I. T. MIRROR

Mouth piece of Income Tax Bar Association

In tune with tomorrow....

INCOME TAX BAR ASSOCIATION

Aaykar Bhavan, Navrangpura, Ahmedabad-380 009. Tel. : No. : 2754 6665 Ext. 7507

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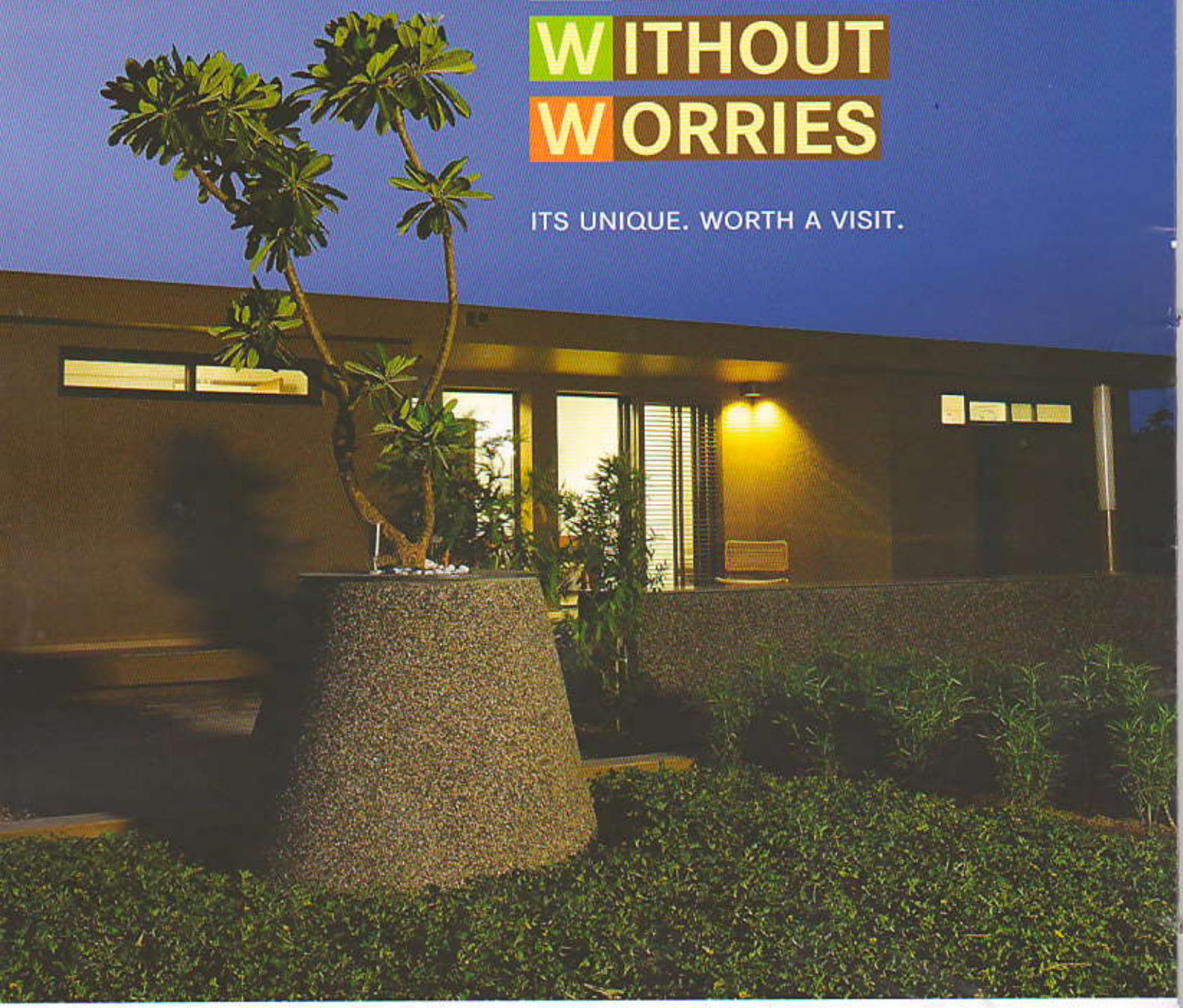

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SITE : NR GREATER THOL

Volume : 02
Part - II
Month : December 2014
Activity Year - 2014-15

I. T. MIRROR

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President Writes.....

Rupesh R. Shah
President

Respected Members,

It gives me immense pleasure and great pride that during my tenure Income Tax Bar Association is publishing 2nd Publication of our mouth piece magazine "I.T.Mirror" as per schedule.

In the first half of my president ship our managing committee has arranged four study circle meetings as well as we have also successfully organized "Service Tax Workshop" for seven days as well as one day "Computer Workshop"

I.T.Bar Association this year had celebrated Diwali Get to gather on 2nd November 2014 @ Sardar Patel SevaSamaj Hall and 500 members have enjoyed the delicious food of " Bhavani" caterers

This year association aim was to organize maximum education programs for their members and this year we have successfully done that with the help of member's cooperation.

In the second half managing committee is planning to organize

(a) Complete Workshop on Income Tax law containing for 12 sessions.
(b) Entertainment Programme
©) One day Picnic jointly with I.T.Bar Ladies wing.
(d) Industrial Visit for members
(e) Cricket match with CA Association on 01-02-2014
(f) Medical awareness programme

This year more than 30 new young members have enrolled their name to our esteem association and I request all the members please encourage your practitioner's friends to enroll as member in this esteem association.

I am thankful to the all article writer for their valuable contribution in "I.T.Mirror".

I am also thankful to the Chairman of "I.T.Mirror" publishing committee Shri. Hirenbhai R. Vakil for his untidily hard working for publishing well in time.

I am also thankful to all my committee members and office bearers for there support.

- MRUDANG H. VAKIL
(Hon. Secretary)
Email Id :- vakilmrudang@hotmail.com

Respected Members,

Income Tax Bar Association is going to organize a fruitful brain storming knowledge series jointly with H.L. Institute of Commerce (H.L.I.C.) Ahmedabad University.

The name given to this knowledge series is 'Income Tax Law in colour of Courts'. The entire series which focus around the theme that have been carefully designed and structured to meaningfully achieve the object that help ld. members to represent their cases before the various authorities.

How the courts had interpreted the language of the sections, how the courts had given shape to the Income Tax Law over a period of time, how the Income Tax Law works under the shadow of Judicial Pronouncement and how the courts had given ultimate colour to the Income Tax Law. Which is now as old as 53 years.

I also express my immense gratitude to Mr.Parag M. Patel (Director H.L.I.C. Ahmedabad University) for his valuable co – operation extended to us.

I hope and wish that this novel series will go a long way to achieve our laudable objectives.

I also salute all the ld. faculty members for their valuable presentation of paper and to be with I.T. Bar Association.

PLACE: AHMEDABAD
DATE : 3-12-2014

CHAIRMAN'S MESSAGE

Committed to I.T. BAR's growth story

Hiren R. Vakil
Chairman

My dear professional colleagues,

At I.T. Bar, the team I.T. Bar is working with all purity and responsibility headed by the president Mr. Rupesh R. Shah

Last year 2013 – 2014, the Managing Committee of I.T. Bar Association during the tenure of Mr. Jignesh A. Bhagat gave a responsibility to me and I started my journey, work hard and with full sense of responsibility you have reposed in me to put the 'I.T. Mirror' – Mouthpiece journal in your hands on quarterly basis with all qualities.

We had dedicated ourselves to fulfill this responsibility in the nature of financial strain also. I have tried to fulfill my responsibility to the best of my ability.

Our journey started in August 2013 with the blessings of Shri NarendraModi then Chief Minister of Gujarat and Prime Minister of India at present. The first edition of last year 2013 -2014 was unveiled by worthy hands of Mayor Minaxiben Patel.

This year, we are celebrating silver jubilee year of publishing I.T. Mirror. To commemorate the silver Jubilee Occasion, we had published special publication on the subject of Bombay Public Trust Act, 1950 – Important Provisions written by CA P. G. Hemaniand Advocate Tushar P. Hemani. I salute both of them for splendid work carried out by them. This special publication is given free of cost to all the members to enrich their library.

The first edition of I.T. Mirror on silver jubilee year and special publication book were unveiled by Hon'ble Mr. Justice M.R.Shah – Judge High Court of Gujarat. Hon'ble Mr. Justice M.R. Shah was impressed with the volume of I.T. Mirror. In his keynote address he blessed that the I.T. Mirror will surely have its golden jubilee and then diamond jubilee celebration. He prayed to the God to grant it so.

On this eventful occasion, Senior Advocate Shri Saurabh N. Soparkar also wish the I.T. Mirror – a continued success and prosperity for years to come.

In this second edition of silver jubilee year, our endeavour to give you very useful topics on issues that may arise in scrutiny assessment as now the period from November, 2014 to 31/03/2015 is a peak one for scrutiny assessments.

The first article is regarding recent important decisions on various controversies arising in Section 14A r/w Rule 8D.

The learned author, has tried to explain how disallowance can be made by invoking provisions of section 14A in different situations with authority. He also gone into the depth of the issues as regard, how the facts can be interpreted with the help of the law laid down by various couts.

The second article refer to the issues arising out of amendment made in Section 2(15) of the Income Tax Act, 1961 for charitable trust. The ld. author himself raised the possible posers. He replied the same for the benefit of the members after analyzing the relevant provision and decision by the courts.

The third article relates with important issues arises in Profit and Gains of Business or Profession. The issues covered by ld. author assumes vital importance.

We have also incorporated synopsis of as many as fourteen recent decisions of Honorable the Gujarat High Court and Income Tax Appellate Tribunal – Ahmedabad Bench for the benefit of members in this issues of Mirror.

At the end, I wish one and all a happy, prosperous peaceful and healthy happy new year Vikram Samvat 2071 and vir Samvat 2541.

Finally I would like to say that. India is facing battle from Pakistan on one end and China from the other end at our Borders.

But one things is certain,

વેરથી વેર શમેના કદાપી,
આગથી આગ બુઝાયના
હિંસાથી હિંસા હણાયના કોઈ'દી
શસ્ત્રોથી શાંતિ સ્થપાય ના

Let us clasp our hands together for betterment of Mother – Association and our Mother India as well.

With warm regards,

Date :- 1-12-2014

Hiren R. Vakil
Chairman

Our Past President Dhiresh T. Shah elected as President All India Notaries Association

The term of the President of All India Notaries Association Shri Dhiresh T. Shah has been extended for a further period of three years. This was decided unanimously at the 6th All India Notaries Conference held in Bangalore recently. The conference was inaugurated by the Supreme Court Judge Justice Shri V. Gopal Gowda which was attended among others by Karnataka Law Minister Shri T. V. Jayachandra and High Court Judge Justice Shri Phaneendra. More than 800 notary delegates from all parts of India attended the conference.

President Mr. Rupesh R. Shah, Hon. Secretary M
Mrudang H. Vakil, Chairman of I.T. Mirror Shri Hire
R. Vakil, Other Office-Bearers, Member of th
Managing Committee and Members of the I.T. Mirro
Committee heartily Congratulate our beloved pas
president Shri Dhireshbhai T. Shah On his re
appointment.

Recent Important Decisions on various controversies arising in S.14A read with Rule 8D.

The Id. Other is a lawyer by profession and a qualified Chartered Accountant. He has been practicing for the last 6 years in the area of Income Tax, Indirect Taxes including VAT, Arbitration and Company Law matters and arguing before Commissioner (Appeals), ITAT, CESTAT and the Hon'ble Gujarat High Court. He has been the Joint Secretary of the Income Tax Appellate Tribunal Bar Association for the term 2011-12 and 2012-13. He successfully runs research based Legal Process Outsourcing (onshore) and providing its services to Corporate, Chartered Accountants and other Law Firms.

- Ankit Talsania
A.C.A, DISA(ICAI), LL.B.

1. Whether disallowance can be made by invoking provisions of S.14A of the Act even in those cases where no income has been earned by an assessee, which has been claimed as exempt during the financial year?

1.1 The following authorities have take a view that where no exempt income is earned, disallowance u/s 14A of the Act cannot be invoked :

- **CIT vs. Corrtech Energy (P.) Ltd. 223 Taxman 130 (Guj)(HC)**

  4. Counsel for the Revenue submitted that the Assessing Officer as well as CIT(Appeals) had applied formula of rule 8D of the Income Tax Rules, since this case arose after the assessment year 2009-2010. Since in the present case, we are concerned with the assessment year 2009-2010, such formula was correctly applied by the Revenue. We however, notice that sub-section(1) of section 14A provides that for the purpose of computing total income under chapter IV of the Act, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. In the present case, the tribunal has recorded the finding of fact that the assessee did not make any claim for exemption of any income from payment of tax. It was on this basis that the tribunal held that disallowance under section 14A of the Act could not be made. In the process tribunal relied on the decision of Division Bench of Punjab and Haryana High Court in case of CIT v Winsome Textile Industries Ltd. [2009] 319 ITR 204 in which also the Court had observed as under :

  "7. We do not find any merit in this submission. The judgement of this court in Abhishek Industries Ltd (2006) 286 ITR 1 was on the issue of allowability of interest paid on loans given to sister concerns, without interest. It was held that deduction for interest was permissible when loan was taken for business purpose and not for diverting the same to sister concern without having nexus with the business. The observations made therein have to be read in that context. In the present case, admittedly the assessee did not make any claim for exemption. In such a situation section 14A could have no application."

  5. We do not find any question of law arising, Tax Appeal is therefore dismissed.

- **CIT vs. Shivam Motors Pvt. Ltd. in ITA No. 88 of 2014. (All)(HC)**

  "As regards the second question, Section 14A of the Act provides that for the purposes of computing the total income under the Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. Hence, what Section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income is not an allowable deduction. For the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the CIT(A), which has been affirmed by the Tribunal, hence does not give rise to any substantial question of

law. Hence, the deletion of the disallowance of Rs.2,03,752/- made by the Assessing Officer was in order.

- **CIT vs. Lakhani Marketing Incl. in ITA No.970 of 2008. (P&H)(HC)**

1.2 However, CBDT vide its Circular No.5/2014, dated 11/02/2014 clarified that Rule 8D of the Rules read with Section 14A of the Act provides for disallowance of the expenditure incurred in relation to the exempt income even where the taxpayer in a particular year has not earned any exempt income.

1.3 It is pertinent to note that none of the High Court has considered the CBDT Circular No.5/2014. However, recently before the **Chennai Tribunal Bench in the case of ACIT vs. Mr. M. Baskaran in ITA No.1717/Mds/2013, dated 31/07/2014**, the department relied upon the Special bench decision of Cheminvest Ltd. vs. ITO 121 ITD 318 and CBDT Circular No.5/2014 to contend that even if the assessee has not earned any exempt income, still disallowance 14A read with Rule 8D has to be made and it is mandatory. However, the Bench followed the decisions of the Gujarat High Court in the case of Corrtech, Bombay High Court in the case of Delite Enterprises, Punjab & Haryana High Court decisions in the case of Lakhani and Winsome Textile to hold that where the assessee has not earned any exempt income during the year, no disallowance can be made in that respective assessment year. Relevant extract of which is reproduced hereunder for ready reference :

"5. Heard both sides. Perused orders of lower authorities and submissions made by the assessee and the decisions in relied on. No doubt in the decision of the Special Bench of Delhi Tribunal in the case of Cheminvest Ltd. Vs. ITO (supra), the Special Bench held that disallowance under section 14A can be made even in the year in which no exempt income has been earned or received by the assessee. This decision of Special Bench of the Tribunal has been impliedly overruled by the decisions of High Courts in the following cases:

6. In the case of M/s. Shivam Motors P.Ltd. (supra), before the Hon'ble Allahabad High Court, the Revenue raised the following question of law:-
xxxx....

7. The High Court while answering the said question held as under:-
xxx....

8. The Gujarat High Court in the case of CIT Vs. Corrtech Energy Pvt.Ltd.(supra) held as under:-
xxx....

9. The Hon'ble Bombay High Court in the case of CIT Vs.Delite Enterprises(supra) held as under:-
xxx....

10. Similar view has been taken by the Hon'be Punjab & Haryana High Court in the case of CIT Vs. M/s. Lakhani Marketing Incl. in ITA No.970 of 2008 dated 2.4.2014. The Hon'ble High Court while affirming the decisions of CIT(A) as well as the Tribunal in deleting the disallowance made under
section 14A observed as under:-
xxx....

11. In the case of CIT Vs. Winsome Textiles Industries Ltd. (319 ITR 204) the Hon'ble Punjab & Haryana High Court held that when there is no claim for exemption of income in such situation section 14A has no application. Respectfully following the above decisions, we delete the disallowance made under section 14A as the assessee has not earned / received for exempt income during the previous year relevant to the assessment year under appeal. Thus, we sustain the order of the Commissioner of Income Tax (Appeals) on this issue."

2. Whether the Assessing Officer can apply Rule 8D mechanically so as to disallow expenditure u/s 14A without rendering any opinion on the correctness or otherwise of the assessee's claim in this regard ?

2.1 The Assessing Officer cannot apply provisions of S.14A of the Act read with Rule 8D of the Rules automatically or mechanically without rendering any opinion on the correctness of the claim of the assessee regarding incurring of any expenditure or non-incurring of any expenditure to earn exempt income. The Hon'ble Delhi High Court in the case of **Maxopp Investment Ltd.** reported in **347 ITR 272** has held as under :

"Sub-section (2) of section 14A provides the manner in which the Assessing Officer is to determine the amount of expenditure incurred in relation to income which does not form part of

the total income. However, if one examines the provision carefully, it would be found that the Assessing Officer is required to determine the amount of such expenditure only if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the Act. In other words, the requirement of the Assessing Officer embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the Assessing Officer returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Sub-section (3) is nothing but an offshoot of sub-section (2) of section 14A. Sub-section (3) applies to cases where the assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the Act. In other words, sub-section (2) deals with cases where the assessee specifies a positive amount of expenditure in relation to income which does not form part of the total income under the Act and sub-section (3) applies to cases where the assessee asserts that no expenditure had been incurred in relation to exempt income. In both cases, the Assessing Officer, if satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure, as the case may be, cannot embark upon a determination of the amount of expenditure in accordance with any prescribed method, as mentioned in sub-section (2) of section 14A. It is only if the Assessing Officer is not satisfied with the correctness of the claim of the assessee, in both cases, that the Assessing Officer gets jurisdiction to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the Act in accordance with the prescribed method, the prescribed method being the method stipulated in rule 8D. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same.

Sub-section (2) of section 14A refers to the method of determination of the amount of expenditure incurred in relation to exempt income. The expression used is - 'such method as may be prescribed'. By virtue of Notification No. 45/2008, dated 24-3-2008, the Central Board of Direct Taxes introduced rule 8D. The said rule 8D also makes it clear that where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with (a) the correctness of the claim of expenditure made by the assessee; or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year, the Assessing Officer shall determine the amount of the expenditure in relation to such income in accordance with the provisions of sub-rule (2) of rule 8D. Rule 8D(1) places the provisions of section 14A(2) and (3) in the correct perspective. The condition precedent for the Assessing Officer to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied, that the Assessing Officer is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of rule 8D."

2.2 Recently, the Pune Tribunal in the case of **ACIT vs. Magarpatta Township Development & Construction Co. Ltd.** in **46 taxamnn.com 284**, following the decision of the Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT 328 ITR 81 and the decision of Delhi High Court in the case of Maxopp Investment Ltd. 203 Taxman 364, has held that where the Assessing Officer has not recorded satisfaction as required by S.14A(2) of the Act, disallowance u/s 14A invoking Rule 8D is unjustified.

3. Whether the disallowance of interest expenditure can be made where the interest free funds available with the assessee is in

excess of investment made?

3.1 The Hon'ble Gujarat High Court in the following cases (pre AY 2008-09) has held that where it was apparent that the assessee was having sufficient interest free funds in excess of investment, and the Assessing Officer has not established nexus between borrowed funds and investment made, disallowance of interest expenditure cannot be made u/s 14A of the Act:

- **CIT vs. Torrent Power Ltd. 222 Taxman 367**
- **CIT vs. Hitachi Home and Life Solutions (I) Ltd. 221 Taxman 109**
- **CIT vs. Suzlon Energy Ltd. 354 ITR 630**

3.2 Recently, the Ahmedabad Tribunal in the case of **Jivraj Tea Limited vs. DCIT beating ITA No.866/Ahd/2012, dated 28/08/2014 for AY 2008-09** followed the Gujarat High Court decision in the case of Torrent Power (supra) and Hitachi (supra) and held that where assessee's interest free funds far exceeded investments made for earning exempted dividend income, and Assessing Officer had also failed to establish nexus between borrowed funds and investments made, no disallowance could be made under section 14A.

3.3 The Mumbai Tribunal in the case of **Binayak Tex Processors Ltd. vs. ACIT 44 taxmann.com 179 (Mum.)** has even held that where assessee is able to show near proximity of availability of own funds, may be exactly not on date of investment or advancement of loan but in a very near future date or within a reasonable short period of time, even then presumption will be that investment was made by assessee from his own funds or in anticipation of availability of its own funds within a short period of time. Relevant extract of which is as under:

> **"7.** We may observe that in day to day business, it is for the assessee to see how to manage its business. Even though the assessee may not show in the absence of separate fund flow statement or separate accounts relating to business loans and transactions and investments made from own funds, but if the assessee is able to show the near proximity of availability of own funds may be exactly not on the date of investment or advancement of loan but in a very near future date or within a reasonable short period of time, even then the presumption will be that the investment was made by the assessee from his own funds or in anticipation of availability of its own funds within a short period of time. The principle underlying this proposition is that a businessman has to circulate his money according to the day to day requirements and the likely inflow and outflow of money in the near future is taken into consideration while making investments. Even if on the date of investment/expenditure, own funds may not be available with the assessee but if the investment/ expenditure is made in anticipation of availability of own funds and the own funds are available to the assessee within a very short period of time, then under such circumstances disallowance cannot be made on the entire loan amount but a very reasonable proportionate disallowance can be made and even in certain cases can be ignored due to the shortness of the period between the date of advancement/expenditure and date of availability of own funds. It can be observed by the Assessing Officer from the Balance Sheet as to whether sufficient own funds were available to the assessee during the financial year or the interest free funds were generated during the course of the year even if the assessee could not prove the availability of own funds on the particular date of investment/advancement/expenditure."

4. Whether disallowance of interest expenditure can be made u/s 14A of the Act where the interest income is more than interest expenditure?

4.1 The Ahmedabad Tribunal in the following cases (post AY 2008-09) has held that S.14A read with Rule 8D cannot be attracted to disallow interest expenditure, where interest income is more than the interest expenditure:

- **ITO vs. Karnavati Petrochem Pvt. Ltd. in ITA No.2228/Ahd/2012, dated 05/07/2013; and**
- **Safal Reality Pvt. Ltd. vs. ACIS (OSD) in ITA Nos.2334/Ahd/2012 and 1842/Ahd/2013, dated 29/11/2013.**

5. Even for disallowance of administrative expenditure, provisions of Rule 8D can only be triggered when Assessing Officer is not satisfied about correctness of assess in respect of such expenditure in relation to exempt income – **Pukhraj Chunilal Bafna vs. DCIT 47 taxmann.com 288 (Mum.)**

6. Whether disallowance of expenditure u/s 14A of the Act can exceed exemption income?

6.1 Following authorities have taken a view that disallowance of expenditure u/s 14A of the Act read with Rule 8D cannot exceed the amount of exempt income.

- **Jivraj Tea Limited vs. DCIT beating ITA No.866/Ahd/2012, dated 28/08/2014 (AY 2008-09)**

"20. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. In the instant case, the assessee received exempt dividend income of Rs.900/-. The Assessing Officer was of the opinion that expenditure incurred for earning the exempt dividend income was not allowable to the assessee and the assessee has not disallowed any expenditure towards the earning of the exempted dividend income, he by invoking the provisions of Section 14A computed expenditure attributable to the earning of exempt dividend income under Rule 8D of the Income-tax Rules and made disallowance for interest expenditure of Rs.1,49,710/- and administrative expenses of Rs.12,750/-. The assessee unsuccessfully appealed before the CIT(A). The contention of the assessee is that the interest free funds available with the assessee in the form of share capital and free reserves as on the date of balance-sheet was Rs.17,86,69,501/- and the investments at the end of the year was at Rs.1,26,00,538/- only. Therefore, in view of the decision of the Hon'ble Gujarat High Court in the case of Hitachi Home and Life Solutions (I) Ltd. (supra) and Torrent Power Ltd. (Supra), no disallowance towards interest expenditure incurred for earning exempt income can be made. Regarding the disallowance of administrative expenses of Rs.12,750/-, we find that the Chandigarh Bench of the Tribunal in the case of A.C.I.T. Vs. Punjab State Coop & Marketing Fed. Ltd. in ITA No. ITA No.548/Chd/2011 for AY 2007-08 has held that disallowance u/s. 14A read with Rule 8D cannot exceed the exempt dividend income. Therefore, we restrict the disallowance of administrative expenses to Rs.900/- only, being the exempt dividend income earned by the assessee. Thus, this ground of appeal of the assessee is partly allowed."

- **Sahara India Financial Corporation Ltd. vs. DCIT 148 ITD 336 (Del) (AY 08-09), dated 10/01/2014**

"81. We have heard the rival contentions and perused the material available on record. It has not been disputed that the administration, expenses and books of account of investment division are separately carried out and maintained by the assessee. No infirmity has been found by the department in this behalf. One of the main issue is on whom lies the onus to establish nexus of available funds with free and taxable income. Similarly courts have held that a finding in objective terms about assessee working being unsatisfactory is to be recorded by AO in the order. Chandigarh Bench of the Tribunal in the case of Punjab State Co-op. & Marketing Fed. Ltd. (supra) has held that in any case the disallowance u/s 14A cannot exceed tax free income of the assessee. If mechanical method of rule 8D is applied, it leads to manifestly absurd results in as much as for tax free income of Rs.68,37,583/- disallowance of Rs.2,16,51,917 (enhanced by CIT(A) at Rs. 2,19,47,772) is made u/s 14A which is way too much than the exempt income. As the interpretation of provisions of sec. 14A r/w rule 8D is leading to unanticipated absurdities which cannot be the intention of legislature. Under these circumstances help of external aids of construction for interpretation of statute is called for. Looking at the varying interpretation offered by various courts and benches of tribunal in relation to sec. 14A, it is quite arduous to precisely decide the issue. In given facts and circumstances without going into all the issues, in our view it is appropriate to take guidance from Chandigarh bench judgment in the case of Punjab State Co-opt Marketing Fed. Ltd. (supra) holding that the disallowance of expenditure in any case cannot exceed the income earned. In our view this judgment takes a holistic view that disallowance in terms of sec. 14A can be maximum to the extent of exempt income, there is no dispute that in this case which is at Rs. 68,37,583/-. This judgment implies that reasonable expenditure less than the exempt income can be disallowed. In our considered

opinion, in the interest of justice, it will be reasonable to estimate and disallow, 50% of exempt income (Rs.68,37,583/-) as relatable to exempt income u/s 14A r/w rule 8D. We do not go into various plea taken by both sides offering diverse views based on judicial citations. This ground of the assessee is partly allowed."

7. Whether disallowance of expenditure u/s 14A of the Act can exceed actual expenditure?

7.1 Following authorities have taken a view that disallowance of expenditure u/s 14A of the Act cannot exceed actual expenditure claimed?

- **Gillete Group India (P) Ltd. vs. ACIT 16 ITR(T) 57 (Del) (AY 08-09)**

"xxx...

6. From the above, it is evident that as per sub-section (1) of Section 14A, no deduction is to be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of total income. Sub-section (2) of Section 14A provides the procedure for determination of such expenditure by the Assessing Officer. The Board has also prescribed Rule 8D for determining the expenditure incurred by the assessee for earning of exempt income. Thus, the disallowance can be made under sub-section (1) for the expenditure incurred for earning of exempt income. In the case under appeal before us, from the perusal of the assessee's profit & loss account, it is evident that the total expenditure incurred was Rs. 49,04,028/- only. Thus, the assessee claimed the deduction for the expenditure of Rs. 49,04,028/- which is debited to the profit & loss account. The disallowance cannot exceed the expenditure actually claimed by the assessee. We, therefore, accept the assessee's contention that the disallowance made by the Assessing Officer and sustained by the learned CIT(A) in excess of total expenditure debited to profit & loss account was unjustified. Accordingly, we restrict the disallowance to the extent of expenditure actually claimed by the assessee i.e. Rs. 49,04,028/-."

- **ACIT vs. Iqbal M. Chagla in ITA No.877/Mum/2013, dated 30/07/2014. (AY 09-10)**

"5. We have heard the rival submission and perused the material before us. We find from the audit report that the expenses in respect of exempt income was shown at Rs. Nil, that the assessee had debited direct expenses on account of dematerialisation and STT in the capital account and in the profit and loss account, th AO had presumed that the assessee had mu have incurred some expenditure under the hea salary, telephone and other administrati charges for earning the exempt income. It further found that the total expenditure claim by the assessee for the year is about 13 lakhs a the AO had made a disallowance of about Rs. lakhs. He has just adopted the formula estimating expenditure on the basis investments. But, the justification for calculati the disallowance is missing. The assessee had n claimed any expenditure in its P & L account, s it the onus was on the AO to prove that out of t expenditure incurred under various heads we related to earning of exempt income. Not on this he had to give the basis of such calculation. any manner disallowance of Rs.16.35 lakhs, against the total expenditure of Rs.13 lakhs (app claimed by the assessee in P & L account, is n justified. Provisions of Rule 8D cannot ar should not be applied in a mechanical way. Fac of the case have to be ananlysed before invokin them. We are of the opinion that the AO had n deliberated upon the facts of the case befo making the disallowance, whereas the FAA h decided the issue on merits. Therefor confirming his order, we decided the effecti ground of appeal against the AO."

8. Whether positive adjustment on account S.14A can be made while computing boo profit u/s 115JB of the Act.

8.1 Recently Ahmedabad Tribunal in the case **DCIT vs. Alembic Ltd. in IT No.1928/Ahd/2010 and C No.204/Ahd/2010, dated 27/03/2014 fo A.Y.2007-08,** relying on the order of the Mumb Tribunal in the case of M/s Essar Teleholdings Lt vs. DCIT in ITA No.3850/Mum/2010 for A.Y., hel that provisions of sub-Section 2 & 3 of Sectio 14B cannot be imported into Clause (f) of th Explanation to Section 115JB of the Act.

8.2 Following authorities have also taken the sam view:

- **ACIT vs. Spray Engineering Devise Ltd. 53 SOT 70 (Chan.) (AY 08 09)**
- **Reliance Petroproducts Pvt. Ltd. vs ACIT in ITA No.2324/Ahd/2009, date 13/07/2012**
- **Atul Ltd. vs. ACIT in ITA No.8/Ahd/2013, dated 11/10/2013**
- **Goetze India Ltd. 32 SOT 101 (Del)**

- **Quippo Telecom Infrastructure Ltd. in ITA No.4931/Del/2010**

9. Whether disallowance u/s 14A can be made in relation to deduction to be made while computing total income under chapter VI-A of the Act?

9.1 The Hon'ble Gujarat High Court, in the case of **CIT vs. Banaskantha Co. Op. Milk Producers Union Ltd. 223 Taxman 501 (Guj.)** following the decision of the Delhi High Court in the case of CIT v. Kribhco [2012] 349 ITR 618, has held that provisions of S.14A of the Act has no applicability to the deduction claimed under Chapter VI-A of the Act. The Delhi High Court in the case of Kribhco held as under:

> "33. It can be urged (though it was not specifically argued by the Revenue) that in case of complete or entire deduction of the gross amount, Section 14A will be applicable, and Section 14A will not apply in case only the net amount (as stipulated in several Sections in Chapter VIA of the Act) is allowable as a deduction. There will be a fallacy in this argument. Even were partial or net amount is to be allowed as a deduction, the figure can be minus or in a loss. Logically, as a squiter, it will follow that in case the assessee has a negative/minus figure as per the computation made any of the provisions of Chapter VIA, the expenditure incurred cannot allowable under Section 37 of the Act, in view of Section 14A. The said position cannot be accepted. Income will include negative income or a loss. The corollary is that the entire income is included under the provisions of the Act by firstly including the entire receipts or incomes as stipulated in the charging section but after excluding the income stipulated in Chapter III. Thereafter, total income is computed under the Act by applying provisions of Chapter IV, V and VI. From this income, deductions are permitted and allowed in terms of Chapter VIA. Deductions do not mean that deduction allowed has the effect that the income, on which deduction is allowed, ceases to be part of the total income. This is not the scheme, effect and purport of the Act. The expression "income which does not form part of the total income" refers to the nature, character or type of income and not the quantum.
>
> 34. Section 14A states that for the purpose of computing total income under Chapter IV, no deduction shall be allowed in respect of expenditure incurred in relation to the income which does not form part of the total income under this Act. It does not state that income which is entitled to deduction under Chapter VIA has to be excluded for the purpose of the said Section. The words "do not form part of the total income under this Act" is significant and important. As noticed above, before allowing deduction under Chapter VIA we have to compute the income and include the same in the total income. In this manner, the income which qualifies for deductions under Sections 80C to 80U has to be first included in the total income of the assessee. It, therefore, becomes part of the income, which is subjected to tax. Thereafter, deduction is to be allowed in accordance with and subject to the fulfillment of the conditions of the respective provisions. This is also subject to Section 80AB and 80A(1) and (2). Chapter VIA does not postulate or state that the incomes which qualify for the said deduction will be excluded and not form part of the total income. They form part of the total income but are allowed as a deduction and reduced.
>
> xxx...
>
> 36. In view of the aforesaid position, we answer the questions of law mentioned above in affirmative, i.e., against the appellant-Revenue and in favour of the respondent-assessee. In the facts of the present case, there will be no order as to costs."

10. Whether disallowance u/s 14A can be made where investment in shares were held as stock-in-trade and not as investment?

10.1 Recently, the Third Member in the case of **D. H. Securities Pvt. Ltd. vs. DCIT in 146 ITD 1 (TM)** has held that disallowance u/s 14A of the Act can be made in cases where dividend income has been earned on shares held as stock-in-trade.

Unreported orders / decisions as cited above can be available on request at ankittalsania@gmail.com.

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Issues arising out of amendments to Section 2(15) of I.T. Act for Charitable Trusts

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- CA Sanjay R. Shah

1. **Controversy**

Whether the amendment to the definition of "charitable purpose" u/s 2(15) w.e.f. Assessment Year 2009-10 would hit the trust if any activity of such charitable trust results into profit and where the aggregate value of the receipts from such activity is exceeding Rs.25 lakhs.

2. **Background**

2.1 **Prior to A.Y. 2009-10,** the definition of 'charitable purpose' u/s 2(15) read like this :

"2(15) 'Charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility".

2.2 **With effect from A.Y. 2009-10,** this definition was amended in following terms:

"2(15) 'charitable purpose' includes relief of the poor, education, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest and the advancement of any other object of general public utility:

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity:

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty five lakh rupees or less in the previous year."

2.3 **Issue – 1**

The moot question, therefore, is whether when a trust engages itself in some activity incidental to achieving its main objects which renders some surplus, whether such trust would be hit by the provisions of section 2(15) as amended w.e.f. A.Y. 2009-10.

Analysis of the amended definition

The amended definition provides that charitable purpose includes following items :

i) relief of the poor
ii) education
iii) medical relief
iv) preservation of environment including watersheds, forests and wildlife
v) preservation of monuments or places or objects of artistic or historic interest
vi) advancement of any other object of general public utility

The provision says that object of the trust **would not be** considered as charitable in respect of advancement of any other object of general public utility **if it involves the carrying on of any activity in the nature of trade, commerce or business or any activity or rendering any service in relation to any trade, commerce or business for cess or fee or nay other consideration, irrespective of the nature of use or application or retention of the income from such activity. Provided, however, that this restriction will not apply to the trust if the aggregate value of receipts from the activities so carried out is not more than Rs.25 lakhs.**

Thus, the restriction imposed by first proviso does not apply to a charitable trust which carries out the activities which falls in first five objects as enumerated earlier out of the six objects mentioned therein.

2.4 **CBDT Circular**

This is also amply clarified by CBDT vide its Circular No. 11 of 2008 dated 19/12/2008 while giving clarification on the amendments made to section 2(15). Now, the moot question is whether the amendment made in section 2(15) would hit the charitable trust which are engaged in advancement of any other object of general public utility, but which have to carry out some revenue generating activities in order to support the main object of the trust due to which there is gross receipt exceeding Rs.25 lakhs referable to such activities and also it generates some surplus.

2.5 **Legal Position**

2.5.1 On plain reading of the amended definition, it may appear that the trust carrying on such activities could be hit by the amendment. However, the guidance is now provided by following decisions of two High Courts :

i) CIT v/s Institute of Chartered Accountants of India (ICAI) [Delhi High Court] 35 Taxman.com 140

ii) CIT v/s Sabarmati Ashram Gaushala Trust [Gujarat High Court] 362 ITR 539

In the first cited case above, the question was when the Institute of Chartered Accountants of India (ICAI) is charging fees for its coaching classes from its students and for their campus placements, who are pursuing CA courses whether it tantamounts to carrying on trade, commerce or business. The Delhi High Court held that the main purpose of ICAI is to impart education to its students and hence the amendment made u/s 2(15) does not apply to it. Even if it is considered that the Institute generates surplus from such activity, such surplus is not arising out of any trade, commerce or business, but arises due to its exercise of sub-serving the object of the trust and is incidental to the same. There is no profit motive to carry out such activities and hence carrying out such activity cannot be equated with trade, commerce or business. The relevant extracts from the decision are reproduced below.

"The expressions "trade", "commerce" and "business" as occurring in the first proviso to section 2(15) must be read in the context of the intent and purport of section 2(15) and cannot be interpreted to mean any activity which is carried on in an organised manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the same is business or not. The purport of the first proviso to section 2(15) is not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee. The object of introducing the first proviso is to exclude organizations which are carrying on regular business from the scope of "charitable purpose" [para 67]."

2.5.2 In the second cited case, it was observed by the Tribunal as a fact finding body that though the Ashram was engaged in advancement of any other object of generate public utility, it had to carry out certain activities for serving its main purpose of charity which resulted into some surplus. However, the same cannot be considered to be carrying on of an activity in the nature of trade, commerce or business as there was no profit motive behind carrying out such activities. The High Court approved such finding of the Tribunal. The Tribunal while dealing with this issue laid down some parameters which can point to the fact that though there are some revenue generating activities undertaken by the assessee trust, the same cannot partake the nature of trade, commerce or business.

It may be, noted that department filed SLP against the above decision of the Gujarat High Court in the Supreme Court, which came to be rejected by the Supreme Court and hence this decision has attained finality.

2.6 Similar view is held by different Courts and Tribunals in this regard, a list of which is given hereunder:

i) CIT v/s Lucknow Development Authority (Allahabad H.C.) 265 CTR 433

ii) GS1 India v/s D.G. (Exemption) (Delhi H.C.) 360 ITR 138

ii) Shree Nashik PanchwatiPanjarapole v/s DIT (E) (Mumbai ITAT) 45 Taxman.com 220

3.0 **Issue - 2**

The other issue connected with the amendment to the section 2(15) is whether if DIT(Exemption) / CIT finds that if a trust which is granted registration u/s 12A of the Act is engaged in the advancement of any other object of the public utility and if such trust engages itself in the nature of trade, commerce or business, whether the registration granted to the trust can be cancelled by invoking proviso to section 12AA (3).

3.1 **Analysis of Relevant Provisions of the Act**

3.1.1 If one reads the language of provisions of section 12AA (3), the registration granted to a trust can be cancelled only if Principal Commissioner or Commissioner is satisfied that the activities of the trust or institution **are not genuine or are not carried out in accordance with the objects of the trust.** Under these circumstances only, he can cancel the registration after giving reasonable opportunity of hearing to the assessee.

3.1.2 An amendment is also made to section 12AA by inserting sub-section-4 w.e.f. 1-10-2014 to provide that if the trust carried out its activities in a manner due to which the provisions section 11 & 12 do not apply to either whole or part of the income of such trust due to operation of section 13(1), then also Commissioner or Principal Commissioner can cancel the registration of the trust. Thus, none of the provisions of section 12AA(3) or 12AA (4) suggests that the registration of the trust can be cancelled if the trust is hit by proviso to section 2(15).

3.2 This is further corroborated by insertion of sub-section-8 in section -13 by the Finance Act, 2012 with retrospective effect from A.Y. 2009-10, which says that if the trust is hit by the provisions of first proviso to section 2(15), then, **such trust will not get exemption u/s 11 & 12 in respect of such income while calculating its total income. However, nowhere in such sub-section it is mentioned that trust will lose its registration granted to it u/s 12A.**

3.3 **Thus, it is amply clear that if charitable trust attracts first proviso to section 2(15), at best, it will forfeit the exemption qua income from such activities which are of the nature of trade, commerce or business. However, it does not empower the Principal Commissioner or Commissioner to cancel the registration granted to such trust u/s 12AA unless the case of the assessee trust falls in sub-sections 3 & 4 of section 12AA.**

3.4 The above view is supported by the following rulings by different Tribunals:

i) KodavaSamaj v/s DIT(E) 32 Taxman.com 124 (Bangalore ITAT)
ii) Gujarat Cricket Association v/s DIT(E) 33 Taxman.com 387 (Ahmedabad ITAT)
iii) Madras Metro Sports Club v/s DIT (E) 30 taxman.com 134 (Chennai ITAT)
iv) VanitaSamaj v/s DIT(E) 45 Taxman.com 303 (Mumbai ITAT)
v) Mahatma Gandhi Charitable Society v/s CIT (Cochin ITAT) 142 ITD 565
vi) Project Management Institute v/s DIT(E) (Hyderabad ITAT) 142 ITD 239
vii) Maharashtra Housing & Area Development Authority v/s ADIT (E) (Mumbai ITAT) 58SOT 196

3.5 **It is also held in following decisions that power granted to withdraw registration u/s 12AA(3) is prospective and not retrospective:**

i) K. Verma Charitable Trust v/s DIT (E) 9 Taxman.com 101 (Ahmedabad ITAT)
ii) Kapoor Education Society v/s CIT 15 Taxman.com 245 (Lucknow ITAT)
iii) Agra Development Authority v/s CIT 31 Taxman.com 40 (Agra ITAT)
iv) Mumbai Cricket Association v/s DIT(E) (Mumbai ITAT) 138 ITD 338

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CA Jayesh C. Sharedalal

I. Interest on Bank Fixed Deposits :

In carrying on business, assesses have to resort to non fund based banking facilities like opening Letter of Credit, giving letter of Undertaking, bank guarantee facilities etc. While providing such banking facilities, the banks ask their customer to deposit margin money by way of making Fixed Deposits with them and such Fixed Deposits carry prevailing rate of interest. Time and again the Assessing Officer contends that such interest on Fixed Deposits is to be taxed as "Income from Other Sources" and not under the head "Profit and Gains of Business or Profession". This may result in payment of undue tax in the following situations:

(I) Assessee has claimed setoff of brought forward business loss aginst the FDR interest income included by him as Busniess Income,

(ii) Assessee has claimed deduction u/s.10A, 10B, 10AA etc where interest has been earned by the undertaking eligible for such incentives.

The FDRs in bank are kept out of business compulsion. Further such FDRs are not made out of surplus funds. It is only due to the insistence of the banks for depositing margin money that such FDRs are made. In such a situation there is a direct nexus of first degree between the source of income i.e. interest on bank FDR and Business, and hence interest will have to be taxed as Business Income and not as "Other Sources".

Fortunately for the assessees, Courts have held that such interest is to be taxed under the head profits and gains of business on profession. Recent decisions on this issue are as follows:

Dy. CIT V. Hari Orgochem (P.) Ltd. (2014) 45 Taxman.com 381(Guj.)

"In the present case, the assessee's stand has consistently been that due to insistence of the financial institutions, the assessee was compelled to park certain amount in fixed deposits from which it earned interest of 12 per cent, whereas the market rent at the relevant time was higher. Such interest income was utilized for the purpose of assessee's business by purchasing new machinery. In short, the assessee contended that such income cannot be treated as income from other sources, but must be seen as part of the assessee's business income.

In a recent decision in the case of C.I.T. v. Jaydee DSC Ventures Ltd. (2011) 335 ITR 132 (Delhi), the Delhi High Court taking stock of various decisions of the Apex Court, namely, Tuticorin Alkali Chemicals and Fertilizers Ltd v. CIT, (1997) 227 ITR 172 (SC), CIT v. Bokaro Steel Ltd., (1999) 236 ITR 315 (SC), CIT v. Karnal Co-operative Sugar Mills Ltd., (2000) 243 ITR 2 (SC), Bongaigaon Refinery and Petrochemicals Ltd v. CIT, (2001) 251 ITR 329 (SC), etc. held that income earned by the assessee from fixed deposit placed as part of performance guarantee, which was a condition for being awarded a contract must be treated as business income and not income from other sources, It was held as under :

"Keeping in view the aforesaid pronouncements in the field, the present controversy is to be adjudged. As is noticeable from the stipulations in the agreement, the performance guarantee by way of bank guarantee was required for faithful performance of its obligations. The non-submission of the guarantee would have entailed termination of the agreement and NHAI would have been at liberty to appropriate the bid security. That apart, the release of such performance security depended upon certain conditions. Thus, it is clearly evincible that the bank guarantee was furnished as a condition precedent to entering into the contract and further it was to be kept alive to fulfill the obligations. Quite apart from the above, the release of the same was dependent on the satisfaction of certain conditions. Thus, the present case is not one where the assessee had made the deposit of surplus money lying idle with it in order to earn interest; on the contrary, the amount of interest was earned from fixed deposits which were kept in the bank for furnishing the bank guarantee. It had an inextricable nexus with securing the contract. Therefore, we are disposed to think that the factual matrix is covered by the decisions rendered in Bokara Steel Ltd. (1999) 236 ITR 315 (SC), Karnal Co.operative Sugar Mills Ltd. (2000) 243 ITR 2 (SC) and Koshika Telecom Ltd. (2006) 287 ITR 479 (Delhi) and, accordingly, we hold that the view expressed by the Tribunal cannot be found fault with.

In view of the exercise already undertaken by the Delhi High Court in the case of Jaydee DSC Ventures Ltd (supra), we may not separately refer to in detail the facts and ratio of the various decisions of the Supreme Court, noted above. Suffice it to conclude, in the present case also, the assessee was compelled to park a part of its funds in fixed deposits under the insistence of the financial institutions. On such funds, the assessee received interest. Such income cannot be treated as income from other sources and must be seen as part of the assessee's business of manufacturing and selling of chemicals."

M/S. GREEN AGRO PACK (P) LTD., V. CIT. [ITA NO.3112/2005 (Karnataka)].

"Having heard the learned counsel on both the sides and on perusal of the material on record, it is not in dispute that the appellant is a 100% Export Oriented Unit which is engaged in export of processed gherkins and during the course of its business it would have to make certain deposits for the purpose of obtaining letter or credit or for bank guarantee when the products which are processed by it have to be exported. In terms of the said letter of credit or bank guarantee, certain deposits are made and such deposits are to be treated as margin amounts and any interest which is earned out of the said deposits has to be treated as business income and not as income earned from other sources. In this context, it would be apposite to refer to two decisions of this Court rendered in I.T.A.No.426/2002 in the case of M/s Hajee Jaffar Shariff v. The Income Tax Officer, disposed of on 12.11.2007, wherein it has been held that when money is invested in fixed deposit to get the benefit of letter of credit and not to invest the same to earn any interest, then the said interest amount earned on the deposit has to be treated as the business income and not as income earned from other sources."

Assistant Commissioner of Income Tax Vs. Ercon Composites

(2013) 158 TTJ (Jd)(UO) 25

"3 We have heard rival submissions. Both parties have reiterated their earlier stand. Apart from the above ld. A.R. has placed reliance on the decision of the Hon'ble High Court of Patna rendered in the case of Shyam Bihari Vs CIT & Anothers reported in (2012) 345 ITR 283 (Pat). The ld. D.R. has relied on the decision of Special Bench, Delhi in the case of DCIT Vs Allied Construction (2007) 106 TTJ (Del (SB) 595 dated 30/11/2006. He has tried to distinguish the facts of the Jaipur Bench 'A' decision in the case of M/s. S.P. Equipment and Securities Vs ACIT in ITA No. 464/JP/2007 on which decision ld. CIT(A) has relied. After considering rival submissions we have found that the Hon'ble High Court of Patna in the above noted case has clearly held that in the case of a civil contractor who derived his income from contract work obtained from the government departments and for obtaining which deposit of money in FDRs and NSCs was a pre requisite condition, it has been held that interest earned by the assessee on the investment of amount in fixed deposits which was only to provide a bank guarantee to the contractee in order to acquire the contract work, could not be treated as income from other sources and has to be treated as business income only. The Hon'ble High Court has relied on the decision of Karnataka High Court in the case of CIT Vs Chinna Nachimuthu Construction 297 ITR 70 (Kar). Accordingly, by respectfully following the above judgments we cannot allow this appeal of the revenue. We also draw support for the judgment of the Hon'ble Apex Court in the case of CIT Vs. Govinda Choudhary & Sons (1993) 203 ITR 881 (SC).""

II. **Depreciation on Windmills :**

Windmills are eligible for an accelerated rate of depreciation i.e. 80%, except for a brief intervening period for installations between 01/04/2012 and 31/03/2014. Vide notification No. 43/2014 dated 16/09/2014, the rate of depreciation on Windmills has again been restored to 80% for Windmills installed after 31/03/2014.

Assessees have been claiming depreciation at 80% on the entire purchase price paid to the supplier. The purchase price includes the charges for Civil Works and Foundation Work. Off late the assessing officers have made additions by disallowing depreciation @ 80 % on amount paid for Civil Works, Foundation of Windmill etc. In the department's view such Civil Works and Foundation Work is not an integral part of the device of Windmill. The A.Os bifurcate the windmill into different parts and allow depreciation at different rates of depreciation as per the block of assets in which the A.O. has classified such Civil Works etc.

Recently Hon'ble Gujarat High Court in the case of **CIT, Ahmedabad-III, v. Parry Engineering & Electronics (P) Ltd. [(2014) 49 taxman n.com 252 (Guj)]** has held as follows:

(a) Whether, in the facts and circumstances of the case, the learned ITAT has erred in law in confirming the order of the CIT (A) deleting the disallowance of excess claim of depreciation of

Rs.21,19,322/- on Windmill?
(b) .....

(1) The first question pertains to the claim of the assesee for depreciation, at the rate of 80 per cent on installation of windmill for generation of electricity, such claim is arising out of Entry (xiii) of Appendix-I to the Income Tax Rules, 1962. Such entry pertains to renewable energy devises, which includes inter alia "Windmills and any specially designed device which run on Windmills". Insofar as the main equipment of Windmill is concerned, the department had no dispute about such claim being granted. The disputed items are as follows:

1.	Amount of interest on term loan for Windmill, before installation	Rs. 2,52,752/-
2.	The amount of civil works, installation, labour and Foundation work if windmill	Rs. 44,18,239/-
3.	The amount paid to GEDA for land application fee and Reimbursement of power evacuation	Rs. 18,50,000/-
	TOTAL Rs.:	Rs. 65,20,991/-

(2) Insofar as the second item is concerned. CIT Appeals and the Tribunal, both held in favour of the assessee, relying on a decision of the Apex Court in the case of 'CIT v. Karnataka Power Corpn.' [2001] 247 ITR 268/[2000] 112 Taxman 629, wherein, the Apex Court in the context of investment allowance on plant and building, observed that whether building is a plant, is a question of fact. It was, further, observed that since authority had come to a finding of the fact that the assessee's generating station building was construed to be an integral part of its generating system, the building was a plant and was entitled to investment allowance. In particular, the CIT Appeals in its elaborate order, Dated 31.10.2011, observed that the company had purchased the windmill from Suzlon Energy Limited with a condition that the said company will install the same and all the cost related to the installation would be borne by the assessee company. It was, further, observed that such windmill cannot be used until it is installed and for the installation of the same a specific civil structure is required. Necessary permission is required from the specific authority. Specific kind of electrification is required for the operation and maintenance of the windmill. The civil structure and the electrification created for the purpose of windmill are of no use, if the windmill is disposed of, Civil structure and the electric fittings would have to be dismantled.

(3) This opinion of the appellate authority was confirmed by the Tribunal in the impugned judgment, in the following terms;

"4. We have considered rival submissions and perused the orders of the AO and the CIT (A). The depreciation is allowable on renewable energy device which also includes windmill. The depreciation at the rate of 80% is allowable on the entire device which is capable of generating electricity using wind energy. There is no provision in the Act to bifurcate the device into several parts and allow depreciation thereon at different rates of depreciation. The foundation, civil and electrical works are necessary for the installation of the windmill and is clearly part and parcel of the windmill project on which depreciation at the rate of 80% is allowable."

(4) We are of the opinion that the approach of both the authorities is perfectly justified. Windmill would require a scientifically designed machinery in order to harness the wind energy to the maximum potential. Such device has to be fitted and mounted on a civil construction, equipped with electric fittings in order to transmit the electricity so generated. Such civil structure and electric fittings, therefore, it can be well imagined, would be highly specialized. Thus, such civil construction and electric fitting would have no use other than for the purpose of functioning of the windmill. On the other hand, it can be easily imagined that windmill cannot function without appropriate installation and electrification. In other words, the installation of windmill and the civil structure and the electric fittings are so closely interconnected and linked as to form the common plant. As already noted, the legislature has provided for higher rate of depreciation of 80 per cent on renewable energy devises including windmill and any specially designed devise, which runs on windmill. The civil structure and the electric fitting, equipments are part and parcel of the windmill and cannot be separated from the same. The assessee's claim for higher depreciation on such investment was, therefore, rightly allowed.

(5) The remaining portion of question No.1 requires consideration."

III. **Section 41(1) : Unpaid Liabilities**

(1) Sometimes addition is made u/s 41(1) for non moving creditors. Generally balances of creditors outstanding on 31st March of last three years is called for, out of which the non moving creditors are added by applying section 41(1). This is done inspite of the fact that such non moving creditors have not been credited to profit and loss account.

(2) Sometimes the department undertakes an exercise of getting confirmation from such non moving creditors. Even if the summons are returned unserved or creditors state having no relations with assessee, and if the debts are outstanding since many years, no addition can be made u/s 41(1).

(3) In other cases department states that the amount has become time barred and the addition is made u/s 41(1). Here alos no addition can be made.

(4) Section permits addition u/s 41(1) when the amount is credited to profit and loss account. No addition can be made u/s 41(1) if A.O. does not establish that the assessee has written back outstanding liabilities in the books of account during the year.

(5) Some times addition is made vis-à-vis unsecured loans. Section 41(1) cannot be resorted to for making any addition vis-à-vis unsecured creditors. Section 41(1) will apply only when the assessee has claimed and is allowed a deduction of any amount. A.O. has not proved that the assessee has obtained benefit in respect of such liabilities by way of remission or cessation thereof.

(6) Following are some of the important court decisions

CIT vs. Sugauli Sugar Works (P) Ltd.

(1999) 236 ITR 518 (SC)

The question whether the liability is actually barred by limitation is not a matter which can be decided by considering the assessee's case alone but it is a matter which has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of limitation as provided in the Limitation Act.

CIT vs. Nitin S. Garg

(2012) 71 DTR (Guj) 73 : (2012) 208 TAXMAN 16 (Guj)

"15. In the case before us, it is not been established that the assessee has written off the outstanding liabilities in the books of account. The Appellate Tribunal is justified in taking the view that as assessee had continued to show the admitted amounts as liabilities in its balance sheet the same cannot be treated as assessment of liabilities. Merely because the liabilities are outstanding for last many years, it cannot be inferred that the said liabilities have seized to exist. The Appellate Tribunal has rightly observed that the Assessing Officer shall have to prove that the assessee has obtained the benefits in respect of such trading liabilities by way of remission or cessation thereof which is not the case before us. Merely because the assessee obtained benefit of reduction in the earlier years and balance is carried forward in the subsequent year, it would not prove that the trading liabilities of the assessee have become non existent.

16. Moreover, as pointed out in the case of Sugauli Sugar Works (P) Ltd. (supra), vide the last five lines of the paragraph-6 of the judgement, the question whether the liability is actually barred by limitation is not a matter which can be decided by considering the assessee's case alone but has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of limitation as provided in the Limitation Act."

CIT.v. Bhogilal Ramjibhai Atara (2014) 222 Taxman 313 (Guj.)

In A.Y.2007-08 the assessee showed an amount of Rs.37.52 lakhs as being due to various creditors. The AO issued summons to the creditors. Some of the creditors were not found at the given address and some stated that they had no concern with the

assessee. The AO took the view that there was a "cessation" of the liabilities and assessed the said liabilities to tax u/s.41(1). The CIT(A) confirmed the addition though the Tribunal deleted it on the basis that as the liabilities had not been written back in the accounts, s.41(1) did not apply. On appeal by the department to the High Court HELD dismissing the appeal:

S.41(1) would apply in a case where there has been remission or cessation of liability during the year under consideration. In the present case, there was nothing on record to suggest there was remission or cessation of liability in the A.Y. 2007-08. It is undoubtedly a curious case. Even the liability itself seems under serious doubt. The AO undertook the exercise to verify the records of the so-called creditors. Many of them were not found at all in the given address. Some of them stated that they had no dealing with the assessee. In one or two cases, the respobse was that they had no dealing with the assessee nor did they know him. Of course, these inquiries were made ex parte and in that view of the matter, the assessee would be allowed to contest such findings. Nevertheless, even if such facts were established through bi-parte inquiries, the liability as it stands perhaps holds that there was no cessation or remission of liability and that therefore, the amount in question cannot be added back as a deemed income u/s 41(1) of the Act. This is one or the strange cases where even if the debt itself is found to be non-genuine from the very inception, at least in terms of s.41(1) of the Act there is no cure for it (Tax Appeal No.588 of 2013, dt. 04/02/2014.) (A.Y.2007-08)

CIT v. Narendra Mohan Mathur (2014) 97 DTR 428 (Raj.)

The assessee showed the liability in the books. It was not proved by the AO as to how the so-called liabilities ceased or crystallized during the previous year. The court observed that the entire amount has been offered to tax in the A.Y. 2006-07.

The court held that merely because there was no response by the creditors, it does not prove that the liabilities ceased during the year. The Courts further observed that when the amount has been offered to tax in the subsequent years, it could not be taxed again in year under appeal. (A.Y. 2002-03)

CIT vs. Chetan Chemicals (P) Ltd. (2004) 267 ITR 770 (Guj)

Before s. 41(1) can be invoked, it is necessary that an allowance or a deduction has been granted during the course of assessment for any year in respect of loss, expenditure or trading liability which is incurred by the assessee, and subsequently during any previous year the assessee obtains, whether in cash or in any other manner, any amount in respect of such trading liability by way of remission or cessation of such liability. In that case, either the amount obtained by the assessee or the value of the benefit accruing to the assessee can be deemed to be the profits and gains of a business or profession and can be brought to tax as income of the previous year in which such amount or benefit is obtained. In the facts of the case on hand, without entering into the aspect as to whether the liability to repay the loans would be a trading liability or not, it is an admitted position that there had been no allowance or deduction in any of the preceding years and hence, there is no question of applying the provision as such. The Tribunal was right in holding that the amount arising as a result of remission of unsecured loans was not taxable in the hands of the assessee.

SYNOPSIS OF SOME RECENT DECISIONS OF HON'BLE THE GUJARAT HIGH COURT AND ITAT AHMEDABAD BENCH

The complier is a Vice – President of Income – Tax Appellate Tribunal Bar Association. He is a qualified Chartered Accountant, practicing as a lawyer by profession before the Honorable High Court of Gujarat and Supreme Court.

- TUSHAR HEMANI
B.Com., LL.B, A.C.A., Advocate

- **Cutting or polishing of diamonds amount to manufacturing activity:**

Assessee is engaged in the business of cutting or polishing of diamonds. AO was of the view that the said activity cannot be treated as manufacturing or production of article of thing as is essential for claiming deduction u/s 80JJA and hence, deduction u/s 80JJA was denied. Hon'ble ITAT, following the ratio laid down in "M/s. Flawless Diamond (India) Ltd. vs. ACIT – ITA No. 2886 & 5617/Mum/2012", held that cutting and polishing of diamonds is manufacturing or production of article or thing for claiming deduction u/s 80JJA. Accordingly, assessee's appeal was allowed.

[M/s. Facets Polishing Works Pvt. Ltd. vs. DCIT – ITA No.207/Ahd/2009]

- **When a Statue contains specific provision for cancellation of registration of a Registered Dealer under GVAT Act, recourse to general revision powers for such cancellation of registration is not valid.**

Petitioner was granted registration under Gujarat Sales Tax [later converted into registration under Value Added Tax CT (VAT)] which came to be cancelled by invoking revisionary jurisdiction u/s 75 r.w.s. 100 of VAT Act broadly on the count that Petitioner was engaged in billing activities without actual sale or purchase transaction. On Writ, Hon'ble observed that S.75 of VAT Act empowers Commissioner with "Revisionary powers" to be exercised within prescribed time frame whereas S.27 of VAT Act specifically deals with power of Commissioner as to "Suspension or cancellation registration" granted to a dealer. Registration of Petitioner was cancelled u/s 75 r.w.s 100 and not u/s 27. Revenue argued that the registration was actually cancelled u/s 27 and mere making wrong reference to S.75 r.w.s. 100 should not vitiate the order. Hon'ble High Court observed that right from the issuance of show cause notice till the very last word of the order cancelling registration, the entire issue was addressed as being u/s 75. It was held that there is a vast difference between nature of powers enjoyed and jurisdiction exercised u/s 75 and 27 of VAT Act. Both statutory provisions have different purview, are enacted with different purpose and operate in different fields. Also, before passing an order u/s 27, notice has to be issued in Form No.104 (i.e. "Notice for suspension/cancellation of Registration under sub-section (5) of S.27 of Gujarat VAT Act, 2003) and principles of natural justice need to be observed which has not been complied with. Hence, it was held that it was not a case of mere wrong reference to a statutory provision. It was rather a situation where tha authority passed an order assuming jurisdiction under a wrong provision exercising powers of entirely different nature which powers were not available to him for revising order of registration. Also, Hon'ble High Court was of

the view that order granting registration cannot be revised because of subsequent acts or omissions of a dealer which had no connection with the competent authority granting registration. Accordingly, the order cancelling registration passed u/s 75 r.w.s. 100 was quashed on technical count and not on merits without preventing Dy. Commissioner from initiating fresh action for cancellation of registration if such action is permissible under the law.

[Vishunbhai A. Patel vs. State of Gujarat – SCA Nos.3541, 3546, 4264-65 of 2014]

- **Statements made by any person in question cannot be taken as evidence against the assessee unless the assessee was allowed an opportunity to cross examine such person**:

  An amount of share application money received by the assessee company from 8 private limited companies was added u/s. 68 as undisclosed income on the basis of the statements of the directors of these private limited companies investing in the assessee company. The assessee stated that these statements are self-serving and demanded cross-examination of the directors who made such statements. The AO issued summons to all these directors to remain present at a given date and time to allow the assessee to cross examine them. However none of the directors remained present. The AO without giving any further opportunity to the assessee to cross examine these concerned directors made the addition u/s 68 by relying on the statements of these directors and holding that assessee has not discharged its onus u/s. 68. If any real and effective opportunity is not given to assessee to cross examine the makers of the statements, such statements cannot be taken as admissible evidence against the assessee.

  [Chartered Motors Pvt. Ltd. (IT(SS)A No.26/Ahd/2012) Order dated 28/08/2014, Chartered Speed Pvt. Ltd. (IT(SS)A No.25/Ahd/2013) Order dated 28/08/2014]

- **Share application money received by private limited company cannot be added u/s. 68 as undisclosed income when the assessee has discharged its onus to prove the nature and source of amount credited in the books of accounts**:

  Share application money received by the assessee company from 8 private limited companies through banking channel was added in the books of accounts of assessee as undisclosed income u/s. 68 after relying on the statements of the directors of the investing companies. Against this the assessee has submitted documents like MOA, AOA, share application & board resolution, Certificate of Incorporation, Certificate of Commencement, acknowledgements of ITRs, audited accounts etc. of concerned companies. It was held that initial onus was discharged by the assessee by furnishing the above documents u/s. 68 and onus was shifted on the department to prove the addition made u/s. 68.

  [Chartered Motors Pvt. Ltd. (IT(SS)A No.26/Ahd/2012) Order dated 28/08/2014, Chartered Speed Pvt. Ltd. (IT(SS)A No.25/Ahd/2013) Order dated 28/08/2014]

- **S.80 G(5) : At time of granting approval of exemption under section 80G, only object of trust is required to be examined**

  At time of granting approval of exemption under section 80G, only object of trust is required to be examined and, therefore, assessee's application seeking approval under section 80G(5) could not be rejected on ground that it failed to incur expenditure to the extent of 85 per cent of its income during relevant year

  [CIT Vs. Shree Govindbhai Jethalal Nathvani Charitable Trust (Tax Appeal No. 306 & 409 of 2014, Judgement Dated 06/08/2014]

- **Addition based on the provision of S.68 creates legal fiction and fiction created by such provision cannot be made applicable u/s 271(1)(c) in absence of any material record which proves the mischief u/s 271(1)(c)**

  AO levied penalty on the amount of addition u/s 68 made in respect of quantum proceedings without satisfying as to how assesse has concealed income or placed inaccurate particulars of income. Moreover addition u/s 68 of the act create legal fiction and such fiction may facilitate assessment proceedings but the same cannot be made applicable while levying penalty u/s 271(1)(c).

  [Chaganbhai K Patel HUF Vs. ITO, ITA No. 3032/AHD/2010 Dated 05/09/2014]

- **Addition made in the assessment proceedings would not directly justify levy of penalty proceedings u/s. 271(1)(c) of the Act:**

  In the case of the assessee an addition of unexplained cash credit was made u/s. 68 and penalty proceedings were initiated u/s. 271(1)(c) and penalty was levied of Rs. 2,42,825/- by the AO. In respect of this the assessee has submitted PAN card, confirmation of depositor and their acknowledgement of return of income. It was held by the ITAT that when assessee has submitted all material facts relevant thereto, merely on the basis of a fact that addition was made would not directly lead to levying of penalty unless and until it has been proved that assessee has concealed particulars of his income or has submitted inaccurate particulars of income. Merely because an addition is made in the assessment proceedings will not directly lead to a conclusion of levying penalty u/s. 271(1)(c).

  [Shri Umesh Krishnani, (I.T. A. No. 2758/AHD/2012), Order dated 25/07/2014]

- **Expense cannot be disallowed only on the basis of a mere fact that such an expense is an exorbitant expense:**

  Expenditure of Rs. 1.5 crore was incurred by the assessee as charge for survey of land at Bauxite Mines in order to assess the reserves of bauxite available at the site. The same expenditure was claimed as deduction by the assessee. The expenditure was disallowed by the AO on the ground that it was not related to business purpose. It was held by the CIT(A) and confirmed by the ITAT and High Court that expenditure was incurred to know the reserves of mines with a view to sell such mines and moreover when the payment was made by cheque of such an expenditure and bills were duly raised, it cannot be disallowed merely on the basis that it is an exorbitant expense.

  [Saurashtra Chemicals, (TAX APPEAL NO. 555 of 2014), Judgement dated 04/08/2014]

- **When several cash withdrawals and redeposit are been made in same bank account, the addition of unexplained cash deposit needs to be restricted to peak amount i.e. maximum cash balance in a day during the whole year:**

  An amount of Rs. 39,70,500/- was added by the AO as unexplained cash deposits on the basis of fact that as the assessee is unable to explain the reasons of continuous withdrawals of cash and their subsequent redeposit in the same bank account even after having sufficient cash balance concludes to the fact that withdrawals are reinvested to some undisclosed source and deposits made are separate cash income generated . On the basis of this AO added entire cash deposits to the income of assessee without considering the cash withdrawals. It was held by the CIT(A) that such an action of AO was without any justification and was bordering to the point of high pitch assessment. It was held by the CIT(A) that maximum income could have

been earned by the assessee is the maximum cash balance on a particular day during the whole year. Therefore CIT(A) restricted addition to the amount of Rs. 7,95,160/- being peak of cash balance during the whole year which was upheld and agreed by the ITAT and High Court.

[Manoj Indravadan Chokshi, (TAX APPEAL NO. 821 of 2014), Judgment dated 11/08/2014]

- **Interest expenditure is allowable u/s 36(1)(iii) so long as the funds borrowed are used for the businesses of the Assesse even though the funds have not been utilized for the purpose for which they were borrowed.**

  Interest bearing funds borrowed for the purpose of business may be merged with other funds for the practical reasons. However it does not tantamount to the disallowance u/s 36(1)(iii) till the capital borrowed were used for the purpose of business even though not used for the purpose for which they were borrowed. Disallowance u/s 36(1)(iii) is not attracted even though the funds have been diverted to the other businesses of the Assesse.

  [CIT Gandhinagar vs. Rajendra Brothers TAX APPEAL NO. 868 of 2014 (Gujarat) dated 19th August 2014]

- **Tax dues of Pvt. Co. cannot be recovered from its directors u/s 179 unless it is established that the same cannot be recovered from company and such non-recovery can be attributed to gross neglect, misfeasance or breach of duty on part of the directors:**

  AO passed an order u/s 179(1) of the Act whereby petitioners (i.e. Directors of Pvt. Co.) have been jointly and severally held liable for payment of outstanding demand of Pvt. Co. in which they were directors. S.179 requires that before initiating recovery proceedings against directors in respect of dues of a company, it is essential for revenue to establish such recovery cannot be made against the company. Further, directors can be made liable for such tax dues of company only if such non-recovery can be attributed to any gross neglect, misfeasance or breach of duty on the part of directors. The Hon'ble High Court observed that Notice issued u/s 179 as well as order passed u/s 179(1) was completely silent on the steps taken by the revenue for recovery of outstanding dues. Also, nothing has been stated regarding misfeasance or breach of duty on the part of directors due to which tax dues of the company couldn't be recovered. It was thus held that, in absence of any finding as required for invoking S.179, no order could have been passed u/s 179(1) of the Act. Accordingly, order passed u/s 179(1) was quashed.

  [Ram Prakash Singeshwar Rungta vs. ITO – SCA No.9032 of 2014]

- **Revenue must implead all the legal heirs of a deceased assessee as respondents in an appeal before ITAT:**

  Revenue filed an appeal before ITAT which was barred by over five years. Hon'ble ITAT observed that Revenue had earlier filed an appeal against the very same order of CIT(A) which came to be dismissed by ITAT since the same was filed against a deceased assessee without impleading legal heirs of such deceased assessee and though the Registry had issued a defect memo to the Revenue in respect of the same and advised it to bring on record legal heirs of such deceased assessee, the said defect was not rectified. Again, the Revenue filed an appeal against the said order of CIT(A). Hon'ble ITAT

observed from records that there were total four legal heirs of such deceased person of which only was made the respondent and other three were not impleaded as respondents. It was held that, since the defect for which the earlier appeal was dismissed was still not rectified completely, the second appeal is also inadmissible and was dismissed accordingly.

[ITO vs. Jayesh K. Patel L/h of Late Kalidas F. Patel – ITA 785/Ahd/2010]

- **Addition made solely on the basis of DVO's report collected during block assessment proceedings is not permissible u/s 158BC:**

A search was carried out u/s 132 and assessment was framed u/s 158BC. During the course of block assessment proceedings u/s 158BC, AO was of the opinion that assessee had undervalued cost of a particular land and building and hence, the case was referred to District Valuation Officer (DVO) who valued the same on higher side and consequently, AO made addition in respect of such difference as unaccounted cost of construction of the said building. Hon'ble High Court observed that it was not the case of Revenue that on the basis of any material collected during the course of search and/or any inquiry at the time of search, the aforesaid valuation was found. Relying on "CIT vs. Kantilal B. Kansara (HUF) – 337 ITR 187 (Guj)", it was held that addition made solely on the basis of DVO's report collected during the block assessment proceedings was not permissible u/s 158BC of the Act. Accordingly, Revenue's appeal was dismissed.

[DCIT vs. M/s. Ravi Builders – Tax Appeal No.17 of 2000]

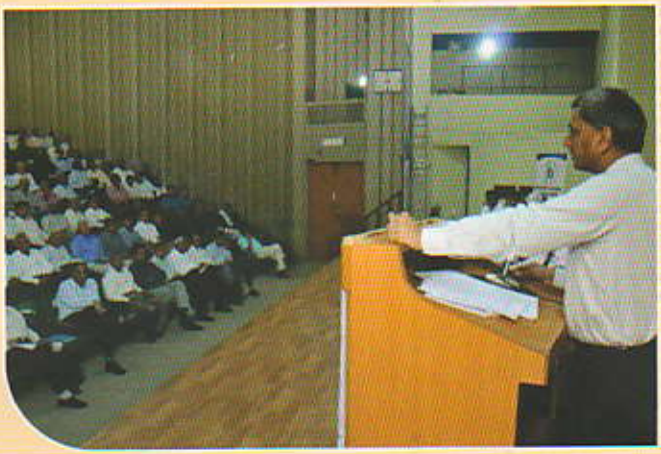
- **S.68 - Returned Income cannot be considered to be conclusive while ascertaining the creditworthiness of the creditor if creditor has enough funds i.e. owned and borrowed funds to lend money:**

The Assesse Bhavnnagar Vegetables Products Ltd claimed to have received Rs.5,38,98,903/- from M/s Sterlin Impex. CIT(A) upheld the order of AO contending that returned income shows lack of creditworthiness on the part of creditor. It was held that returned income of the creditor cannot be considered conclusive test while ascertaining the Creditworthiness if balance sheet of the creditor shows enough owned and borrowed funds that could have been used to lend money to the assesse.

[Bhavnagar Vegetables Products Limited (ITA No. 25/AHD/2010, Judgement Dated 05/09/2014]

Shri N. Vasudevan-Member ITAT Banglore lightening the lamp at 55th RRC held at Golden Palm Hotel-Banglore.

President Mr. Rupesh R. Shah alognwith Guest of Honour Past President Shri Umesh Majmudar, Ld. Faculty Shri Snehal Shah from Mumbai & Office Bearers at the maiden study circle Meeting for the activity year 2014-15.



CA Dhinal A. Shah addressing to the house on Proposed Provisions in union Budget 2014.

Guest Of Honour & Past President Shri Hiren R. Vakil Lightening the lamp at Second Study Circle Meeting.

Guest of Honour & Past President Shri Pramod N. Popat lightening the lamp at third study Circle Meeting.

Guest of Honour & Past President Shri Snehal K. Thakkar lightening the lamp at Fourth Study Circle Meeting. Also seen [From L to R] Hon. Secretary Shri Mrudang H. Vakil Ld. Faculty CA Deepak R. Shah President Shri Rupesh R. Shah and Vice-President Shri Ronak R. Sheth