirement of mandatorily having a common seal, brought in by the Companies (Amendment) Act, 2015, has also resulted into amending Schedule I of the Companies Act, 2013 ('Act') *vide* MCA's Notification<sup>2</sup> dated April 11, 2018.

This article analyses the changes brought in through the amended Rules and the alteration in Schedule I of the Act.

## 2. Provisions of law

### 2.1 Requirements as per Rule 5 (2) of the Companies (Share Capital and Debentures Rules), 2014 :

"(3) Every share certificate shall be issued under the seal, if any, of the company, which shall be affixed in the presence of, and signed by-

- (a) two directors duly authorized by the Board of Directors of the company for the purpose or the committee of the Board, if so authorized by the Board; and
- (b) the secretary or any person authorised by the Board for the purpose:



NIKITA SNEHIL  
Manager,  
Vinod Kothari & Company

**Provided** that in case a company does not have a common seal, the share certificate shall be signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary:

**Provided further** that, if the composition of the Board permits of it, at least one of the aforesaid two directors shall be a person other than a managing director or a whole time director:

**Provided also** that, in case of a One Person Company, every share certificate shall be issued under the seal, if any, of the company, which shall be affixed in the presence of and signed by one director or a person authorised by the Board of Directors of the company for the purpose and the Company Secretary, or any other person authorised by the Board for the purpose, and in case the One Person Company does not have a common seal, the share certificate shall be signed by the persons in the presence of whom the seal is required to be affixed in this proviso.

*Explanation.*—For the purposes of this sub-rule, a director shall be deemed to have signed the share certificate if his signature is printed thereon as a facsimile signature by means of any machine, equipment or other mechanical means such as engraving in metal or lithography, or digitally signed, but not by means of a rubber stamp, provided that the director shall be personally responsible for permitting the affixation of his signature thus and the safe custody of any machine, equipment or other material used for the purpose.”

## 2.2 Requirements as per the Amended Rules :

“(3) Every certificate shall specify the shares to which it relates and the amount paid-up thereon and shall be signed by two directors or by a director and the

Company Secretary, wherever the company has appointed Company Secretary:

**Provided** that in case the company has a common seal it shall be affixed in the presence of persons required to sign the certificate.

*Explanations.*—For the purposes of this sub-rule, it is hereby clarified that,-

- (a) in case of an One Person Company, it shall be sufficient if the certificate is signed by a director and the Company Secretary or any other person authorised by the Board for the purpose.
- (b) a director shall be deemed to have signed the share certificate if his signature is printed thereon as facsimile signature by means of any machine, equipment or other mechanical means such as engraving in metal or lithography or digitally signed, but not by means of rubber stamp, provided that the director shall be personally responsible for permitting the affixation of his signature thus and the safe custody of any machine, equipment or other material used for the purpose.”

## Changes brought in through the Amended Rules

3. Pursuant to the enforcement of the Companies (Amendment) Act, 2015, the use of common seal has been made optional and, consequently, several provisions of the Companies Act, 2013 and the Rules dealing with common seal have been amended to incorporate the above requirement. However, even after aligning the changes with the requirements of the Companies (Amendment) Act, 2015, the provisions dealing with the requirement of signing the physical share certificates were not clear. In this regard, the Amended Rules provide the following simple requirements:

- (a) The physical share certificates shall be signed by two directors or by a director and the Company Secretary, wherever the company has appointed Company Secretary;
- (b) In case the company has a common seal, it shall be affixed in the presence of persons required to sign the certificate as mentioned in point a) above.
- (c) In case of an OPC, the certificate shall be signed by a director and the Company Secretary or any other person authorised by the Board for the purpose.

The following requirements have been done away with:

- (a) The separate authorisation and signing requirements in case of companies having common seal have been done away with.
- (b) Where a company does not have a common seal, the requirement of at least one of the two directors, signing the certificate, is no more required from a person other than a managing director or a whole time director.

### 3.1 Changes brought in Schedule I of the Act :

- (a) Alteration in Table F (AoA of a company limited by shares):

In Para 2 (ii) of Table F, the requirement of issuing share certificate under the common seal has been substituted by the following:

“Every certificate shall specify the shares to which it relates to and the amount paid-up thereon and shall be signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary: Provided that in case the company has a common seal it shall be affixed in the presence of the persons required to sign the certificate.

*Explanations.* – For the purposes of this item, it is hereby clarified that in case of an One Person Company, it shall be sufficient if the certificate is signed by a director and the Company Secretary, wherever the company has appointed a Company Secretary, or any other person authorised by the Board for the purpose.”

The said alteration is in order to align the signing requirements as provide in the Amended Rules.

Further, para 2 (79), after item (ii), the following *explanation* has been inserted:

“*Explanations.* – For the purposes of this sub-paragraph it is hereby clarified that on and from the commencement of the Companies (Amendment) Act, 2015 (21 of 2015), *i.e.* with effect from the 29th May, 2015, company may not be required to have the seal by virtue of registration under the Act and if a company does not have the seal, the provisions of this sub-paragraph shall not be applicable.”

The same has been inserted to align the provisions of Table F with the requirements of Companies (Amendment) Act, 2015.

- (b) Alteration in Table H (AoA of a company limited by guarantee and not having share capital):

In Para 30, after item (ii) but before the ‘Note’, the following *explanation* has been inserted:

“*Explanations.* – For the purposes of this sub-paragraph it is hereby clarified that on and from the commencement of the Companies (Amendment) Act, 2015 (21 of 2015), *i.e.* with effect from the 29th May, 2015, company may not be required to have the seal by virtue of registration under the Act and if

a company does not have the seal, the provisions of this sub-paragraph shall not be applicable.”

This change is similar to the second change inserted in Table F and the same has been inserted to align the provisions of this Table with the requirements of the Companies (Amendment) Act, 2015.

## Conclusion

4. Both, the Amended Rules and the alteration in Schedule I of the Act, are mainly clarificatory in nature and are the result of the changes brought in the requirement of having a common seal in the company *vide* Companies (Amendment) Act, 2015 almost two years before.

...

1. [http://www.mca.gov.in/Ministry/pdf/SharecapitalRule2018\\_11042018.pdf](http://www.mca.gov.in/Ministry/pdf/SharecapitalRule2018_11042018.pdf).
2. [http://www.mca.gov.in/Ministry/pdf/NotificationSchedule2018\\_11042018.pdf](http://www.mca.gov.in/Ministry/pdf/NotificationSchedule2018_11042018.pdf).

# TAXMANN<sup>®</sup> APP

Always  
Stay  
Updated



[DOWNLOAD NOW](#)




# Commission paid by Prasar Bharati to advertising agencies now liable to TDS u/s 194H

## Introduction

MEENAKSHI SUBRAMANIAM  
Former IRS officer

1. A tiger once hit upon an idea. He called two ministers, the jackal and the fox, for a meeting. The tiger said: "I will offer commission to whichever of you locates my prey every day."

The foolish jackal was ecstatic: "O tiger, what a splendid idea!"

The clever fox said: "O tiger, if animals come to know that you are offering commission to devour them for breakfast, you would pay a heavy tax. In fact, you may lose the next election."

The tiger scratched its head and abandoned the project.

Commission paid by organizations to advertising agencies for securing business has consistently attracted deduction of tax at source. The most shocking thing is that Prasar Bharati which also offers commission to advertising agencies has merrily increased business and gone scot-free many times. But not so any longer. The Supreme Court has ruled that sum paid by Prasar Bharati to advertising agencies is commission, liable to TDS under Section 194H. Since it failed to deduct the payment, the provisions of Section 201 were rightly invoked.

The Prasar Bharati's case illustrates that a blinkered view can't be taken by a viewership channel.

## Director, Prasar Bharati v. CIT, Thiruvananthapuram [2018] 92 taxmann.com 11 (SC)

2. The appellant, known as "Prasar Bharati Doordarshan Kendra," functioning under the Ministry of Information and Broadcasting, during the course of business activities, which included the running of the TV channel, "Doordarshan", had been regularly telecasting advertisements of several consumer companies.

The dispute in this case related to the appellant's Regional Branch at Thiruvananthapuram.

With a view to have a better regulation of the practice of advertising and to secure the best advertising services for the advertisers, the appellant entered into an agreement with several advertising agencies

In terms of the agreement, the advertising agency was required to make an application to the appellant to get “accredited status” to do business with the appellant of telecasting the advertisements of several consumer products on Doordarshan TV Channel.

The agreement, *inter alia*, provided that the appellant would pay 15% by way of commission to the Agency. The Agency was to retain the commission/remuneration earned. The agreement also provided the manner, mode and the time regarding payment by the agency to appellant. The Agency was to give minimum annual business of ₹ 6 Lakhs and furnish a bank guarantee for a sum of ₹ 3 Lakhs.

In the assessment years 2002-2003 and 2003-2004, the appellant paid a sum of ₹ 2,56,75,165/- and ₹ 2,29,65,922/- to the various accredited Agencies. The amount was paid towards commission in terms of the agreement.

The AO held Section 194H was applicable to the payments because the amounts were made in the nature of “commission” as defined in the *Explanation* appended to Section 194H of the Act.

The AO also held that the appellant had committed default thereby attracting the rigour of Section 201(1) because it failed to deduct the “tax at source” from the amount paid to various advertising agencies as provided under Section 194A of the Act.

The appellant felt aggrieved and filed appeals before the Commissioner of Income Tax (Appeals), but he concurred with the reasoning and conclusion arrived at by the AO and, accordingly, dismissed the appeals.

Aggrieved, the appellant filed appeals before the Tribunal, which set aside the orders passed by the AO and the CIT (Appeals).

The High Court, while setting aside the Tribunal’s order restored the order of the CIT (Appeals) and the AO. It opined that Section 194H was applicable because the payments made were in the nature of “commission” paid to the Agencies as defined in the *Explanation* appended to Section 194H and since the appellant had failed to deduct the “tax at source” while making these payments to the Agencies, it committed default of non-compliance of Section 194H resulting in attracting the provisions of Section 201 of the Act.

The appellant (assessee) felt aggrieved and filed appeals by way of special leave in the Supreme Court.

**2.1 Judgment** - The Supreme Court held that keeping in mind the requirements of Section 194H when examining the transaction in question, it was of the considered view that the reasoning and the conclusion arrived at by the AO, the CIT (Appeals) and the High Court appeared to be just and proper and did not call for any interference.

In other words, the High Court was right in holding that the provisions of Section 194H were applicable to the appellant because the payments made were in the nature of payments made by way of “commission” and, therefore, the appellant was under statutory obligation to deduct the income-tax at the time of credit or/and payment to the payee.

The aforementioned conclusion of the High Court was clear from undisputed facts because the Apex Court noticed that the agreement itself had used the expression “commission” in all relevant clauses; Secondly, there was no ambiguity in any clause and no complaint was made to this effect by the appellant; Third, the terms of the agreement indicated that both the parties intended that the amount paid by the appellant to the agencies should be by way of “commission” and it was for this reason, the parties used the expression “commission” in the agreement; Fourth, keeping in view the tenure and the nature

of transaction, it was clear that the appellant was paying 15% to the agencies by way of “commission” but not under any other head; Fifth, the transaction in question did not show that the relationship between the appellant and the accredited agencies was that of principal-to-principal rather it was principal and Agent; Sixth, it was also clear that payment of 15% was being made by the appellant to the agencies after collecting money from them and it was for securing more advertisements for them and to earn more business from the advertisement agencies; Seventh, there was a clause in the agreement that the tax shall be deducted at source on payment of trade discount; and lastly, the definition of expression “commission” in the *Explanation* appended to Section 194H being an inclusive definition giving wide meaning to the expression “commission”, the transaction in question did fall under the definition of expression “commission” for the purpose of attracting rigour of Section 194H of the Act.

For all these reasons, the Supreme Court found no difficulty in holding that the payment in question was in the nature of “commission” paid by the appellant to the advertisement agencies to secure more business.

In Supreme Court’s view, the provisions of Section 201 were, therefore, rightly invoked in this case for non-compliance.

Learned counsel for the assessee placed reliance on the decision of the Allahabad High Court in *Jagran Prakashan Ltd. v. Dy. CIT (TDS)*, [2012] 21 taxmann.com 489/209 Taxman 92/345 ITR 288 in support of his submission.

The Apex Court on perusal of the said judgment found that the law laid down by the Allahabad High Court was not applicable to the facts of the case at hand. The Judges of the Allahabad High Court “dealt with the impugned judgment with which we are concerned in these appeals and distinguished it” in the following words:

“61. Now we come to the judgment of the Kerala High Court in the case of *CIT v. Director, Prasar Bharati* reported in [2010] 325 ITR 205 on which much reliance had been placed by the assessing authority.

There was explicit agreement between the agency and the Doordarshan where both understood that payment made to the agency was liable to tax deduction. It would be useful to quote the following observations of the judgment of The Kerala High Court:-

...it is very clear that parties have understood their relationship as Principal and Agent and what is paid to the agent by Doordarshan is 15% of advertisement charges collected and remitted to it by the agent which is in the form of commission payable to the Agent by Doordarshan. Counsel for the respondent referred to one of the agreements where the commission is referred to as standard discount and contended that the arrangement between respondent and advertising agency was not agency but was a Principal to Principal arrangement of sharing advertisement charges. We are unable to accept this contention because advertisement contract entered into between the customer and the agency is for telecasting advertisement in Doordarshan channels. The agent canvasses advertisement on behalf of Doordarshan under agreement between them...

...there was provision in the agreement that the agent after retaining 15% give cheque or demand draft for TDS amount which was originally 5% until it was enhanced to 10% by the Finance Act, 2007 with effect from 1-6-2007.

In the aforesaid case, the relationship of principal and agent was fully established since there was written agreement and specific clause that tax shall be deductible at source on payment of trade discount.

In the said circumstances, the Kerala High Court held that Section 194H of the Income-tax Act was applicable. In the *Jagran Prakashan* case, there was no agreement between the petitioner and the advertising agency...

The judgment of the Kerala High Court thus does not help the respondents in the present case."

In the light of the foregoing discussion, the Supreme Court said it concurred with the reasoning and the conclusion arrived at by the High Court and found no merit in the appeals. The appeals thus failed and were, accordingly, dismissed, the Apex Court concluded.

## A Fair Judgment

3. Once a man came to a king with a magnificent horse. He had been asked by the minister to find a wonderful stallion. The man, forgetting that he was standing before the king, asked for commission. The horse, already smarting under loss of freedom, gave a kick to the man. The king said: "That's your commission! The horse also doesn't like the word 'commission.'"

Prasar Bharati too had studiously maintained that the word "commission," does not relate to its dealings.

But the Supreme Court in *Thiruvananthapuram* case got the entire picture on viewership channel, Prasar Bharati. It found out that the dealings of Parasar Bharati with advertising agencies were commission transactions, coming under Section 194H squarely.

The Apex Court's verdict has done away with the special status of Prasar Bharati, which was paying commission, like other private organizations. It brought Prasar Bharati at par with private players.

The judgment has also demonstrated that the law is same for everyone. There can't be one law for John and another for Jack. Commercial practices can't be followed by

the governmental organizations, while at the same time claiming government immunities and privileges.

It is anticipated that other government organizations using advertisement agencies may also suffer same fate.

## Verdict Overturns Previous Case

4. The Supreme Court has overruled a previous case, which held that Doordarshan need not pay any TDS on commission given to advertising agencies:

*All India Radio Commercial Broadcasting Service/ Prasar Bharati Broadcasting Corporation of India v. ITO* [2006] 8 SOT 513 (Delhi)

The facts were that DD Commercial Services, a unit of Prasar Bharati, was paying commission at the rate of 15 per cent to advertising agencies but was not deducting tax at source. It said there was principal to principal basis relationship, as ad agency was buying time space from DD to advertise client's products. The AO refuted theory that agencies were directly deducting commission from amount payable to DD, while CIT called it indirect payment. The Delhi Tribunal held that Prasar Bharati had not paid commission and, hence, it was not subject to TDS.

## The Amusing Part of It All

5. The most interesting part is that CBDT itself penned a circular that a client need not pay TDS when it gives payment to advertising agency as commission for boosting revenue.

Circular No. 5/2016 dated 29-2-2016, CBDT dealt with TDS on payments by television channels and publishing houses to advertisement companies for procuring or canvassing for advertisements, wherein it clarified that no TDS is attracted on payments made by television channels/newspaper companies to the advertising agency for booking or procuring of or canvassing for advertisements.

That is, the income-tax department has itself gone against CBDT's circular and argued that TDS is payable on amount offered to advertising agency.

### Prasar Bharati's TDS Imbroglio

6. The Prasar Bharati is a fully owned Government of India undertaking engaged in telecasting of news, various sports, entertainments, cinemas and other programmes. The advertisements are canvassed through agents under the agreement with them.

The submission of the assessee was that the relationship between the appellant and accredited Agencies was not that of principal and agent but it was in the nature of principal-to-principal. In other words, the accredited agencies were not working as agents of the appellant.

What does the law say? Section 194H provides that any person other than individual or HUF, responsible for paying any income by way of "commission" to any person shall at the time of credit of such income to the account of payee or at the time of payment of such income in cash or by cheque or draft or any other mode will deduct income-tax thereon at the rate of five per cent (now 10 per cent).

The *Explanation* appended to Section 194H defines the expression "commission or brokerage". It is an inclusive definition and includes therein any payment received or receivable, directly or indirectly by a person acting on behalf of another person for services rendered.

### Arguments Against Prasar Bharati

7. Let us see as to what are the arguments which can be advanced against Prasar Bharati, which failed to pay TDS, at its own sweet will:

- ◆ The Finance Minister during consideration of the Finance Bill, 1995 declared on floor of the Parliament that TDS

applies when client makes payment to advertising agency.

- ◆ A pure agency contract, Prasar Bharati had all the responsibility to pay TDS
- ◆ Section 194H has a wide meaning. It covers both direct as well as indirect commission.
- ◆ *Explanation* (1) to Section 194H covers any payment received directly/indirectly by person acting on behalf of another.
- ◆ Principal and agent relationship is between advertiser and agency, not between client-assessee and advertising agency.
- ◆ Advertising agency can't act as an agent on behalf of both advertiser and client and that too in same agreement.

### 8. Arguments for Prasar Bharati

- ◆ It is a common trade practice and clients pay commission to advertising agency, without submitting TDS amount
- ◆ it manages cash flow
- ◆ It improves financial parameters for production activities

### 9. Cases Against Assessee

**9.1 CIT v. Director, Prasar Bharati Doordarshan Kendra [2010] 189 Taxman 315/325 ITR 205 -** The Kerala High Court held in this famous case that commission payable by Doordarshan to advertising agencies is fully liable to TDS provisions. The reasons were that the agent canvassed on behalf of Doordarshan under an agreement. The ad charges are in accordance with tariff rates of Doordarshan, it was held. The advertisement material also conformed to Doordarshan standards. The Kerala High Court came down heavily on income-tax officers, saying that the department must take notice of this 'untenable' position of officials, who engaged in tax evasion.

**9.2 CIT v. Idea Cellular Ltd. [2010] 189 Taxman 118/325 ITR 148 (Delhi)** - Here the agent sold SIM cards of assessee, under an agreement. The court held that a specific agreement showed legal relationship. TDS was applicable on commission paid by assessee.

**9.3 Hutchison Telecom East Ltd. v. CIT [2015] 59 taxmann.com 176/232 Taxman 665 (Cal.)** - The assessee-company offered discount on starter packs and recharge coupons to agents, which it said was not liable to TDS provisions. The court held it was not discount, but commission.

## 10. Cases for Assesseees

**10.1 TV Today Network v. Department of Income Tax [IT Appeal 3943 (Delhi) of 2006], dated 15-7-2011]** - The assessee was running two news channels, Aaj Tak and Headlines Today. It was held that the assessee was not exigible to tax deduction at source.

**10.2 ITO v. Mumbai Entertainment Network [IT Appeal 1352 (Mumbai) of 2014, dated 11-1-2017]** - It was held that no TDS is attracted on payments made by TV channels to advertising agency for booking/procuring/canvassing for ads.

**10.3 ABP (P.) Ltd. v. Asstt. CIT [2008] 23 SOT 28** - The Kolkata Tribunal held that advertisement agencies were not working under control of the assessee. Therefore, there was principal-to-principal basis relationship. The payment made by assessee to accredited advertising agencies was not commission, liable to TDS, the Tribunal declared.

**10.4 CIT v. Living Media India Ltd. (IT Appeal No. 1264 of 2007)** - The organization was publishing 'Dainik Jagran' and claimed it was giving trade discount to advertising agencies. It was held by court that the amount was not commission. Also, TDS was not applicable on payment by news agency to ad agency.

**10.5 DCIT (TDS) v. Music Broadcasting (P.) Ltd. [IT Appeal No. 3935 (Mumbai) of 2015, dated 18-4-2017]** - The assessee in broadcasting field operated a FM radio channel. The Tribunal held that advertisement agencies can't be considered as 'agents' of the assessee.

## Concluding Remarks

**11.** There is a saying "Everyone must drink water from same well." It means that all are same before the law. With an uppity stance, Prasara Bharati could not claim separate status.

Fred Allen, an American comedian once said: "An advertising agency is 85 per cent confusion and 15 per cent commission." In Indian context, it can be said that law of TDS on advertising is 100 per cent confusion! That's why funny situations like this occur:

A man was frantically pouring over dictionaries and thesauruses. He would grimace, roll his eyes and jump up and down, frenetically. A friend asked him: "What's the matter?" The man groaned; "I am looking for a substitute word for 'commission.'" The friend asked: "Why?" The man cried: "Whenever I say 'commission,' the client, muttering something about 'income-tax,' is chasing me down the street with sticks and bricks!". Is it not an amusing situation?

● ● ●

# Education Cess and Anti-profiteering: An impending tussle?

## Introduction

ARPITPUSHP CHATURVEDI  
Associate, Lakshmikumaran  
& Sridharan Attorneys

1. In the past one-year Indian businesses have seen a major shift in the economic conditions due to the advent of GST regime. Several businesses were prepared beforehand to deal with any situation during the transition period. However, there were a lot who were taken by surprise in the GST wave. As various industries deliberated upon and scratched their heads to take control of the situation, the Indian government approved of the constitution of a National Anti-profiteering Authority (NAA) which would act as the institutional mechanism, handling the responsibility of keeping away businesses from making unreasonable profits during the initial years of the GST regime.

## Dilemma over EC and SHEC under GST

2. Already burdened with compliance needs, the businesses have been carefully treading the path of price change under the GST regime since the introduction of GST laws. However, the constitution of the NAA has spurred the need for a hawk eye for examination of any price change in products to avoid penalty and unnecessary litigations. During such internal reviews and price negotiations with customers/vendors, many assesseees are facing a dilemma as to whether the Education Cess & Secondary and Higher Education Cess, which are exempted from payment on the IGST component, are to be included while calculating the commensurate reduction in prices under the GST regime.

Before dwelling further on this issue, let's refer to the levy of Education Cess & Secondary and Higher Education Cess under the erstwhile regime. The Central Government, in order to finance universalised quality of basic education had introduced a cess in the nature of Education cess *vide* section 91 of the Finance Act, 2004 and Secondary and Higher Education Cess over and above the existing education cess *vide* section 136 of the Finance Act, 2007. Corresponding to the

above sections, section 94 & section 137 were also introduced in the corresponding Finance Acts to levy such cesses on the import of goods inside India.

Interestingly, both the above cesses, *i.e.*, Education Cess & Secondary and Higher Education Cess (hereinafter collectively referred to as the "Education Cess") were levied as well as collected on imported goods as a duty of Customs under section 12 of the Customs Act, 1962. It is pertinent to note here that, subsequently, the levy of Education Cess was exempted under Excise as well as Service Tax from 2015, however, it continued to be levied and collected on imported goods.

Coming back to the GST regime, section 171 of the CGST Act, 2017 has been introduced to ensure that any reduction in the rate of tax on supply of goods or services or the benefit of ITC shall be passed on by the supplier to the end-consumer by way of **commensurate reduction** in prices. The said section reads as follows:

*"171. (1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*

*(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.*

*(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed."*

Concurrently, the levy of education cess has been exempted by the Central Government under Notification No. 54/2017-Customs and Notification No. 55/2017-Cus, w.e.f. 1-7-2017.

As a result of the above notifications issued under Customs, the importers are no longer required to pay education cess on the IGST component which was payable on the CVD component of the customs duty earlier in respect of the goods which are imported from outside India.

A note should be issued that such exemption from levy of customs education cess is an exemption granted by the Central Government under section 25 of the Customs Act, 1962 and the same is not being abolished on account of implementation of GST.

Thus, it can be argued that the reduction in cost is on account of reduction in customs duty which is not on account of taxes/duties subsumed under GST. Therefore, it should not be considered as 'reduction in tax' under section 171 of the CGST Act.

However, at this juncture reference should be made to the Anti-Profiteering Application Form (APAF-1), which can be submitted by a customer to the standing and screening committee under Rule 128 of the CGST Rules for examining whether the benefits of reduction in tax or the benefit of ITC are passed on to the customer or not?

On perusal of this application form, it appears that the authorities would examine the total taxes/duties payable pre-and post-GST period and if there is any reduction in the total taxes/duties payable, whether the same is passed on or not (*i.e.*, gross reduction). In fact, the calculation method as given under APAF does not differentiate between the taxes/duties subsumed under GST regime and the taxes/duties which are not subsumed under GST regime. Thus, if the matter is taken up for the examination, the committee examining the matter may argue that Importer should also pass on the benefit availed on account of exemption of payment of education cess on the IGST component.

The authority monitoring the implementation of the anti-profiteering provisions has been notified in many States. However, the authorities

so notified have not specifically prescribed any methodology to calculate the benefit which is required to be passed on by the supplier. All we have at this juncture is the wisdom obtained from the APAF-1 (which is technically a complaint form).

### Conclusion

3. The present issue can sway both ways and the outcome is unpredictable. However, the likelihood of many more such dilemmas under the Anti-profiteering provisions is

predictable. Therefore, in the absence of any specific methodology prescribed by the authorities, the supplier may have to apply its own wisdom to ensure compliance of the anti-profiteering provisions in its true spirit and device a methodology to calculate and pass on the benefit to its customers. Further, a detailed working should be maintained in this regard to justify the same to authorities in case of specific probe initiated against it.

...

# taxmann.com

## Research Box

Create Your Personal Library



Customized Folders | Sticky Notes | Synchronization

- ◆ Don't waste your research. Save all your documents in 'Research Box' in user defined folders.
- ◆ You can write down your thoughts or interpretation in any document for future references.
- ◆ Similarly, one can place personalized bookmarks in a document.
- ◆ In short, you can create your personal library and can synchronize it with your mobile phone and computers.

# MCA clarifies accounting procedure for foreign currency transactions and advance consideration under Ind AS

## Introduction

SANTOSH MALLER  
CA

1. On 29 March, 2018, the Ministry of Corporate Affairs issued Companies (Indian Accounting Standards) Amendment Rules, 2018. These rules are effective from financial year beginning from 1 April, 2018.

The rules inserted Appendix B, *Foreign Currency Transactions and Advance Consideration* to Ind AS 21. *The Effects of Changes in Foreign Exchange Rates*. The Appendix deals with what exchange rate to use for translation when payments are made or received in advance of the related asset, expense or income.

## Background

2. Ind AS 21 requires an entity to record a foreign currency transaction on initial recognition in its functional currency, by applying to the foreign currency amount the spot exchange rate between the functional currency and the foreign currency (the exchange rate) at the date of the transaction. Although IndAS 21 sets out these requirements, there is diversity in practice in circumstances in which an entity recognises a non-monetary liability arising from advance consideration. The diversity resulted from the fact that some entities were recognising revenue using the spot exchange rate at the date of the receipt of the advance consideration while others were using the spot exchange rate at the date that revenue was recognised.

When an entity pays or receives consideration in advance in a foreign currency, it generally recognises a non-monetary asset or non-monetary liability before the recognition of the related asset, expense or income. The related asset, expense or income (or part of it) is the amount recognised applying relevant Standards, which result in the derecognition of the non-monetary asset or non-monetary liability arising from the advance consideration. The interpretational issue is how to determine 'the date of the transaction' applying Ind AS 21 when recognising revenue. The question is particularly

when an entity recognises a non-monetary liability arising from the receipt of advance consideration before it recognises the related revenue.

The issue was not restricted to just revenue transactions. For example, the same issue arises for transactions such as a sale of property, plant and equipment or the purchase of services when consideration is denominated in a foreign currency and is paid or received in advance.

Accordingly, Appendix B clarifies the date of the transaction for the purpose of determining the exchange rate to use on initial recognition of the related asset, expense or income when an entity has received or paid advance consideration in a foreign currency.

### Scope of Appendix B to Ind AS 21

3. Appendix B applies to a foreign currency transaction (or part of it) when an entity recognises a non-monetary asset or non-monetary liability arising from the payment or receipt of advance consideration before the entity recognises the related asset, expense or income (or part of it). This Appendix does not apply when an entity measures the related asset, expense or income on initial recognition:

- (a) at fair value; or
- (b) at the fair value of the consideration paid or received at a date other than the date of initial recognition of the non-monetary asset or non-monetary liability arising from advance consideration (for example, the measurement of goodwill applying Ind AS 103, *Business Combinations*).

An entity is not required to apply this Appendix to:

- (a) income-taxes; or
- (b) insurance contracts (including reinsurance contracts) that it issues or reinsurance contracts that it holds.

### Guidance provided by Appendix B to Ind AS 21

4. Appendix B clarifies that the date of the transaction for the purpose of determining the exchange rate to use on initial recognition of the related asset, expense or income (or part of it) is the date on which an entity initially recognises the non-monetary asset or non-monetary liability arising from the payment or receipt of advance consideration.

If there are multiple payments or receipts in advance, the entity shall determine a date of the transaction for each payment or receipt of advance consideration.

### Transition provision

5. An entity shall apply Appendix B for annual reporting periods beginning on or after April 1, 2018.

On initial application (*i.e.*, 1 April, 2018), an entity shall apply this Appendix either:

- (a) retrospectively applying Ind AS 8, *Accounting Policies, Changes in Accounting Estimates and Errors*;

or

- (b) prospectively to all assets, expenses and income in the scope of the Appendix initially recognised on or after:
  - (i) the beginning of the reporting period in which the entity first applies the Appendix (1 April, 2018); or
  - (ii) the beginning of a prior reporting period presented as comparative information in the financial statements of the reporting period in which the entity first applies the Appendix (1 April, 2017).

An entity that applies Appendix B prospectively shall, on initial application, apply the Appendix to assets, expenses and income initially recognised on or after the beginning of the

reporting period in paragraph (b)(i) or (ii) above for which the entity has recognised non-monetary assets or non-monetary liabilities arising from advance consideration before that date.

## Requirements under Indian GAAP

6. Under Indian GAAP, *i.e.*, accounting standards under Companies (Accounting Standards) Rules 2006 under Companies Act, 2013, the issue was not clear. There was diversity in practice amongst companies. Many companies treated advances from customers in foreign currency as a monetary item, based on a past EAC opinion. Other companies treated customer advances from foreign currency as non-monetary items, again based on a later conflicting EAC opinion.

## Concluding Remarks

7. The notification of the Appendix by the MCA is a welcome move. Translating foreign

currency income, expense, assets or liabilities using the exchange rate on the date of recognising a non-monetary asset or non-monetary liability reflects the true commercial effect of the advance payments in a foreign currency. Payment of advances in foreign currencies results in eliminating exposure to future foreign currency movement since the advances are to be dealt with by supplying goods and rendering services. Such advances are not financial instruments under Ind AS 32 *Financial Instruments: Presentation*.

However, companies may face certain operational issues in implementing the Appendix, given that there may be some conflicts with the requirements in Goods and Services Tax (GST) laws for the purpose of GST levy. Companies may need to have information systems in place to be able to reconcile the requirements.

...

# taxmann.com

## Corporate Laws Module\*



Covering Companies Act,  
FEMA, SEBI Laws, Insolvency Laws,  
Competition Laws, Banking &  
Insurance Laws/Other Corporate Laws

Corporate Laws Module\* with All About™ Companies Act

Subscription : ₹ 7500<sup>†</sup>

# Ind AS Implementation

## (Based on Ind AS Transition Facilitation Group Clarification Bulletin)

### Query 1

---

A company, say B Ltd. issued preference shares in the past. Preference share capital is classified as liability in accordance with Ind AS 32, Financial Instrument: Presentation. The management of B Ltd. wants to know whether Dividend Distribution Tax (DDT) paid on dividend distributed to preference shareholders can be capitalised as borrowing costs.

•

According to para 8 of Ind AS 23, *Borrowing Costs*, an entity shall capitalise borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset as part of the cost of that asset. Further, para 5 of Ind AS 23 states that borrowing costs are interest and other costs incurred in connection with borrowing of funds or debt.

As per para 36 of Ind AS 32, dividend on preference share capital which is recorded as financial liability should be treated in the same way as interest on debt. This is also clarified by the Guidance Note on Ind AS Schedule III. It says that dividend on preference shares, whether convertible or redeemable, is in the nature of interest and, hence, Dividend Distribution Tax (DDT) paid on such dividend should also be treated as interest.

Therefore, in the given case, assuming that conditions for capitalizing borrowing costs are satisfied, both dividend on preference share capital which is recorded as financial liability and DDT thereon should be capitalised as borrowing costs.

### Query 2

---

A company, say X Ltd. has taken a loan from a bank. As per the conditions of the loan, director, Mr. A has to give guarantee for the loan to the bank. In case of default by the company, Mr. A shall

compensate for losses incurred to the bank. The company does not pay any premium or fees to Mr. A for the guarantee.

**Whether X Ltd. is required to record the financial guarantee given by its director to the bank?**

•

The accounting treatment of a financial guarantee is prescribed in Ind AS 109, *Financial Instruments*. It defines a financial guarantee as a contract that requires its issuer to make specified payment to compensate its holder for a loss it incurs because a specified debtor defaults in making payment to the holder in accordance with terms of a debt instrument. In this case, the guarantee given by Mr. A is to compensate the bank only for losses it incurs if X Ltd. defaults in making payments. Considering the definition given under Ind AS 109 and facts of the query, this will be treated as a financial guarantee under Ind AS 109.

Ind AS 109 prescribes accounting of financial guarantee only for the issuer (Mr. A) of the guarantee, not for the beneficiary (X Ltd.). However, a beneficiary of the financial guarantee can recognise the guarantee fee or premium paid as an expense. Further, the beneficiary entity should assess the substance of the transaction considering relevant facts & circumstances of the transaction, *i.e.*, whether the issuer of the guarantee is being compensated.

In the given case, X Ltd. is the beneficiary, so there is no requirement of recording the financial guarantee issued by its director for the loan taken by it. But it should disclose this fact as related party transaction in accordance with para 18 of Ind AS 24, *Related Party disclosures*.

### Query 3

An Ind AS compliant company, say B Ltd. has certain customers contributing 10% or more of its total revenue. Such customers are known as major customers under para 34 of Ind AS 108, *Operating Segments*. Para 34 requires disclosure of the total amount of revenues

from each major customers. The company has only one segment as per Ind AS 108.

**Whether the company should disclose customers contributing more than 10% revenue even if the entity has only one segment?**

•

According to para 31 of Ind AS 108, following disclosures should be made even if an entity has only one segment:

- (i) Revenues from external customers for each product and service, or each group of similar products and services (para 32 of Ind AS 108);
- (ii) The amount of revenue realised from domestic and foreign customers (para 33 (a) of Ind AS 108);
- (iii) Non-current assets other than financial instruments, deferred tax assets, post-employment benefit assets, and rights arising under insurance contracts located in the entity's country of domicile and foreign countries (para 33 (b) of Ind AS 108); and
- (iv) The fact of revenue realised from major customers, total amount of revenues from each major customer, and the identity of segment or segments which has made such revenues (para 34 of Ind AS 108).

Accordingly, B Ltd should disclose the amount of revenues realised from its major customers.

### Query 4

A company, say A Ltd. is a company and this company carries out business activities similar to that of Non-banking Financial Company (NBFC). The company applied to Reserve Bank of India (RBI) for the registration as NBFC. The registration is still awaited. The company has questions regarding Ind AS applicability.

**Whether normal Ind AS applicability rules (Ind AS applicable from FY 16-17/FY 17-18) shall be applied to A Ltd. or whether Ind AS**

**applicability rules as applicable to NBFC (Ind AS applicable from FY 18-19/FY 19-20) shall be applicable to A Ltd.?**

•

Rule 4(1)(iv) of the Companies (Indian Accounting Standards) (Amendments) Rules, 2016 states that NBFC shall comply with Ind AS from financial years beginning on or after 1<sup>st</sup> April, 2018 or 1<sup>st</sup> April, 2019, as the case may be. Here, NBFC means as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 and includes Housing Finance Companies, Merchant Banking Companies, Micro Finance Companies, Mutual Benefit Companies, Venture Capital Fund Companies, Stock Broker or Sub-Broker Companies, Nidhi Companies, Chit Companies, Securitisation and Reconstruction Companies, Mortgage Guarantee Companies, Pension Fund Companies, Asset Management Companies and Core Investment Companies.

If A Ltd. is covered in the above definition then Ind AS applicability rules as applicable to NBFC shall be applied to this company. If A Ltd. is not covered in the above definition then normal Ind AS applicable rules shall be applicable to this company.

## Query 5

**An Ind AS compliant company, C Ltd., wants to disclose operating profit on the face of Statement of Profit and Loss. Can the company do so?**

•

Ind AS Schedule III to the Companies Act, 2013 states that revenue from operations is to be disclosed separately as sale of products, sale of services and other operating revenue. Other operating revenue is not defined anywhere. As per the Guidance Note on Ind AS Schedule III, other operating revenue would include revenue arising from a company's operating activities other than revenue arising from sale of products or rendering of services. A company can use this guidance for determining which incomes should be recorded as other operating income.

In respect to the disclosure of operating profit on the face of Statement of Profit and Loss, the general instructions for preparation of financial statements given in the Ind AS Schedule III need to be referred. As per the instructions, additional line items, sub-line items and sub-totals can be presented on the face of Statement of Profit and Loss, if the same is relevant for understanding of the financial statement or when required for compliance with changes to the Companies Act or Ind AS. If a company decides to opt for this, it should disclose the same along with relating policy. In respect to operating profit disclosure, certain incomes credited to profit & loss may not form part of operating profit measure. Hence, disclosure of operating profit as separate line item may not be appropriate and may result in change in the format of Statement of Profit & Loss prescribed by Ind AS Schedule III. Further, Ind AS Schedule III and Ind AS requires presentation of incomes and expenses by nature and not function.

Accordingly, in this case, C Ltd. can't disclose operating profit on the face of Statement of Profit and Loss. However, it can provide operating profit as additional information in its financial statements.

## Query 6

**Ind AS 109, Financial Instruments requires recognition of gain or loss arising on renegotiation of terms of defaulted borrowings. If such gain or loss arises after the end of reporting period but before the date of approval of financial statements, then when it would be recognised?**

•

According to para 5.4.3 of Ind AS 109, whenever terms of a financial instrument are renegotiated or otherwise modified which results in gain or loss in form of change in contractual cash flows and the renegotiation does not result in the derecognition of that instrument then such gain or loss should be recognised in the year of renegotiation.

Therefore, in the present case, renegotiation has happened after the end of the reporting period and accordingly gain or loss should be recognised in the subsequent year.

### Query 7

A company say X Ltd. is a parent company of subsidiary Y Ltd. X Ltd. has 75% stake in Y Ltd. During the current year, the stake of X Ltd. in Y Ltd. has reduced from 75% to 60% without loss of control over the subsidiary. How the partial deemed disposal should be recorded in standalone and consolidated financial statements of X Ltd.?

•

In the standalone financial statements of the parent company, the investments in the subsidiary will continue to be recognised at its carrying amount. So, there will be no impact on goodwill or profit & loss.

As per para 23 of Ind AS 110, *Consolidated Financial Statements*, change in ownership stake of parent in subsidiary that do not result in loss of control by parent over subsidiary is treated as equity transactions. Further, para B96 of Ind AS 110 provides that in case of change in the proportion of the equity held by Non-Controlling Interests (NCI), an entity shall adjust the carrying amounts of controlling and NCI. Any difference between the amount of adjustments to NCI and the fair value of consideration received or paid should be attributed to the owners of the parent by recognising the same in equity. Accordingly, in the given case, the parent company is required to adjust the carrying amounts of its interests and NCI in the subsidiary.

### Query 8

An Ind AS compliant company, say A Ltd. has availed the exemption under para D13AA of Ind AS 101 to continue with the policy adopted under previous GAAP. As per para D13AA a first-time adopter may continue the policy adopted for accounting for exchange

**differences arising from translation of long-term foreign currency monetary items recognised in the financial statements for the period ending immediately before the beginning of the first Ind AS financial reporting period as per the previous GAAP.**

Further, Ind AS 107 also requires disclosures regarding market risks. Para 40 (a) of Ind AS 107 requires, subject to other paras, Unless an entity complies with paragraph 41, it shall disclose a sensitivity analysis for each type of market risk to which the entity is exposed at the end of the reporting period, showing how profit or loss and equity would have been affected by changes in the relevant risk variable that were reasonably possible at that date. In such case, whether A Ltd. should disclose the information related to foreign currency or exchange risk as required by Ind AS 107, **Financial Instruments: Presentation?**

•

Clause (a) of para 40 of Ind AS 107 provides that an entity should disclose a sensitivity analysis for each type of market risk to which it is exposed to at the end of the reporting period, the possible impact on profit or loss and equity by the changes in the relevant market risk variable that were reasonably possible at that time.

Irrespective of accounting treatment, an entity remains exposed to exchange risk arising on any long-term foreign currency monetary items. Accordingly, in the present case, A Ltd. should disclose the information related to foreign currency risk in its financial statements even though it has availed exemption provided under para D13AA of Ind AS 101, *First-time Adoption of Indian Accounting Standards*.

### Query 9

A holding company P Ltd. has a subsidiary Q Ltd. P Ltd. wants to know what will be the treatment of Dividend Distribution Tax (DDT) in the Consolidated Financial Statements (CFS) in following scenarios:

1. **Scenario 1:-** P Ltd. holds 60% stake in equity shares of Q Ltd., i.e., holds 12,000 shares out of 20,000 shares. Accordingly, Q Ltd. is partly-owned subsidiary of P Ltd. During the current year, Q Ltd. paid a dividend of ₹ 5 per share, amounting to ₹ 100,000. Q Ltd also paid DDT @ 10% amounting to ₹ 10,000. DDT Share of P Ltd works out to ₹ 6,000 (₹ 10,000\*60%).

2. **Scenario 2(A):-** Extending the above situation, if P Ltd. also pays dividend of ₹ 200,000 to its shareholders and DDT @ 10% thereon, amounting to ₹ 20,000 and as per tax laws, P Ltd. is allowed to adjust ₹ 6,000 (DDT on dividend received from Q Ltd.) for the payment of ₹ 20,000 resulting in net payment of ₹ 14,000 as DDT.

**Scenario 2(B):-** If in (A) above, P Ltd. pays dividend of ₹ 50,000, instead of ₹ 200,000, with DDT @ 10% amounting to ₹ 5,000.

3. **Scenario 3:-** If the DDT is paid by associate, say A Ltd., of P Ltd. and the same is not allowed to set-off against the DDT liability of P Ltd. as per the tax laws.

•

#### Scenario 1

Share of dividend of P Ltd. out of dividend paid by its subsidiary Q Ltd. is ₹ 60,000. This dividend amount would be eliminated in the consolidated financial statements as a result of consolidated adjustments. Balance amount of dividend, i.e., ₹ 40,000 paid to Non-Controlling interest (NCI) shareholders should be adjusted with the balance of NCI in the consolidated Statement of Changes in Equity (SOCIE).

Out of DDT paid by Q Ltd., ₹ 6,000 pertains to dividend received by P Ltd. and balance pertain to NCI shareholders. So, ₹ 6,000 will be charged as tax expense in the consolidated Statement of Profit and Loss and ₹ 4,000 will

be adjusted with the balance of NCI in the consolidated SOCIE.

#### Scenario 2

(A) In this case, the share of P Ltd. in DDT paid by Q Ltd. is ₹ 6,000 which was entirely utilised by P Ltd. while making payment of DDT on dividend declared to its shareholders. Accordingly, the total amount of DDT paid by P Ltd. (₹ 14,000) and by Q Ltd. (₹ 10,000) (i.e. total of ₹ 24,000) should be recognised in consolidated SOCIE. Nothing will be recorded in the consolidated Statement of Profit and Loss. ₹ 24,000 is the effective DDT on distribution of dividend to shareholders of parent company P Ltd.

(B) In this scenario, ₹ 1,000 (₹ 6,000 - ₹ 5,000) will be charged to consolidated Statement of Profit and Loss. ₹ 1,000 is the balance amount of share of P Ltd. in DDT paid by Q Ltd. after utilizing against its DDT liability of ₹ 5,000.

#### Scenario 3

If the DDT paid by the associate A Ltd. is not allowed to set-off against the liability of P Ltd. then share of P Ltd. in the DDT liability of A Ltd. should be credited to investment of P Ltd. in A Ltd. and correspondingly, debited to the share of P Ltd. in the Statement of profit or loss of A Ltd.

### Query 10

**An Ind AS compliant company, say A Ltd. issued compulsorily convertible debentures with 14.5% coupon rate. These debentures will be converted at the end of 20 years in the ratio of 1 equity share for every 10 debentures. The market rate of interest on unsecured loan is also 14.5%. So, the market rate of interest and coupon rate is same even though the debentures have conversion option. Generally, the coupon rate on financial instruments with conversion option is lower than the market rate of interest on unsecured loans. As there is no difference between both the rates, how should A Ltd. compute debt portion of the debentures instrument?**

Ind AS 32, *Financial Instruments: Presentation* states that a debt instrument with an embedded conversion option is treated as compound financial instrument. In case of a compound financial instrument, if an entity is required to deliver a fixed number of its own equity shares for a fixed amount of the instrument then the entity should recognise liability component and equity component separately at their fair value. The fair value of the liability component is the present value of the contractual cash

flows discounted at the market rate of interest on a comparable similar instruments without conversion option. The fair value of the equity component is the residual amount after deducting the fair value of liability component from the fair value of the compound financial instrument.

Accordingly, in the given case, A Ltd. may compute the liability component of the convertible debentures using the market rate of interest on unsecured loans of comparable credit status.

...

**TAXMANN®**

DOWNLOAD

Bookstore  
App








# Your Queries

---



## Goods and Services Tax

---

(Contributed by CA Mohammad Salim)

### GST on employee trainings abroad

*X Limited, located in Mumbai, is a company registered under GST Act. It sent its employees to London for training which was organised by a Delhi based Company. Whether it would be subject to GST? Whether there would be any change in taxability in case such training was organised by a London based Company?*

The taxability of any transaction under GST Law hinges upon the place of supply. In the first case the recipient as well as supplier were located in India and, thus, for determining the place of supply we need to refer to section 12 of the IGST Act, 2017. As per sub-section (5) of said section the place of supply of services in relation to training and performance appraisal to a registered person, shall be the location of such person. As in this case the recipient was located in Mumbai, Mumbai would be the place of supply. Further, as the supplier

was located in Delhi, the supply would be regarded as inter-State supply and would be subject to IGST.

However, in case the supplier of service is located in London, the place of supply would be determined as per section 13 of the CGST Act. Sub-section (3)(b) of said Section mandates that in cases of services supplied to individual acting on behalf of recipient, which require the physical presence of the recipient or person acting on his behalf, with the supplier for the supply of services, the place of supply would be the location where the services are actually performed. As in instant case the training in London required physical presence of employees who were acting on behalf of the recipient, i.e., Company, the place of supply would be London where the training actually took place. Accordingly, such transaction would not be exigible to GST as the location of supplier as well as place of supply were outside the taxable territory.

## Valuation of second hand goods

*I am engaged in buying and selling of second hand goods. Kindly tell me how to determine the value of supply of such goods?*

As per Rule 32(5) of the CGST Rules, 2017, where a taxable supply is provided by a person dealing in buying and selling of second hand goods, i.e., used goods as such or after such minor processing which does not change the nature of the goods and where no input tax credit has been availed on the purchase of such goods, the value of supply shall be the difference between the selling price and the purchase price. Where the value of such supply is negative, it shall be ignored.

It may be noted here that in case you want to avail of the input tax credit and/or you have done processing on the second hand goods which has resulted into change in nature of goods, the valuation will be done as per normal provisions, i.e., section 15 of the CGST Act, 2017 and the transaction value, i.e., sale price will be exigible to GST.

## Payment under Reverse Charge Mechanism

*I am a GST registered person who had obtained legal services from an advocate and the advocate had issued invoice dated 10-10-2017 for Rs. 1,00,000. Due to some reasons I have not made the payment of such invoice till now. Whether I am required to deposit tax under reverse charge mechanism?*

Legal services by an individual advocate or firm of advocates to any business entity are covered under reverse charge as per section 9(3) of the CGST Act, 2017 the read with Notification No. 13/2017-Central Tax

(Rate), dated 28-6-2017 (as amended). Under GST Law the date of payment of tax hinges upon the time of supply. As per section 13(3) of the CGST Act, 2017 the time of supply in cases where payment of tax is required to be made under reverse charge is date of payment or date immediately following 60 days from the date of issue of invoice by supplier. As in your case the invoice was issued by the advocate on 10-10-2017, the period of 60 days expired on 9-12-2017 and, thus, the time of supply will be 10-12-2017 even if no payment is made. Accordingly, as the time of supply is 10-12-2017 you were required to pay GST under reverse charge on the advocate's bill on 20-1-2018. In case you have not deposited tax by said date you need to deposit the same now along with interest @ 18% p.a. for the actual period of delay.

## GST on Volume Discount

*We have to give volume discount/year-end discount to customers through credit note. Is there GST impact on this? Should we raise credit note with GST? Should customers reverse ITC of GST on discount availed by them?*

As per section 15(3)(b) of the CGST Act, 2017 the value of supply shall not include any discount which is given after the supply has been effected, if such discount is established in terms of an agreement into at or before the time of such supply and specifically linked to the relevant invoices and further ITC on such discount amount has been reversed by the recipient of supply. Accordingly, in case above conditions are satisfied you can issue a credit note with GST for the volume discount and claim adjustment of GST on such discount by showing the same in Table 9 of return form GSTR 1. Further, as stated earlier the customers should reverse ITC on discount availed by them.

## E-way bill when billing and dispatch addresses are different

*How will e-way bill be generated in cases where billing and dispatch of goods are made from different addresses?*

The above scenario is known as 'Billing From' and 'Dispatching From'. E-way bill system has provision for catering to such a situation. In the e-way bill form there are two portions under 'FROM' section. On the left hand side - 'Bill From' supplier's GSTIN and trade name are entered and on the right hand side - 'Dispatch From', address of the dispatching place is entered. The other details are entered as per the invoice. Accordingly, in case 'Billing From' State is different from

'Dispatching From' State, the tax components are entered as per the billing State party and tax would also be charged accordingly. This can be explained with help of an example as under:

If the supplier X at Delhi raises bill to Y in Haryana in respect of goods which are dispatched from Haryana such supply would be regarded as inter-State supply and IGST will be entered. Similarly, if the supplier X at Delhi raises bill to Y in Delhi where goods are dispatched from Haryana, such supply would be regarded as intra-State and CGST + SGST will be entered irrespective of movement of goods, whether movement happened within State or outside the State.

● ● ●



## Income Tax

### Treatment of shares as stock-in-trade or investment

*I am engaged in buying & Selling of shares by closely analyzing the market trends besides tips from share brokers. In the financial year 2014-15, I bought shares worth Rs. 45 lakhs and sold shares worth Rs. 58 lakhs. My opening holding of shares was Rs. 2,10,000 and the cost of shares held on the closing date was Rs. 2,85,000. I admitted the income under the head capital gains, whereas the Assessing Officer completed the assessment as income from business. I cited the CBDT's Circular No. 6 of 2016 dated 29-2-2016, yet he completed the assessment by taxing it as income from business was he correct in doing so?*

*(Contributed by CA V.K. Subramani)*

From the facts furnished by you, it is not clear whether you have consistently claimed the income from purchase and sale of share as (short-term) capital gain or as business income? In case you have been claiming the income as investment income, i.e., the nature of income being capital gain, you have a fair chance of winning in appeal.

The Circular No. 6 of 2016 provides three situations of which the first one given below is in your favour.

“(a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income”.( Emphasis supplied)

In *Vimal Parwal v. Asstt. CIT* (ITA No. 367/JP/2014) dated 6-6-2016 it was held that the intention behind the issue of Circular No. 6 of 2016 was to avoid dispute/litigation and maintain uniform approach. The tribunal held “the CBDT has by and large accepted that income from shares should be considered as business income/capital gain according to the treatment accorded by the assessee but once he has accepted the taxability under the particular head, he will not be allowed to adopt a different head in subsequent years”.

Thus, the Circular was interpreted as giving the benefit of option to the taxpayer. Once it is opted for, he cannot change the same in the subsequent years.

### Consequence of notice under section 142(1)

*My client did not file the return of income for the assessment year 2016-17 till December 2016. He received a notice under section 142(1) asking him to file the return. He filed the return of income in February, 2017 admitting total income of Rs. 6,40,000 from profession. In April, 2018 the Assessing Officer issued to him a notice under section 148. I want to contest the validity of notice issued under section 148 as the consequence of notice issued under section 142(1) remains pending and without passing an order under section 143(3), he cannot issue a notice under section 148. Is my contention tenable in law?*

When a return is not filed within the time allowed under section 139(1) or before the end of the relevant assessment year, a notice under section 142(1) can be issued by the Assessing Officer. The title to the section says “Inquiry before assessment”. The issue of notice under section 142(1) is only to get a valid return filed by the taxpayer and/or to obtain information/documents which are considered as necessary by the Assessing Officer. Now notice under section 148 is issued which you want to contest on the

reasoning that an order under section 143(3) was not passed subsequent to issue of notice under section 142(1).

There is no provision, in law, mandating an assessment under section 143(3) in respect of taxpayers to whom notices have been issued under section 142(1). Further, enquiry before assessment does not mean that the assessment would be made under section 143(3). The Assessing Officer may drop enquiry after receipt of return filed by the taxpayer. Hence, your objection that without disposal of the case in consequence of the notice under section 142(1) having recourse to section 148, seems to be not tenable in law.

### Deploying entire sale consideration and exemption under section 54F

*My client sold a vacant site for Rs. 30 lakhs and the value of site for the purpose of a stamp duty was Rs. 40 lakhs. He applied the entire sale consideration for acquiring a residential apartment for Rs. 75 lakhs. The indexed cost of acquisition of the site is Rs. 15 lakhs. He wants to know whether he can claim complete tax exemption under section 54F as the entire sale consideration was invested in acquiring the residential apartment. In other words, he wants to know whether the deemed sale consideration of Rs. 40 lakhs would have any impact in his claim of exemption?*

Your contention is that the entire net sale consideration when deployed in acquisition of residential apartment, the provisions of section 50C could not be applied.

Section 54F(1)(i) says “if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of the capital gain shall not be charged under section 45”.

When the entire sale consideration has been deployed in acquisition of new asset, considering deemed sale consideration for the

purpose of computing exemption under section 54F might provide absurd results. The proportion of the sale consideration *vis-a-vis* the stamp duty value will be applied for the purpose of exemption and that could defeat the purpose of the legal provision which is to bestow a benefit on the taxpayer for the reinvestment made.

In *ITO v. Gyan Chand Batra* [2010] 133 TTJ (JP) 482 it was held that the provisions of section 50C(1) are not applicable in computing exemption under section 54F. The exemption under section 54F has to be computed with reference to full value of consideration specified in the sale deed.

### **Resident leaving India otherwise than for 'employment'**

*A doctor who was practicing for the last 10 years in India left for Hong Kong in September, 2017 to join his friends who are running a hospital there. He had never visited any foreign country prior to that. His total income from 1-4-2017 and till he left India was Rs. 6,50,000. He wants to know whether his income outside India would also be taxed in India as he has stayed for 170 days during the financial year 2017-18?*

Section 6(1) says that if a person, being a citizen of India, leaves India, for the purpose

of employment he would be construed as a resident and ordinarily resident if his stay in India is for 182 days or more in the previous year of such departure. The extended time limit as against the time limit of 60 days - is a concession to Indian citizens when they go for employment outside India.

In your case, you stayed in India for 170 days and your cause for leaving India is to provide professional service. In *CIT v. O. Abdul Razak* [2011] 337 ITR 267 (Ker.) it was held that when an Indian citizen leaves India for the purpose of doing business then also the extended time period benefit is to be given to him.

The Court held that the word 'employment' used in the *Explanation* to section 6(1) does not mean only employment but also self-employment like business or profession. The limitation, however, will apply when the person leaves for tourism or for medical treatment or for studies or the like. Hence, it would be letter to rely on the decided case given above and claim income earned outside India during the financial year 2017-18 as not chargeable to tax in India.

The DTAA between India and Hong Kong was entered into on 19-3-2018. I have answered your query on the assumption that the DTAA does not apply for the financial year 2017-18.

...



## Corporate Laws

### FAQs on Companies Act, 2013

*Can a company or partnership firm be converted into LLP?*

**Y**es, a company or a partnership firm can easily be converted into LLP provided that all the partners in a partnership firm or all the shareholders agree to become partners of the LLP.

*How will a company function if all the directors of company vacate their offices?*

**A**s per section 167 of the Companies Act, 2013 where all the directors of a company vacate their offices under any of the disqualifications then the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall

hold office till the directors are appointed by the company in the general meeting.

*Can a person be appointed as a director in private company by the Board of directors without appointing him as an additional director?*

**N**o person can be appointed as a director of a company unless he/she has been appointed as an additional director by the board of directors. Board can exercise its power to appoint additional director only if it is authorized by Articles of Association. An additional director holds office only up to the date of the next Annual general meeting of the company or the due date of next Annual General Meeting, whichever is earlier.

...



## Accounts and Audit

### Meaning of Accounting Policies

*What do you mean by "Accounting Policies"?*

**A**ccounting policies refers to the specific principles, bases, conventions, rules and practices applied by an entity in preparing and presenting its financial statements.

### Selection of accounting policy

*How an entity should select accounting policy for a particular item?*

**I**n selection of accounting policy for a particular item, an entity should check whether there is specific guidance on the said item in any Ind AS. If yes, the policy is determined by applying that Ind AS, otherwise, the management of the entity shall use its judgment in developing appropriate accounting policy.

## Points to be considered while formulating accounting policy

*While formulating accounting policy for an item, which points should be considered by the management when no specific guidance is available?*

In making the judgment, the management shall consider following points:

- (i) the requirements in any Ind AS dealing with similar and related items; and
- (ii) the definitions, recognition criteria and measurement concepts for assets, liabilities, income and expenses in the Framework for the Preparation and Presentation of Financial Statements

● ● ●

TAXMANN®

# Subscribe

**SEBI AND  
CORPORATE  
LAWS**

www.taxmann.com

**THE CORPORATE LAWS WEEKLY**  
Covering Company Law/SEBI Laws/Competition Law/  
Insolvency Laws/Banking Insurance & Foreign Exchange Laws



Annual Subscription in 2018  
Price : ₹ 9400 (52 Issues)



# Weekly Review

A Weekly Guide to  
Statutory Changes & Landmark Rulings



## Goods and Services Tax

### Recruitment services to students of foreign universities aren't 'Export of services'; taxable under GST

*Global Reach Education Services (P.) Ltd., In re [2018] 92 taxmann.com 211 (AAR - WEST BENGAL)*

The assessee provided the recruitment services to the students of foreign universities. It also provided the promotional services which were incidental and ancillary to the principal supply. It received the consideration in convertible foreign exchange. It contended that the supply of services should be treated as export of service because the place of supply is outside India, *i.e.*, location of service recipient as per section 13(2) of the IGST Act. It filed the application for advance ruling whether such service would be treated as export of service or not?

The Authority for Advance Ruling (AAR) held that such services were provided only as a representative of the University and not

as an independent service provider. Being an intermediary service provider, the place of supply shall be determined as per section 13(8)(b) of the IGST Act and not under section 13(2) of the IGST Act. Therefore, the place of supply shall be location of service provider, *i.e.*, within India. As the condition for export of service was not satisfied, the assessee's service to the foreign universities would not qualify as "Export of Services". Hence, such service would be taxable under the GST Act.

### Supply of UPS & battery if supplied under single contract at combined price is Mixed Supply: AAR

*Switching Avo Electro Power Ltd., In re [2018] 92 taxmann.com 223 (AAR - WEST BENGAL)*

The assessee preferred an application for Advance Ruling on the classification of the supply when it supplied UPS along with the

battery. It contended that such supplies could be treated as Composite Supply.

The Authority for Advance Ruling (AAR) held that the supply of UPS and Battery is to be considered as Mixed Supply because they are two different and independent items which are supplied under a single contract at a combined single price, *i.e.*, not naturally bundled.

### ► **Imported 'Thermal Printer' was classifiable as 'other capable goods of connecting to data processing machine'**

***Honeywell Automation India Ltd. v. CC* [2018] 92 taxmann.com 161 (Mumbai - CESTAT)**

The assessee imported 'Thermal Printer' and claimed that it was classified under Customs Tariff Heading No. 8443 32 90 as 'Other capable of connecting to an automatic data Processing machine or to a network'. The department held that the said product was classified under Heading No. 8443 19 90 as 'Other printers, copying machines and facsimile machines'. The assessee filed an appeal in the Tribunal against the same.

The Tribunal held that the printers connected to an automatic data processing machine or to a network were different by their character and nature from the Heading No. 8443 19 90. Therefore, the 'Thermal Printer' was covered under Heading No. 8443 32 90. Hence, the appeal of assessee was allowed.

### ► **'Samosa' classifiable as 'Cooked food' & not as 'Namkeen': HC**

***Sarva Shri Neeraj Misthan Bhandar v. Commissioner of Commercial Tax, Uttarakhand* [2018] 92 taxmann.com 162 (Uttarakhand)**

The assessee was running a shop and was engaged in the activity of selling sweets, namkeen, samosa, milk and curd. It contended

that samosa would come under the category of 'Sweets and Namkeen' and, therefore, it had to be taxed at the rate of 5%.

The department held that it would taxable as 'Cooked food' at the rate of 8%. The assessee filed an appeal before Commissioner (Appeals) who allowed the appeal in favour of assessee. Again, it filed an appeal in the Tribunal. On aggrieved by the order of Tribunal, it again filed an appeal in the High Court.

The High Court held that the word 'cooked food' is called in Hindi as 'pakaya hua bhojan' and in that sense, samosa may not be a meal as such. Therefore, samosas could more appropriately be classified under the entry 'Cooked food' rather than 'Namkeen'. Hence, it would be taxable at the rate of 8%.

### ► **Issue of classification of 'Coconut Oil' to be placed before CJI: SC**

***CCE v. Madhan Agro Industries (I) (P.) Ltd.* [2018] 92 taxmann.com 196 (SC)**

The assessee was a manufacturer of 100% pure coconut oil who had received coconut oil from Marico Limited in bulk and, thereafter it had packed the same in small packages which were supplied back to Marico. It contended that coconut oil in small packings was classifiable as coconut oil under Heading 1513. However, the revenue claimed classification of the said products as "hair oil" under Heading 3305 while conceding that coconut oil in large packing's, *i.e.*, beyond 2 Kgs. to be classified under Heading 1513.

The issue before Supreme Court was 'Whether coconut oil supplied in small packages to be classified under Chapter 15 or Chapter 33'?

Justice Gogoi was of view that coconut oil in small packings was more appropriately classifiable under Chapter Heading 1513 and not under Chapter Heading 3305 because the product was packed in small containers and used by some sections of the customers as hair

oil. 'Coconut oil' packed in small packages/containers did not cease to be 'coconut oil' and became 'hair oil' though such 'coconut oil' might be capable of being used for both purposes.

However, Justice Banumathi records dissenting view, holding that 'Coconut Oil' packed in small sachets/containers, as they were suitable for use on hair, was classifiable under Chapter Heading 3305 and not Chapter 1513.

Thus, in view of difference of opinion, the appeals have to be placed before Chief Justice of India for appropriate orders.

## **Statutory Changes**

### **Dealers opting for composition scheme not required to furnish details of inward supplies in GSTR-4**

**PRESS RELEASE, DATED 17-4-2018**

Govt. has clarified that the taxpayers who have opted to pay tax under the composition scheme shall not be required to furnish the details of inward supplies in serial number 4A of Table 4 of FORM GSTR-4.

### **Govt. notifies CGST (Fourth Amendment) Rules, 2018**

**NOTIFICATION NO. 21/2018- CENTRAL TAX, DATED 18-4-2018**

The Govt. has notified the CGST (Fourth Amendment) Rules, 2018 wherein it prescribed the same formula as of goods for calculation of maximum refund amount for services in case of inverted duty structure and substituted the Rule 97 on Consumer welfare fund. Further, it has also inserted the Form GSTR-10 of final return in the CGST Rules.

### **Roll-out of e-way bill for intra-State supplies in 6 more States from 20/04/2018**

**PRESS RELEASE, DATED 18-4-2018**

The e-way bill system for intra-State movement of goods has already been rolled out in the States of Andhra Pradesh, Gujarat, Karnataka, Kerala, Telangana and Uttar Pradesh. Now, the Govt. has informed that e-way bill system for intra-State movement of goods would be implemented from April 20, 2018 in 6 more States, namely, Bihar, Jharkhand, Haryana, Himachal Pradesh, Tripura and Uttarakhand.

### **E-way bill for intra-State supplies applicable from May 01, 2018 in Maharashtra**

**NOTIFICATION NO. 15B/2018- STATE TAX, DATED 18-4-2018**

The E-way bill system would be applicable from May 01, 2018 in the State of Maharashtra for intra-State movement of goods.

### **Govt. clarifies on processing of refund applications for UIN agencies**

**CIRCULAR NO. 43/17/2018-GST, DATED 13-4-2018**

Govt. has clarified that till the system generated FORM GSTR-11 does not have invoice-level details, UIN agencies are required to manually furnish a statement containing the details of all the invoices on which refund has been claimed, alongwith refund application. It also clarified that the recording of UIN on the invoice is a necessary condition under the CGST Rules. If suppliers are not recording the UINs, action may be initiated against them.

Further, in cases where, UIN has not been recorded on the invoices pertaining to refund claim for the second, third and fourth quarters of 2017-2018, a one-time waiver is being given by the Government, subject to

the condition that the copies of such invoices will be submitted to the jurisdictional officers and will be attested by the authorized representative of the UIN agency.

...



## Income-tax

### Sec. 44BB being specific provision would prevail over provisions dealing with royalty/FTS: Delhi ITAT

*Dy. DIT v. RPS Energy Pty. Ltd.* [2018] 92 taxmann.com 77 (Delhi - Trib.)

The assessee was a foreign company, had entered into a contract with an Indian company (RIL) and a company incorporated in Australia (BHP) to provide personnel for carrying on geophysical and geological services for prospecting for mineral oils.

Assessing Officer (AO) observed that assessee in the return had considered deemed profit & gains against gross receipt from business under section 44BB at 10% and no accounts were maintained by it.

AO came to the conclusion that assessee was a contractor to RIL and BHP were rendering services in the nature of FTS as per provisions of section 115A, read with section 9(1)(vii).

The Dispute Resolution Panel (DRP) held that the income received by assessee on account of services rendered should be brought to tax by applying deemed profit rate of 10% under section 44BB. Aggrieved-Revenue filed the instant appeal before the Delhi Tribunal.

**The Delhi ITAT held in favour of assessee as under:**

Section 44BB is a special provision for computing profits and gains of NR in connection with business of providing services or facilities in connection with, or supplying plant and machinery on hire, used or to be used, in the prospecting for or extraction or production of mineral oils, including petroleum and natural gas.

Sections 44BB, 44DA and 115A relating to royalty/FTS operate in different fields. If assessee was imparting services which could be a simple royalty or FTS then the same would be taxed under section 9(1)(vi)/(vii) read with section 115A, but where assessee was imparting any services in relation to exploration of mineral oil then the royalties/FTS would be taxable under section 44BB; as section 44BB being specific provision in relation to specific services, it would prevail over the other provisions dealing with royalties/FTS.

Therefore, the payments received by assessee was to be assessed under the specific provision of section 44BB and not section 115A.

## **No official notification required if protocol clause of DTAA provided automatic application of subsequent treaty**

***Apollo Tyres Ltd. v. CIT* [2018] 92 taxmann. com 166 (Karnataka)**

For relevant years, assessee's case was earlier covered by India-Netherlands DTAA. Subsequently, by introduction of India-Finland DTAA, assessee's case was governed by said DTAA.

Commissioner passed an order holding that unless a separate notification was issued by Central Government, beneficial provision of subsequent treaty could not be applied to assessee's case and it would continue to be governed by India-Netherlands DTAA.

Karnataka HC held that since Protocol clause in India-Netherlands DTAA itself provided for automatic application of subsequent treaty, no separate notification was required to be issued by the Central Government for enforcing beneficial provisions of India-Finland DTAA to assessee's case.

## **Provisions towards electricity tariff adjustment couldn't be added while computing book profit under MAT**

***Principal CIT v. NHPC Ltd.* [2018] 92 taxmann. com 130 (Punjab & Haryana)**

The assessee was engaged in business of selling electricity to the State Electricity Boards (DISCOMs). The tariff was determined and identified by the Central Electricity Regulatory Commission (CERC).

Assessee computed book profit under section 115JB at certain amount in the original return. It adjusted tariff for sale of electricity in the sum of ₹ 51.80 crores.

Assessing Officer (AO) held that assessee's application for fixing tariff was pending

before CERC and therefore, it was not an ascertained liability. He, thus, added back amount of provision to book profit under section 115JB.

**The High Court held in favour of assessee as under:**

Assessee was not entitled to fix the tariff. It was the CERC which fixed the tariff, albeit upon the assessee's application. This application was to be made after the completion of the earlier period for which the tariff was fixed.

Therefore, there was always a time-lag between the expiry of the period for which the tariff was fixed and the date on which the CERC fixed the tariff for the subsequent period.

In the instant case, the liability had definitely arisen, although it would have to be quantified and discharged to adjust it at a future date, *i.e.*, the date on which the CERC determined the tariff.

It was not even suggested by the revenue that the liability was not likely to be incurred. Considering the nature of the assessee's enterprise and the mode of fixation of tariff, it was reasonably certain that the liability would arise.

The liability was estimated by assessee after taking all the relevant factors into consideration. Therefore, addition on account of tariff adjustment was to be deleted as liability was not a contingent liability.

## **No deemed dividend if advance from co. was just to block deal of sale and purchase on behalf of co.**

***Dinesh Pandey v. Dy. CIT* [2018] 92 taxmann. com 125 (Delhi - Trib.)**

Assessee was a director of company-SEPL in which he held 50% shareholding. SEPL was engaged in the business acting as commission agent for sale and purchase of ships.

Assessee was actively involved in the negotiations for sale and purchase of ships with the interested parties. In the course of such negotiations, he required funds to block the deal or where advances had to be paid to intermediary brokers. For such purposes, SEPL had provided advance to the assessee.

Assessing Officer (AO) treated the amount of advance received by assessee from SEPL as deemed dividend in his hands. Accordingly, an addition was made to the assessee's income.

**The Tribunal held in favour of assessee as under:**

The sub-clause (e) of section 2(22) seeks to bring within the tax net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans or advances.

The word 'advance' has to be read in conjunction with the word 'loan' which carries an interest and there is an obligation of repayment. The word 'advance' if not found in the company of or in conjunction with a word 'loan' may or may not include the obligation of repayment.

The words 'loans or advances' can be applied to loans or advances simpliciter and not to transactions carried out in the course of business. There was no legal bar such transactions.

By granting advance, if the business purpose of the company was served and which was not the sum, which it otherwise would have distributed as dividend and couldn't be brought within the deeming provision of treating such advance as deemed dividend.

**Editorial Note:** w.e.f. Assessment Year 2019-20, deemed dividends are now under the scope of Dividend Distribution Tax (DDT). Therefore, companies are now liable to pay DDT on the deemed dividend. The tax rate is 30% on such deemed dividend.

**Lease income from warehousing services provided to keep goods safe was assessable as business income**

*Dy. CIT v. Tewari Warehousing Co.* [2018] 92 taxmann.com 168 (Kolkata - Trib.)

Assessee was engaged in providing warehousing services to tea companies. In addition to providing space in warehouse, assessee was providing other facilities such as security service and other services to keep goods safe and under hygienic conditions.

Pre-dominant object was not limited to earn rental from parties but also extended to provide other services. It was held that said activity systematically undertaken by assessee was in nature of business and, thus, merely because one of contracting parties had wrongly deducted TDS under section 194-I, same would not change character of income to rental income.

**Set off of unabsorbed losses of amalgamating cos couldn't be denied if merger was approved in public interest**

*Electrocast Sales India Ltd. v. Dy. CIT* [2018] 92 taxmann.com 85 (Kolkata - Trib.)

The Kolkata ITAT held that merger scheme approved by High Court having in mind larger public interest couldn't be disturbed by revenue merely because assessee was not entitled to benefits under section 72A.

**Sec. 194J TDS on provision made for audit fees was required even if payment to be made was uncertain**

*Citadel Fine Pharmaceuticals (P.) Ltd. v. ACIT* [2018] 92 taxmann.com 79 (Chennai - Trib.)

Assessee made provision for audit fees and claimed same as deduction. Assessee's case

was that provisions of section 194J would not apply to audit fees, as question of payment to auditor would arise only after signing of accounts which took place at year end.

Assessing Officer (AO) however, proceeded to disallow same under section 40(a)(ia) which was upheld by Commissioner (Appeals).

The Chennai ITAT held that in view of provisions of section 194J, tax was deductible at source either at time of credit of expenditure to account of payee or at time of payment whichever was earlier. Since assessee had made provision for audit fees to account of payee, provisions of section 194J were clearly attracted and non-deduction of tax at source would automatically invite disallowance under section 40(a)(ia).

### **National Highway constructed on BOT basis was intangible asset; eligible for depreciation**

**ACIT v. Progressive Constructions Ltd. [2018] 92 taxmann.com 104 (Hyderabad - Trib.) (SB)**

Assessee had entered into a Concession Agreement (C.A) with Government of India for four laning of National Highway in State of Andhra Pradesh on BOT basis. It was found that as per terms of agreement, assessee was to complete work at its own cost and maintain same for a period of 11 years and after completion of said period road was to be handed over on 'as is where is' basis to NHAI.

Assessing Officer held that as assessee had no right on road, except for maintaining road and receiving toll collections during concession period as per rates specified by the Government and since asset on which assessee had claimed depreciation was neither a building nor a plant and machinery, assessee would not be entitled to depreciation.

However, it was found that by virtue of C.A., assessee had acquired an intangible asset by acquiring right to operate toll road/bridge and collect toll charges in lieu of investment made by it in implementing project. Right to operate toll road/bridge and collect toll charges was a business commercial right as envisaged under section 32(1)(ii), read with *Explanation 3(b)*. Thus, assessee would be eligible to claim depreciation on such an asset at specified rate.

### **Non-furnishing of MAT computation would amount to concealment of income if it was consistently provided in prior year**

**Indian Chronicle Ltd. v. ITO [2018] 92 taxmann.com 111 (Ahmedabad - Trib.)**

Assessee had claimed exemption under section 10(38) on capital gain from sale of shares - It had not provided any calculation of book profit under section 115JB viewing that said income was not includible in book profit.

Assessing Officer initiated penalty proceedings for not offering correct MAT on book profit.

ITAT held that assessee had not furnished working of income under section 115JB only in year under consideration, though it was done in previous years wherein normal tax was higher than MAT.

Further, even during course of assessment proceedings, assessee had not corrected its mistake by filing Form 29B and paying necessary taxes. Therefore, there was a lack of *bona fideness* and *mens rea* of concealment of particulars of income on part of assessee and, hence, penalty levied was to be confirmed.

## **Statutory Changes**

- **CBDT directs CIT(A) to decide appeal for restoration of 'struck off' Cos. name by May 31, 2018**

**NOTIFICATION F.NO. 225/423/2017 DATED, 18-4-2018**

The Central Board of Direct Taxes (CBDT) has directed all Principal Chief-Commissioners/ Principal Directors-General of Income-tax to complete the exercise of filing references, including instances of pendency of outstanding tax-liability in cases of struck-off/de-registered companies by 31-5-2018



## **Corporate Laws**

- **Petition filed against company could not be maintained when petitioner was not member at time of oppression**

***Power Finance Corporation Ltd. v. Shree Maheshwar Hydel Power Corporation Ltd.* [2018] 92 taxmann.com 68 (NCL-AT)**

CL: Where appellant/petitioner was not member and shareholder of respondent-company when alleged acts of oppression took place, appellant could not maintain petition under section 241 of the Companies Act, 2013.

- **Transferred winding up plea dismissed under Bankruptcy Code on**

- **Certificate of Incorporation issued by MCA is proof of PAN & TAN for companies; CBDT clarifies**

**CBDT PRESS RELEASE, DATED 14-4-2018**

The Central Board of Direct Taxes (CBDT) has clarified that since section 139A as amended by FA 2018 has removed the requirement of PAN in form of laminated card, PAN and TAN mentioned in Certificate of Incorporation issued by MCA shall be treated as sufficient proof of PAN and TAN for the corporate assesseees.

...

- failure to issue notice within time frame: NCLAT**

***Sriram Compounds (P.) Ltd. v. Shiva Drums (P.) Ltd.* [2018] 92 taxmann.com 60 (NCL-AT)**

IBC: Where petition for winding up of company was transferred to NCLT, but as requirement under Application to Adjudication Authority Rules, after transfer of case operational creditor neither issued demand notice under section 8 nor furnished necessary information within time frame as stipulated in Rule 5 of Companies (Transfer of pending proceeding) Rules, same would be treated as abated.

### Provisional attachment order was to be set aside as property was never part of alleged transaction

*Horizon Info Solutions (P.) Ltd. v. Deputy Director Directorate of Enforcement* [2018] 92 taxmann.com 61 ((PMLA-AT), NEW DELHI)

PMLA: Where Adjudicating Authority passed order confirming provisional attachment order in respect of subject property but did not consider fact that said property was never a part of proceeds of crime and was never part of alleged transaction for which investigation under PMLA was being carried out, provisional attachment order passed against subject property was to be set aside.

### CCI to conduct investigation against "Honda Motorcycle" for unfair business practices

*Vishal Pande v. Honda Motorcycle & Scooter India (P.) Ltd.* [2018] 92 taxmann.com 59 (CCI)

Competition Act: Where OP, Honda Motorcycle and Scooter India Private Ltd., perpetuated tie-in arrangements, imposed resale price maintenance and maintained a discount control mechanism through standard form of dealership agreement with Informant dealer, *prima facie* case of contravention of provisions of sections 4 and 3(4) being made out against OP, DG was to be directed to cause an investigation to be made into matter.

### Attachment of properties which were not proceeds of crime was illegal under Money Laundering Act

*Jagati Publications Ltd. v. Joint Director, Directorate of Enforcement, Delhi* [2018] 92 taxmann.com 51 ((PMLA-AT), NEW DELHI)

PMLA: Where attached properties were not *per se* proceeds of crime but only value equivalent to proceeds of crime, attachment

was not as per mandate of section 5 and, therefore, was to be set aside.

### Apex Court directs 'Amrapali builders' to furnish details of their completed projects

*Bikram Chatterji v. Union of India* [2018] 92 taxmann.com 176 (SC)

IBC: Where pursuant to direction of Supreme Court dated 15-3-2018, 14 projects of Amrapali Builders had been inspected and details of deficiencies of projects had been given, it was held that concerned officers of Noida and Greater Noida Authorities would submit in details inspection report as to what were deficiencies and things to be completed before issuance of completion certificate, Amrapali builders were also directed to submit their opinion and money required and how they were going to arrange it and how much work had been completed by now pursuant to order passed by Supreme Court.

### Transferred winding up petition to be deemed as having been abated when operational creditor failed to issue notice under IBC

*M. Nandagopal v. Virtuous Urja Ltd.* [2018] 92 taxmann.com 117 (NCL-AT)

IBC: Where petition for winding up of corporate debtor was transferred to Tribunal, but operational creditor failed to issue demand notice under section 8, same was to be deemed to have been abated.

### Dispute regarding breach of contract to be agitated before Civil Court: NCLAT

*KLA Construction Technologies (P.) Ltd. v. CKG Realty (P.) Ltd.* [2018] 92 taxmann.com 95 (NCL-AT)

IBC: Where operational creditor entered into an agreement with corporate debtor to provide civil construction work at site of corporate debtor, and as per operational creditor mobilization advance was to be paid prior to actual work, however, as per corporate debtor it was obliged to pay mobilization advance subject to completion of mobilization process by operational creditor, dispute regarding alleged breach of contract was to be dealt with by the civil court.

### ■ Sending a calendar of events could not be treated as service of notice under Companies Act, 2013

*Ajith Kunimal Venugopal v. Oil Tools International Services (P.) Ltd.* [2018] 92 taxmann.com 97 (NCL-AT)

CL: Sending a calendar of events could not be treated as service of notice under Companies Act; where in EOGM, directors of company increased authorized share capital of company and allotted shares to themselves as well as to third parties by sending calendar of events to shareholders holding majority shares of company, said EOGM was to be held invalid.

## Statutes

### ■ SEBI reviews framework for stocks in Derivative Segment

**CIRCULAR NO.SEBI/HO/MRD/DP/CIR/O/2018/67, DATED 11-4-2018**

With a view to improve market integrity and provide better alignment of cash and derivatives segment, the market regulator SEBI has reviewed the framework for stocks in Derivative segment wherein various provisions related to physical settlement of stock derivatives and eligibility criteria for introduction of stocks have been discussed.

### ■ RBI imposes ₹ 3 crore penalty on IDBI Bank

**PRESS RELEASE, DATED 11-4-2018**

The Reserve Bank of India (RBI) has imposed a monetary penalty of ₹ 30 million on IDBI Bank Limited for non-compliance with the directions issued by the RBI on Income Recognition and Asset Classification (IRAC) norms.

### ■ SEBI issues disclosure norms for performance of post-merger schemes

**CIRCULAR NO.SEBI/IMD/DF3/CIR/P/2018/69, DATED 12-4-2018**

The SEBI has issued disclosure norms in order to standardize the disclosure of performance of schemes post-merger. At present there are no specific guidelines governing the depiction of performance of the surviving scheme, pursuant to merger of scheme.

### ■ Banks must upload daily transaction - wise information under Liberalized Remittance Scheme: RBI

**A.P. (DIR SERIES 2017-18) CIRCULAR NO.23, DATED 12-4-2018**

In order to improve monitoring and also ensure compliance with Liberalized Remittance Scheme limits, the RBI has decided to put in place a daily reporting system by AD banks of transactions undertaken by individuals under LRS, which will be accessible to all other authorized dealers.

### ■ Interest rate for Small Savings Schemes remains unchanged

**CIRCULAR NO. DGBA.GBD. 2573/15.02.005/2017-18, DATED 12-4-2018**

Government *vide* an office memorandum on 28-3-2018 had stated that Interest rate for Small Savings Schemes for the first quarter of financial year 2018-19 starting from 1-4-2018 would remain unchanged. In this regard, RBI has directed banks to bring to the notice of their branches who are operating Government Small Savings for necessary actions and to display on notice boards about the scheme for information of the subscribers to these schemes.

### SEBI specifies 'Fit and proper' criteria essential for STP service providers

**CIRCULAR NO. SEBI/HO/MIRSD/DOSR1/CIR/P/2018/0000000072, DATED 17-4-2018**

The market regulator, SEBI has amended the guidelines for 'Straight Through Processing' centralized Hub and service providers wherein new proviso related to fit and proper criteria has been inserted and specified 'Fit and proper' criteria essential for STP service providers.

...





**TAXMANN'S**  
**GST on DVD**  
Also Incorporating:  
Excise/Service Tax/All India VAT  
With  
Weekly Web Upd

- Always updated Central and State Notifications
- Always updated GST Tariff
- Customized database of GST
- Instant GST Rate Finder
- Also Covering Articles & Comments
- Acts/Rules/Circulars/Notifications All India VAT

Also Incorporating:

## Excise/Service Tax/ All India VAT

With Weekly Web Updation



**TAXMANN'S**  
**GST on DVD**  
2018

With  
Always updated Central and State GST Rates, Rules, Notifications and Acts/Rules  
Also covering Articles & Comments on GST  
Customized database of GST  
Instant GST Rate Finder  
Also Covering Articles & Comments on GST  
Acts/Rules/Circulars/Notifications All India VAT

**Annual Subscription : ₹ 9900\***

\*GST @ 18% extra