I T MIRROR

Mouth Piece of Income Tax Bar Association

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Knowledge Hub

INCOME TAX BAR ASSOCIATION

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I T MIRROR

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Chairman's Communication

CA Kaushik D.SHAH
Chairman of IT Mirror Committee 2016-17

Dear Members,

I am indeed grateful to the president Mr. Dhruven Shah and Hon. Secretary Shri Kartikey Shah for reposing trust and confidence in me by inviting me to be the editor of I.T. Mirror, Mouth piece of Income Tax Bar Association.

As you are aware there have been many changes in the Income Tax Act by way of amendments to the Finance Act and also by issuing circulars for time to time, the CBDT also brings tots of changes in the administration of income tax act. We are very to note that CBDT has become very proactive and positive to the problems of the tax payers. Most of the circulars issued by CBDT are for the benefit of tax payers.

The Finance Act 2016 has been passed by the parliament which has as good as 55 amendments. Though there are so many amendments, the finance act does not address concerns expressed by the professional organization and other stack holders. The concept of levy of concealment of penalty on under reporting and misreporting is going to become headache for the tax payers in general and professionals, We have experience that whenever any addition is made invariably concealment penalty is initiated and imposed. Nothing has been done to rectify the situation. The present Government's efforts to mitigate the tax litigation are laudable. However, certain provisions of the finance act 2016 may give fresh lease of life to litigation. The new concept of levy of penalty falls under this category.

Now real challenge lies before the Government to bring out GST Act with the consensus of all States and make it effective from 01 /04/2017. It is expected that most services will become costlier in short run and final impact on common man largely depends on final GST rate. Model law on GST hosted on Govt. website requires lot of changes and if implemented in same manner will result in lot of litigation and turmoil. Hence, it requires effective representation to be made by various stakeholders.

In this issue I intend to cover interesting articles by experts in profession.

In future we shall cover important articles and useful Judgments.

I am sure this issue of I.T. Mirror will be of immense help to the professional brothers in their day to day practice.

President's Communication

Dhruven V. Shah
President

Respected Seniors and dear professional colleagues

A very warm greeting to all of you.

I T Mirror is in real sense mouthpiece of our association as it brings us updates from Experts and latest developments in practising law. This year we have decided to adopt more technological approach and to publish I T Mirror in soft version to members via E-mail. In this way Association can be a part of “Green Earth” drive and knowledge can be reached to members instatntly.

At this juncture I must thank Chairman, Co-chairman and members of I T Mirror committee for their constant effort to make this issue possible. I appreciate kind guidance of Chairman CA Kaushik D. Shah for the execution of I T Mirror. I appreciate efforts of Article writers for their valuable input. I must acknowledge wholehearted support of my committee members and Invitee members specially Hon. Secretary Kartikey B. Shah for execution on time.

As GST is on a roll we can assume clear intention of present Government of “One Nation, One Tax.” It may be recognised as a technological revolution in the areas of taxation. It will surely open up new dimensions for the Tax professionals to work upon. Though importance of Direct Taxes will not diminish GST will surely change the whole methodology and pattern of traditional tax practise. Present committee has decided that I T Mirror shouldn't remain limited to Direct taxation and it should include a good articles on Indirect taxation as well which supports our members to update themselves in their new area of profession. As a part of decision we have covered one article on FAQs on GST which will surely help you to understand the intricacies of subject.

As this is a start of I T Mirror soft version trend for the year 2016-2017 we intend to serve you maximum for the remaining year. We always appreciate any updates, news etc. from our members.

STAY OF DISPUTED TAX

Legal position with regard to grant of stay of disputed demand and recent instruction issued by CBDT dated 29/02/2016

Paper for I T Mirror

BY
UPENDRA J. BHATT
ADVOCATE

1. Preamble

It is our practical experience in our day to day practice that only 1% of cases are selected for scrutiny and high pitched assessments are made in many cases and consequently, huge demands are raised against the assesses. It is also experienced that on the basis of such high pitched assessments, the Assessing officers/Additional CITs/ CITs take coercive action for collection of such arbitrary demands.

When stay application is filed by the assessee, such stay application is rejected without passing a speaking order. Stay is granted if 50% of such disputed demand is paid and for the remaining 50% demand, installments are granted. Generally 6 to 9 Monthly installments are granted for balance outstanding demand. Thus before the appeal is heard by CIT(A), attempt is made to recover the entire disputed demand.

Due to policy of CBDT of fixing hearing of appeals after one year, appeals are not heard for 1 year and thus at one end there is pressure of recovery from the I T Authorities and on the other hand, the appeals are not heard by CIT(A). This puts the assesse into helpless position.

CIT(A) are working under CBDT so they cannot function independently. CBDT fixes certain quota for disposal of cases and also issued guidelines for taking certain high demand cases on priority after obtaining permission of Principal CCIT / CCIT. Thus on account of this approach of CBDT, justice is delayed.

In this paper, I have tried to deal with recovery proceedings in question – answer form as well as CBDT recent instruction dated 29/02/2016. This paper is divided in

two parts. Part 'A' deals with legal position which covers judgments, Instructions etc. and Part 'B' deals with CBDT instruction dated 29/02/16.

Hope that this paper will be useful to my professional friends.

Q.1 Under which section of the Income Tax Act, the assessing officer can grant stay of disputed tax ?

A.1 Under section 220(6), assessing officer has power to treat the assessee not in default for not making payment of disputed tax even though the time of payment of tax has expired till the appeal is disposed of. While granting stay, assessing officer can impose such condition/conditions as he may think fit looking to the facts and circumstances of the case.

Q.2 What is the time limit for payment of tax ? Whether this time can be curtailed ?

A.2 Time limit for payment of tax is 30 days as per section 220. This time can be curtailed by the assessing officer if he has reason to believe that it will be detrimental to revenue if the full period of 30 days is allowed. In such cases, assessing officer will take previous approval of JCIT. In those cases tax will be payable as per time prescribed in the notice of demand issued u/s. 156.

i. In the case of **GUJARAT STATE ENERGY GENERATION LTD. vs. ACIT** reported in **358 ITR 254 Gujarat** it was held that, 30 days time for payment of tax cannot be reduced unless there is belief that full period would be detrimental to the interest of revenue.

* Mere discussion in a meeting of several high ranking tax officers checking out a certain action plan for timely recoveries would not satisfy such requirement, which must be observed individually.

ii. In the case of **AMUL RESEARCH & DEVELOPMENT ASSOCIATION vs. ITO** reported in **359 ITR 549 Gujarat** it was held by the Honorable Gujarat High Court that non meeting of the budgetary deficit of the Central Government could not be ground to reduce payment of 30 days considering it to be detrimental to the cause of revenue.

In this case even the permission of JCIT was not obtained. It was held that recovery

proceedings were not valid. Recovery proceedings are Garnishee proceedings and in such proceedings, assessee must be given an opportunity of being heard.

It was further held by the court that though appeal was preferred by the assessee, there was no bar to issue of writ.

Q.3 Which are the instructions for grant of stay on which the department is relying and the assessee is relying ?

A.3 The department is always relying on instruction no.1914 contents of which is reproduced here under :

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

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

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

i. The demand is yet not due

ii. The demand is stayed by any Court, Tribunal, Settlement commission

iii. The demand which is referred to CBDT for write off

iv. Where the certificates are issued to TRO's in such cases TRO's will recover the demand

v. Stay application to be disposed of within 2 weeks and the assesses to be informed

vi. When the stay application is filed to Deputy CIT/CIT/Chief Commissioner, they should dispose of such stay application within maximum 2 weeks under intimation to the assessee and assessing officer.

vii. Generally the stay applications are to be disposed of by assessing officer. Only in exceptional cases, higher authorities should interfere when they feel that the assessment order is not properly framed and the assessee will face problems on account of such orders.

* In practice, this is not followed

B. Specific directions given in this instruction are as under

i. If there is no reasonable cause to grant stay to the assessee, simply because an appeal is filed, the stay should not be granted.

ii. If the issue on which addition is made by the assessing officer is decided in favour of the assessee by appellate authority, in such case, stay should be granted.

iii. The issue involved in the case of the assessee, if there are different judgments of different courts but not from the jurisdictional High court under which the assessee falls and on the basis of some judgment the addition is made in the case of the assessee, the stay should be granted to the assessee.

iv. If the issue involved in the case of the assessee is decided in favour of the assessee by jurisdictional High court but the same is not accepted by the I T department, in such case stay should be granted.

v. The assessing officer can impose certain conditions at the time of granting stay like taking security from the assessee, giving installments, taking assurance from the assessee that he will co-operate in early disposal of appeal, to adjust future refunds against outstanding demand etc.

vi. Maximum 18 installments to be granted to the assessee for recovery of disputed tax.

vii. Stay application should be decided by passing a speaking order.

viii. When the stay is granted by ITAT, such matters should be heard out of turn and for that, departmental representative to make necessary efforts.

ix. On receipt of appeal order, appeal effect to be given within 2 weeks

While the assessee is relying on Instruction no.96 contents of which is reproduced here under

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

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

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

The then Deputy Prime Minister had observed as under :

"…Where the income determined on assessment was substantially higher than the returned income, say, twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeals, provided there were no lapse on the part of the assessee."

The Board desires that the above observations may be brought to the notice of all the Income Tax Officers working under you and the powers of stay of recovery in such cases up to the stage of first appeal may be exercised by the Inspecting Assistant Commissioner / Commissioner of Income Tax.

B. Circulars issued by CBDT to grant stay

i. <u>Circular no.530 dated 06/03/89 reported in 176 ITR 240 Statute</u>

Assessing officers were directed by this circular that when the appeal is filed by the assessee against the assessment order, stay of disputed tax should be granted by the assessing officer looking to the facts of the case and by imposing certain conditions till the appeal is decided. It was directed in this circular to grant stay in the following circumstances.

- The issue on which addition is made, where there are different views by different high courts

or

- The issue is decided in favour of the assessee by jurisdictional high court but the same is not accepted by the department

or

- The issue on which addition is made, the same is decided in favour of the assessee by appellate authority or court

ii. <u>Circular no.589 dated 16/01/91 reported in 187 ITR 79 Statute</u>

Assessee financially sound not relevant. Stay to be granted

In this circular it was directed to consider the above circular i.e. Circular no.530, as well as it was further directed to grant stay to the assessee by passing a speaking order. At the time of granting stay, whether the assessee is capable enough to make the payment of disputed tax is not to be taken into consideration.

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

iii. Instruction no.96 was again repeated by new Instruction no.977 dated 13/07/96 (XXII/I/54)

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

appellate proceedings.

Q.4 Which instruction out of the above two is still holding the field i.e. Instruction no.96 and Instruction no.1914 ?

A.4 Instruction no.96 is still holding the filed because it was issued on the basis of assurance given by the Minister from the floor of the Parliament and on account of this assurance, this instruction was issued.

CBDT chairman is not above the parliament so he cannot cancel the assurance given by the then Minister from the floor of the Parliament. As per view of **Shri T. N. Pandey (Ex. Chairman CBDT 297 ITR page1 Journal on page 6)** in the article of stay of demand of disputed assessments it has been mentioned that,

"If instruction no.96 is not followed, the I T authorities are committing contempt of parliament. The Central Board of Direct Taxes cannot unilaterally issue circulars which are contrary to instruction no.96 dated 21/08/1969 issued with the approval of the informal consultative committee of parliament and the then deputy prime minister / finance minister."

ICICI PRUDENTIAL LIFE INSURANCE CO. LTD. V/s. CIT reported in 272 CTR 82 Bombay

In this case identical issue in dispute was decided in favour of assessee in the earlier years and still the assessing officer demanding 50% of total demand with a non speaking order, therefore order of assessing officer was set aside.

Q.5 Whether instruction no.96 has been tested by judicial authorities?

A.5 Yes in the following decisions, instruction no.96 was considered and I.T. Authorities were directed to consider instruction no.96 and to take appropriate action. Short summery of judgments is given here under :

(1) 182 ITR 413 Gujarat

VIKRAMBHAI PUNJABHAI PALKHIWALA vs. S.M. AJBANI, RECOVERY OFFICER & ORS.

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

(2) **217 ITR 641 Allahabad**

MRS. R. MANI GOYAL vs. COMMISSIONER OF INCOME TAX & ANR.

In this case returned income was Rs.11710/-. The income was enhanced and the tax payable was worked out at Rs.3304450/- i.e. more than several times of the income returned.

It was held by the Honorable Court that recovery of such huge demand is opposed to principles of good conscious and fair play.

(3) **223 ITR 192 Rajasthan**

Maharana Shri Bhagwat Singhji of Mewar v. Income-tax Appellate Tribunal

It was directed not to force the assessee to deposit 25% of the disputed tax.

(4) **267 ITR 60 MP**

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

In this case, directions were given to the appellate authorities to decide appeal expeditiously.

(5) **303 ITR 115 Madras**

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

In this case, return showing **loss** was filed. Harsh assessment was made and demand of Rs.14025762/- was raised.

It was held by the court that, instruction no.96 was squarely applicable. Without giving any factual finding and simply by writing, “No valid reason has been stated for stay of demand” was not sufficient. The petitioner was entitled to stay for collection of tax till order was passed in appeal subject to making certain payments.

(6) **307 ITR 103 Delhi**

Valvoline Cummins Limited V/S. SCIT and Others

In this case returned income was Rs.7.5 crore and which was assessed at Rs.58.68 crore.

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

after deducting 1 crore paid.

(7) 323 ITR 305 Delhi

SOUL V/s. DCIT

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

(8) 324 ITR 247 Delhi

Taneja Developers And Infrastructure Ltd. V/s. ACIT

And Others Date of Order : 24/02/09

In this judgment instruction no.96 was considered.

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

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

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

(9) 346 ITR 375 Rajasthan

246 CTR 113 Rajasthan Date of order 15/12/11

MAHESHWARI AGRO INDUSTRIES vs. UNION OF INDIA & ORS

Details of this judgment is given in reply to Que.No.7.

(10) As the assessing officers were insisting for payment of 50% of disputed tax to grant stay, CBDT issued instruction which is produced here under.

New Delhi, Dated: 29th February, 2016

Office Memorandum

Sub: Partial modification of Instruction No. 1914 dated 21.03.1996 to provide for guidelines for stay of demand at the first appeal stage.

1. Instruction No. 1914 dated 21.03.1996 contains guidelines issued by the Board regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand.

2. In part 'C' of the Instruction, it has been prescribed that a demand will be stayed only if there are valid reasons for doing so and that mere filing of an appeal against the assessment order will not be a sufficient reason to stay the recovery of demand. It has been further prescribed that while granting stay, the field officers may require the assessee to offer a suitable security (bank guarantee, etc.) and/ or require the assessee to pay a reasonable amount in lump sum or in installments.

3. It has been reported that the field authorities often insist on payment of a very high proportion of the disputed demand before granting stay of the balance demand. This often results in hardship for the taxpayers seeking stay of demand.

4. In order to streamline the process of grant of stay and standardize the quantum of lump sum payment required to be made by the assessee as a pre-condition for stay of demand disputed before CIT (A), the following modified guidelines are being issued in partial modification of Instruction No. 1914:

(A) In a case where the outstanding demand is disputed before CIT (A), the assessing officer shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category discussed in pars (B) hereunder.

(B) In a situation where,

(a) the assessing officer is of the view khat the nature of addition resulting in the disputed demand is such that payment of a lump sum amount higher than 15% is warranted (e.g. in a case where addition on the same issue has been confirmed by appellate authorities in earlier years or the decision of the Supreme Court /or jurisdictional High Court is in favour of Revenue or addition is based on credible evidence collected in a search or survey operation, etc.) or,

(b) the assessing officer is of the view that the nature of addition resulting in the

disputed demand is such that payment of a lump sum amount lower than 15% is warranted (e.g. in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.), the assessing officer shall refer the matter to the administrative Pr. CIT/ CIT, who after considering all relevant facts shall decide the quantum/ proportion of demand to be paid by the assessee as lump sum payment for granting a stay of the balance demand.

(C) In a case where stay of demand is granted by the assessing officer on payment of 15% of the disputed demand and the assessee is still aggrieved, he may approach the jurisdictional administrative Pr. CIT/ CIT for a review of the decision of the assessing officer.

(D) The assessing officer shall dispose of a stay petition within 2 weeks of filing of the petition. If a reference has been made to Pr. CIT/ CIT under para 4 (B) above or a review petition has been filed by the assessee under para 4 (C) above, the same shall also be disposed of by the Pr. CIT/ CIT within 2 weeks of the assessing officer making such reference or the assessee filing such review, as the case may be.

(E) In granting stay, the Assessing Officer may impose such conditions as he may think fit. He may, inter alia,-

(i) require an undertaking from the assessee that he will cooperate in the early disposal of appeal failing which the stay order will be cancelled;

(ii) reserve the right to review the order passed after expiry of reasonable period (say 6 months) or if the assessee has not cooperated in the early disposal of appeal, or where a subsequent pronouncement by a higher appellate authority or court alters the above situations;

(iii) reserve the right to adjust refunds arising, if any, against the demand, to the extent of the amount required for granting stay and subject to the provisions of section 245.

5. These instructions/ guidelines may be immediately brought to the notice of all officers working in your jurisdiction for proper compliance.

(A.K. Sinha)
Director (ITCC)

Q.6 Which issues are to be taken by the assessee in stay application ?

A.6 While drafting the stay application, following points are to be incorporated in the stay application.

a. Brief history of the assessee regarding nature of activities carried out by the assessee.

b. Assessment history i.e. details called by the assessing officer and its compliance made with necessary evidences to be mentioned.

c. History of previous assessments where the order was passed u/s.143(3) and if addition was made then on what ground.

d. Attitude of the assessee in payment of taxes and finalizing assessment proceedings.

e. If appeal is filed against the assessment to CIT(A), points raised in appeal. It is advisable to attach copy of appeal memo filed before the CIT(A).

f. If the amount is required to be paid, financial difficulty, genuine hardship and irreparable loss going to cause if the amount was recovered immediately.

g. If the assessee has relied on any decision and the decision is identical to the issue involved in the case of the assessee, it should be mentioned that though there is no financial difficulty but there is a strong prima facie case on merits.

h. If the issue involved in the case of the assessee is decided in favor of the assessee by appellate authority in the previous year/years, then instruction no.1914 will be directly applicable in the case of the assessee. This fact should be brought to the notice of the assessing officer.

If the issue is decided in favour of another assessee on same facts, stay should be granted and decision given in the case of **KALAPET PRIMARY AGRICULTURAL CO-OP. CREDIT SOCIETY LTD. V/s. ITO reported in 378 ITR 658 Madras** should be brought to the notice of the assessing officer.

i. If the assessed income is substantially higher than the returned income, instruction no.96 relied in case of **Valvoline Cummins Ltd v/s. DCIT reported in 307 ITR 103 Delhi** should be brought to the notice of the assessing officer.

j. Tax, interest and the figures in the assessment order must be verified and if there is any mistake, it should be brought to the notice of the assessing officer by making application u/s.154 of the Income Tax Act and it may be also brought to the notice of the assessing officer with a request not to initiate recovery proceedings till rectification is carried out.

k. A request should be made to give personal hearing.

Q.7 Whether stay application can be filed to CIT(A) ?
(Reply of this question is given in detail as it is important and necessary).

A.7 Yes. It can be filed to CIT(A) also. It was held in the case of **Maheshwari Agro Industries V/s. Union of India & Ors reported in 346 ITR 375 Rajasthan** that the tendency of making high-pitched assessments by the AOs is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice and sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro revenue manner. It may be like execution of death sentence, whereas the accused may get even acquittal from higher appellate forums or courts. Therefore such powers under sub-s (6) of s.220 also have to be exercised in accordance with the letter and spirit of instruction no.96, dt. 21st August 1969, which even now holds the field and its spirit survives in all subsequent CBDT circulars and undoubtedly the same is binding on all the assessing authorities created under the Act.

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

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

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

Similar view was expressed in the case of **Gera Realty Estate V/s. CIT And Others reported in 368 ITR 366 Bombay** that CIT(A) has inherent jurisdiction to deal with application for stay. CIT(A) directed to dispose of the stay application expeditiously. In the mean time, the revenue was not to adopt coercive proceedings against the assessee till the disposal of its stay application by CIT(A).

Q.8 When stay application is pending whether coercive measures of recovery should be taken by the assessing officer ?

A.8 No. First of all the assessing officer has to dispose of stay application and there after a reasonable period should be given to the assessee to contact higher authorities. In such cases decision given in the case of **UTI Mutual Fund v. Income-tax Officer reported in 345 ITR 71 Bombay (A.Y.09-10)** is worth mentioning here.

(i) It was held in this case that this court laid down certain guidelines in the case of **KEC International Ltd. V/s. B.R. Balkrishnan and Others** should be borne in mind by the I T Authorities for effecting recovery of disputed demand. It was directed in that guideline that,

No recovery of tax should be made during the period allowed for filing an appeal against the impugned assessment order or appellate order. No recovery of tax should be made during the pendency of stay petition moved by the assessee and for a reasonable period thereafter, to enable the assessee to move higher forum.

(ii) It was held in the case of **Khandelwal Laboratories Pvt Ltd v/s. DCIT reported in 383 ITR 485 Bombay** that, if stay application is filed by the assessee it is right to be heard. Till stay application is disposed of, recovery is not permissible. AO withdrew part of attached amounts from banks. It was held that act of AO was without jurisdiction and unlawful. Garnishee notice on assessee's bankers was quashed. Directions were issued to deposit withdrawn amount and deposit the same till stay application was disposed.
KEC International 251 ITR 158 Bombay
UTI Mutual Fund 354 ITR 71 Bombay followed

(iii) It was held in the case of **Piramal Management Pvt Ltd v/s. DCIT reported in 383**

ITR 581 that, the assessee filed two stay applications for tax and penalty. One acknowledgment was issued by Assessing Officer buy other acknowledgment was not issued which was issued only after notice of writ by assessee. Conduct of assessing officer was not proper. The court directed CIT to ensure fair manners of officials. It was further directed that assessee will be heard by different AO.

Q.9 What are the parameters for grant of stay?

A.9 For grant of stay, parameters were laid down by Mumbai High Court in the case of **KEC International Ltd. V/s. B.R. Balkrishnan and Others reported in 251 ITR 158 Mumbai.**

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

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

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

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

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

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

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

The court gave direction to the Assessing Officer to dispose of the stay

application of the assessee in accordance with law.

Q.10 Whether the assessing officer can reject stay application and attach the bank account on the same day ?

A.10 Legally the assessing office can do so but natural justice demands that the assessee must be given reasonable time to approach I T Authority to either request for installments or to approach higher authority.

In the case of **1. SONY INDIA P. LTD. 2. SONY MOBILE COMMUNICATIONS (INDIA) P. LTD. v/s. ACIT** reported in **363 ITR 330 Delhi.**

Stay application of the assessee was rejected and garnishee order was passed on the same day. It was held that though it was legal but not in consonance with principles of fair day.

* There was element of impropriety in the action of assessing officer. Assessing officer ought to have waited for reasonable period before taking coercive steps to recover amount. Applicant may need some time to make arrangements to pay the entire demand or may request for installments. In this case on the same day of rejection of application, amount was ordered to the bank for payment to the assessing officer.

Q.11 Whether prior notice before attachment of bank account is required?

A.11 Yes. This was the view in the case of **Purnima Das V/s. Union of India reported in 329 ITR 278 Calcutta.**

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

Q.12 Whether CIT(A) has power to grant stay ?

A.12 Yes. In the following cases it was held that CIT(A) has power to grant stay.

(1) Purushothaman (V.N.) v. Agricultural Income-tax Officer 149 ITR 120 Kerala

(2) **Prem Prakash Tripathi v. Commissioner of Income-tax**
208 ITR 461 Allahabad

(3) **Kesav Cashew Co. v. Deputy CIT**
210 ITR 1014 Kerala

(4) **Tin Manufacturing Co. of India v. Commissioner of Income-tax**
212 ITR 451 All

(5) **Debasish Moulik v. Deputy CIT**
231 ITR 737 Cal

(6) **J K Industries Ltd V/s. CIT**
238 ITR 820 Calcutta

(7) **Bongaigaon Refinery and Petro-Chemicals Ltd. v. Commissioner of Income-tax**
239 ITR 871 Gauhati

(8) **JAGADISH N. HINDUJA vs. COMMISSIONER OF INCOME TAX & ANR.**
59 DTR 333 Karnataka

(9) **ACIT vs. GR INDIA INDUSTRIAL PVT. LTD.**
358 ITR 410 Gujarat

(10) **Haresh Ravji Majithiya V/s. ACIT**
227 Taxman 211 Bombay HC

(11) **Nikhil Kakar V/s. ITO**
225 Taxman 196
42 Taxman.com 279 Bombay HC

Q.13 Whether ITAT has power to grant stay ?

A.13 Yes. ITAT has power to grant stay as held in the case of

i. **INCOME TAX OFFICER vs. M.K. MOHAMMED KUNHI reported in 71 ITR 815 SC.**

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

ii. In the case of **Bhoja Reddy v. Commissioner of Income-tax reported in 231 ITR 47 Andhra Pradesh,** it was held that the power of Tribunal to grant stay was ancillary to appellate jurisdiction.

iii. Similar view was expressed by Bombay ITAT in the case of **RPG Enterprises Limited V/S. DCIT reported in 251 ITR 20.**

Q.14 Whether ITAT has power to grant stay u/s.254 beyond 365 days?

A.14 Section 254 of the I T Act deals with orders of Appellate Tribunal. As per section 254(2A) proviso, ITAT may pass an order of stay after considering the merits of the application. This stay will be in operation not exceeding 180 days from the date of such order and within the period of 180 days ITAT shall dispose of the appeal.

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

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

There are different views by different courts on this issue. Decisions given in favour of the assessee and against the assessee are as under :

A. Decisions in favour of assessee

(1) 240 CTR 265 Bombay

COMMISSIONER OF INCOME TAX vs. RONUK INDUSTRIES LTD.

(2) 138 TTJ 257 (SB) ITAT Spe. Mumbai

TATA COMMUNICATIONS LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX

(3) 150 TTJ 661 Delhi

Qualcomm Incorporated V/s. Assistant Director of Income Tax

(4) 81 ITR 397 Calcutta

HINDUSTHAN RUBBER WORKS LTD. vs. INCOME TAX OFFICER & ORS.

(5) 365 ITR 376 Allahabad

ADOBE SYSTEMS INDIA P.LTD V/S. JOINT CIT

Power to grant stay. Limited to total 365 days from date of first order. Judgment reserved by Tribunal. Stay to be continued till pronouncement of order. Direction to Tribunal to dispose of appeal expeditiously.

(6) 376 ITR 23 Gujarat

DCIT V/s. VODAFONE ESSAR GUJARAT LTD. AND ANOTHER

In this case it was held that ITAT has power to stay of demand beyond period of 365 days. In such cases ITAT to pass a speaking order on each application and record satisfaction. If revenue is aggrieved by such extension in a particular case, revenue can challenge in particular case before High Court.

(7) 376 ITR 51 Delhi

NEW DELHI TELEVISION LTD V/s. Deputy CIT

In this case it was held that, ITAT has power to grant stay beyond 365 days. Assesse's appeal was listed for hearing but not taken up for reasons not attributable to assessee. It was directed that stay continued till disposal of appeal.

(8) 376 ITR 87 Delhi

PEPSI FOODS P. LTD. V/s. ACIT

It was held in this case that, ITAT has power to grant stay. Amendment in Income Tax Act from Finance Act 2008 empowering Tribunal to grant stay if delay was not attributable to assessee. Amended provision violates article 14 of constitution of India. This provision was struck down by the High Court and it was held that Tribunal has power to grant extension of stay beyond 365 days in deserving cases.

B. Decisions against the assessee

(1) 252 CTR 281 Karnataka

CIT vs. ECOM GILL COFFEE TRADING PVT. LTD. & OTHERS

In this case it was held that, legislature stipulate time of 365 days in the third proviso to section 254 (2A) within which the stay order granted by Tribunal can operate. The Tribunal has no power to pass order granting stay beyond the period of 365 days.

C. Practice approach of the court

(1) 362 ITR 215 Delhi

266 CTR 337

CIT V/s.

1. Maruti Suzuki (India) Ltd.

2. Income Tax Appellate Tribunal & Another

It was held in this case that, power of ITAT to grant stay is limited to 365 days from 1st order of stay. If there is any delay on the part of the Department, the Tribunal can conclude the hearing and decide appeal meanwhile department can make a statement that no coercive steps will be taken for recovery. Assessee can approach High Court for grant of stay.

Q.15 While rejecting stay application, what stand is taken by the department ?

A.15 While rejecting stay application, the department is relying on decision given in the case of **ASSISTANT COLLECTOR OF CENTRAL EXCISE vs. DUNLOP INDIA LTD. & ORS.** reported in **154 ITR 172 SC.**

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

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

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

Q.16 It has been experience that the department is attaching property belonging to the wife of the assessee as if the property was purchased by the assessee in the name of his wife. Whether the stand of the department is correct ?

A.16 No. Without proving that the cost of acquisition was paid by husband and the property was purchased in the name of wife, property cannot be attached.

i. As held in the case of **TRO v/s. Gangadhar Vishvanath Ranade reported in 234 ITR 188 S.C.**

It was held that, Power of TRO is limited to property in the name of defaulter. Property in name of wife of defaulter was attached by I T Department on the ground that it actually belonged to defaulter assessee. It was held that action of I T Department was not valid as per section 222 of the I T Act.

ii. As held in the case of **Sancheti Leasing Company Ltd. and Another V/s. ITO and Another** reported in **246 ITR 814 Madras** that ITO cannot declare a transfer to be void. Income tax authorities must file a suit to have transaction declared void.

iii. As held in the case of **Jaymac Lasetron P. Ltd. Vs. Commissioner of Income-tax Munir Ahmed Vs. Union of India reported in 286 ITR 453 Calcutta** that revenue has no power to declare a transfer to be void. Only the competent Civil Court has power to declare a transfer to be void.

iv. As held in the case of **Shamim Bano G. Rathi Vs. Oriental Bank of Commerce Ltd.** reported in **306 ITR 234 Bombay that** there is no adjudicatory machinery to declare transfer fraudulent. Appropriate proceedings to be taken before Civil Court.

v. **Karsanbhai Gandabhai Patel V/s. TRO reported in 362 ITR 374 Gujarat**
In this case it was held that TRO has no power u/s.281 to declare a transfer to be void. Only civil suit would lie.

vi. It was held in the case of **Bank of India V/s. Union of India and Others** reported in **167 ITR 668 Delhi** that property of wife cannot be attached unless it is proved that the property belonged to the assessee in default and his wife was a benami holder.

Q.17 If there is outstanding tax demand payable to the State as well as to the Income Tax department, who gets priority ?

A.17

(i) This issue was decided in the case of **Dena Bank V/s. Bhikhabhai Prabhudas Parekh And Co. and Others** reported in **247 ITR 165 S.C.**
It was held in this case that Sales Tax law providing for recovery of arrears of sales

tax, penalty or other amount in the same manner as arrears of land revenue. Thus the effect was, that State acquires precedence over secured creditors. Thus though the bank has obtained decree and was authorized to sale mortgage property, the arrears due to the state to be paid first and only thereafter the bank could adjust the remaining amount.

(ii) CIT V/s. KARNATAKA STATE INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION LTD. reported in 378 ITR 234 Karnataka

It was held in the case of this State Financial Corporation that against the sale proceeds, first payment will be given to secured creditors and remaining amount if any to be handed over to TRO.

Relied 234 ITR 188 SC. Gangadhar

Q.18 Whether the Income Tax department gets priority over secured creditors ?

A.18 No. It was held in the case of **Syndicate Bank Vs. Official Liquidator, Wester Works Engineers Ltd., Oriental Bank of Commerce Vs. Official Liquidator, Western Works Engineers Ltd.** reported in **242 ITR 281 Bombay** that secured creditors and workers have priority over tax department.

In the case of **ACIT V/S. Official Liquidator of Minal Oil and Industries Ltd. and Others** reported in **290 ITR 643 Gujarat** it was held that, I.T. Dep. cannot claim propriety over such secured creditors.

Similarly in the case of **KARNATAKA STATE INDUSTRIAL INVESTMENT DEVELOPMENT ORPORATION LTD. vs. CIT** reported in **259 CTR 485 Karnataka** it was held that, if the property is mortgaged, TRO cannot attach this property.

Similarly in the case of **AXIS BANK LTD. vs. COMMISSIONER OF INCOME TAX & ANR** reported in **259 CTR 492 P&H** it was held that secured creditor has preference over the dues of the Income Tax Department in respect of the secured assets.

Q.19 If the property is purchased in auction from the assessee who is a defaulter, what are the rights of bona fide purchaser ?

A.19 Right of bona fide purchaser is protected as held in the case of **Janatha Textiles**

Vs Tax Recovery Officer reported in **301 ITR 337 S.C.**

It was held in this case that, if there is auction of property of defaulter assessee, right of independent bonafide purchase to be protected by court.

Q.20 While rejecting stay application, it is noticed that the authority passing order rejects stay application without passing a speaking order, without giving opportunity of being heard, without taking judicious view and directing to pay 50% of disputed tax. In such cases which authorities should be brought to the notice of assessing officer?

A.20 In the circumstances mentioned above, the following decisions should be brought to the notice of assessing officer looking to the facts of case.

(1) 43 ITR 562 Assam

HARDEODAS JAGANNATH vs. INCOME TAX OFFICER

Opportunity of hearing to be given to the assessee.

(2) 139 ITR 900 MP

SETH GOPALDAS PALIWAL vs. WEALTH TAX OFFICER & ANR.

Stay petition dismissed without giving reasons and hearing. A O directed to give hearing.

(3) 175 ITR 428 Madras

Sri Balaji Trading Co. v. CTO (Deputy)
M.C. and Co. v. Appellate Assistant Commissioner
Thangaraj (S.M.) v. State of Tamil Nadu
Saravana Oil Mills v. Appellate Assistant Commissioner
New Steel Industries v. Appellate Assistant Commissioner
Rajagopal (G.) v. State of Tamil Nadu
Gurunathan (T.) v. Collector of Customs (Addl)

Discretion to grant stay must be exercised judiciously by passing a speaking order.

(4) 183 ITR 532 Calcutta

DUNLOP INDIA LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX & ORS.

Discretion to grant stay should be exercised in reasonable manner and reasons must be given.

(5) **204 ITR 480 P&H**

Aggarwal Rice and General Mills v. Commissioner of Income-tax

No opportunity of being heard given and no speaking order passed. A.O. Directed to give opportunity of being heard.

(6) **213 ITR 299 Allahabad**

Shiv Shakti Rubber and Chemicals Works v. Income-tax Appellate Tribunal

Assessing Officer directed to act in judicial manner and to give justice to the litigant.

(7) **230 ITR 705 Delhi**

Teletube Electronics Ltd. Vs. Commissioner of Income-tax

Assessing Officer directed to give opportunity to the assessee and pass a speaking order.

(8) **266 ITR 62 Allahabad**

Shivangi Steels (P.) Ltd. V/S. ACIT and Another

Assessing Officer directed to decide stay application in accordance with law and discretion given to I T Authority to be exercised judiciously.

(9) **301 ITR 233 Karnataka**

M. Shivanna and another V/S. DCIT

Rejection of stay application without giving reasons was not valid.

(10) **351 ITR 160 Bombay**

Deloitte Consulting India Pvt Ltd V/s. ACIT

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

(11) **372 ITR 582 Gujarat**

HITECH OUTSOURCING SERVICES V/s. ITO

Recovery of tax. Stay. Authority to prima facie consider merits, balance of convenience and irreparable injury to the assessee. Recovery authority also record reasons and then conclude whether stay should be granted and if so on what condition.

(12) **385 ITR 82 Gujarat**

M D Infra Developers V/s/DCIT

It was held in this case that, assessing officer must consider all relevant factors and pass speaking order. In this case high pitched assessment was framed. Assessee filed stay application. There was no order by Assessing Officer in response to application for stay. Stay application was also rejected by principal commissioner and coercive measure were initiated during pendency of application of stay. Order and coercive measure were not valid.

(12) **237 CTR 153 Mumbai**

PARAMOUNT HEALTH SERVICES (TPA) (P) LTD. & ORS. vs. ASSISTANT COMMISSIONER OF INCOME TAX & ORS.

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

(13) **249 CTR 190 Bombay**

UTI Mutual Fund vs. INCOME TAX OFFICER and Ors.

In this judgment it was held that, revenue made unfortunate and hasty attempt to make a recovery of demand against the petitioner without enabling it to take reasonable recourse to the remedies available in law. Stay application rejected without hearing the assessee, considering the submission. Revenue directed not to take any coercive steps, pending disposal of appeal and for six weeks thereafter.

CBDT issued instructions to the assessing officer to recover 15% of disputed tax instead of insisting for 50% of disputed tax. This circular is already given in reply to Que. No.5 in this paper.

Q.21 Whether courts have taken strict view for taking harsh action of recovery proceedings i.e. without affording opportunity, attachment of bank account and recovery from bank account ? (Reply of this question is given in detail as it is important and necessary.)

A.21 Yes. The courts have taken strict view which could be noticed from the wordings of judgment given

i. In the case of **Mahindra and Mahindra Ltd. v. Assessing Officer reported in 295 ITR 42 Bombay.** Certain portion of the judgment is reproduced.

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

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

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

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

Stricture against the Joint Commissioner of Income Tax Act is worth reading.

"The joint commissioner Mr J R Dahad, respondent no.2 who was present in the court and it was made clear that this order has been pronounced loudly in the open court and learned council for the respondent has fully understood the above order and joint commissioner Mr J R Dahad has also fully under stood the above order. Notice of contempt was issued for prima facie knowingly and willfully disobeying the two order of Bombay High Court."

ii. Another judgment was given in the case of **Director of Income Tax (Exemption) V/s. ITAT** reported in **265 CTR 337 Bombay.**
This is also a land mark decision in which it was held that, under haste of A O in

recovering a sum of Rs.159.84 Crore was not only contrary to the binding decision of the court but also shocking to the judicial conscience. The entire action appears to have been directed to make the Tribunal and assessee helpless so that no relief can be granted in favour of assessee. There is no reason to interfere with the order passed by ITAT directed the revenue to refund Rs.159.84 Crores to the assessee.

Q.22 Can the assessing officer without disposing stay application can proceeds for recovery of outstanding demand ?

A.22 No. The assessing officer is required to decide the stay application by passing a speaking order.

In the following cases directions were issued by Courts not to make recovery till stay application was decided.

(1) 256 ITR 698 Gauhati

Bongaigaon Refinery and Petro Chemicals Ltd. V/S. CIT and Others

Sometimes even though stay application is filed to appellate authorities, the I T authorities insist for payment of disputed tax. For such cases, this is the excellent judgment. It was held by the court that demand must be stayed until application is considered and order passed by Tribunal.

(2) 285 ITR 419 Bombay

Coca Cola India P. Ltd. v. Additional Commissioner of Income-tax

Obiter Dicta : Attaching the bank account of the petitioner even before communicating the order passed on the stay application is totally high handed.

(3) 351 ITR 302 Bombay

261 CTR 410

Society of the Franciscan (Hospitaller) Sisters V/s. DCIT

It was held by the court that, pending appeal and stay application of asseesee, recovery of demand by revenue without giving opportunity of hearing to assessee is not justified.

Q.23 Whether director can be held liable for the disputed tax in the case of the company ?

A.23 Yes. As per section 179 which deals with liability of a director in a private company.

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

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

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

It was held in the case of **Ram Prakash Singeshwar Rungta v/s. ITO reported in 370 ITR 641 Gujarat that,** when the return is not filed by company and nothing is mentioned in the assessment order regarding gross negligence, misfeasance or breach of duty by directors, the tax cannot be recovered from the Director. Order passed u/s.179 to recover tax from the Director was not valid.

Q.24 Whether the tax can be directly recovered from the Director instead of from the company ?

A.24 No. Liability of director arises only when tax cannot be recovered from Company.

a. 268 ITR 302 Calcutta
Dipak Dutta and another V/S. Union of India and Others
It was held in this case that, the Director is liable for recovery of the company only if there is a finding that tax for relevant period cannot be recovered from company.

b. 282 ITR 120 Gujarat
Indubhai T. Vasa (HUF) V/S. ITO
It was held in this case that, revenue must establish that recovery cannot be made from company, then only the Directory will be liable.

c. 308 ITR 113 Gujarat
Amit Suresh Bhatnagar V/S. ITO
It was held in this case that, when no effective steps are taken to recover the tax

from company, revenue cannot initiate action against Directors.

d. 353 ITR 585 Gujarat

Pravinbhai M Kheni V/s. ACIT

It was held in this case that, Section 179 (1) is not applicable to Public Company.

e. 362 ITR 115 Gujarat

Jashvantlal Natvarlal Kansara & Others V/s. ITO

In this case, Debt Recovery Tribunal (DRT) directed bank to recover its dues. The remaining amount due to the bank was paid by the Directors from their own resources and also forgo their loans to the company with a request to delete their names from registrar of companies. In such circumstances recovery could not be made from the Directors for the dues of the company.

f. 264 CTR 520 Allahabad

Pratibha Garg V/s. CIT

It was held in this case that, there was no evidence of gross neglect, misfeasance or breach of duty on the part of the assessee, Section 179 could not be invoked against the asseessee.

Q.25 If the tax is not deposited by the deductor after collecting it from the deductee, whether the tax can be recovered from the deductee ?

A.25 No. It was held in the case of **Sumit Devendra Rajani V/s. ACIT reported in 369 ITR 673 Gujarat that,** when the deductor failed to deposit the tax in Government treasury then the same cannot be recovered from the deductee.

Even circular on this issue was issued by CBDT. The same is produced here under.

Circular/Instruction dated June 01, 2015

374 ITR Page 34-35

Subject : Non-deposit of tax deducted at source-regarding

When tax is deducted under chapter XCII (which covers section 190 to section 206AA) and the same is not deposited by the deductor to the credit of Central Government, the deductee should not be called upon to pay this tax which is prohibited as per section 205.

[No. 275/29/2014-IT-(B)]

Other issues with regard to recovery proceedings

Q.26 Whether salary of a debtor of a tax defaulter can be attached u/s.226(3)?

A.26 No. Only salary of tax defaulter can be attached u/s.226(3) and not of the debtor of tax defaulter assessee. As held in the case of **Tejal R. Amin (Smt.) Vs. Assistant CIT** reported in **208 ITR 103 Gujarat.**

Q.27 Whether tax can be recovered in protective assessment ?

A.27 No. In protective assessment recovery of tax cannot be made. As held in the case of **Commissioner of Wealth Tax V/S. Begam Brigees Zahoor Qasim and Others** reported in **248 ITR page 482 Delhi.**

Q.28 Where the assessee is a partner in Individual capacity, Whether his share in HUF can be attached for his Individual tax dues ?

A.28 No. As held in the case of **ITO V/s. Tippala China Appa Rao** reported in **331 ITR 248 A.P.** In this case the assessee was a partner in the firm. Demand was raised in the case of the firm. His share in HUF was attached by the assessing officer. It was held that, HUF properties cannot be attached for recovery of tax due by firm.

Q.29 Whether the transferee has no knowledge about pending Income Tax proceedings in the case of the transferor, and the property is transferred by the transferor, whether this transferee is void as per section 281 ?

A.29 No. As held in the case of **Tax Recovery Officer v. Industrial Finance Corporation of India** reported in **346 ITR 11 Gujarat.**

It was held in this case that transfer u/s.281 is void only if transferee had notice of pendency of income-tax proceedings.

Q.30 When the assessee has succeed in appeal in the previous year and the assessing officer has made addition on the same ground, whether the refund can be adjusted against the demand raised by the assessing officer ?

A.30 No. As held in the case of **Maruti Suzuki India Ltd. V/s. Deputy Commissioner of Income Tax** reported in **246 CTR 176 Delhi** that, if the issue has already been decided in favour of the assessee by the appellate authority, the assessing officer cannot pass an order of adjustment of refund u/s.245.

Q.31 Whether PPF account of the assessee can be attached ?

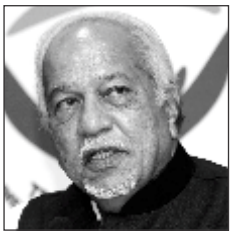
A.31 No. In the case of **Dineshchandra Bhailalbhai Gandhi V/s. TRO** reported in **362 ITR 380 Gujarat** it was held that, PPF account cannot be attached for recovery of tax dues.

Conclusion :

In this paper I have tried to cover most of the issues in relation to recovery of disputed tax. As there was no uniform policy, the assessing officers were reluctant to grant stay unless 50% of disputed tax was paid. Bank accounts were attached without considering the merits of assessment order only to achieve revenue targets. After the appeal was decided in favour of the assessee, the assessee was finding it difficult to get back the amount paid against disputed tax.

It is also admitted by the higher departmental officers that 90% of the appeals are decided against the department but the hassle faced by the assessee for granting stay cannot be equated in terms of rupees. By giving direction to the assessing officer to collect only 15% of disputed tax is defiantly a relief to the assessee who is facing appellate proceedings.

WHO ARE THE PERSONS THEY ARE REQUIRED TO COMPULSORILY MAINTAIN BOOKS OF ACCOUNT ?



BY
CA AJIT C. SHAH
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Under the provisions of the Income Tax Act 1961, every person carrying on legal, medical, engineering or architectural profession, profession of accountancy or technical consultancy or interior decoration or ***any other profession as is notified by the Central Board of Direct Taxes*** (CBDT) are mandatorily required to keep and maintain such books of account and documents, ***as may enable the Assessing Officer to compute his total income.***

CBDT has also notified Authorized Representatives, Film Artists, Company Secretaries and Profession of Information and Technology as notified professions.

Over and above, ***any persons carrying on a non specified profession or carrying on Business*** are also required to compulsorily maintain books of account. Every person carrying on business or profession (not a specified profession) whose total income exceeds Rs. 1,20,000 or his total sales/loss receipts from such business or profession exceeds Rs. 10,00,000 in any of the 3 years immediately preceding the relevant previous year.

01.Following are the ***prescribed books of account and documents to be kept and maintained under Section 44AA(3) of the Income Tax Act, 1961*** by person carrying on specified profession. Rule 6F prescribes books of account to be maintained by specified persons.

Rule 6F(2) Professionals:

(i) Cash Book
(ii) Journal, in case of mercantile system of accounting
(III) Ledger
(iv) Carbon copies of bills serially numbered in case of bills or receipts of Rs. 25/- and above
(v) Original Bills and Receipts in respect of expenditure . Payment vouchers in case of bills and receipts not issued and other expenditure do not exceed Rs. 50/-

'Cash Book' means a record of all cash receipts and payments, kept and maintain from day to day and giving the cash balance in hand at the end of each day or at the end of specified period not exceeding a month.

Rule 6F(3) Medical Professional's – in addition to above:

(i) A daily case register in Form 3C
(ii) Inventory Register of stock of drugs, medicines and other consumable

accessories.

02. Where the specified books of account and other document are to be kept?

Rule 6F(4), states that *for other than those relating to a previous year which has come to an end,* the specified books of account and other documents shall be kept and maintained by the person at the place where he is carrying on the profession or, where the profession is carried at multiple places, at the principal place of his profession.

Where person keeps and maintain separate books in respect of each place of profession carried on, such books and other documents may be kept and maintained at the respective places.

03. Up to what period should the books of account etc to be kept?

Rule 6F(5) states that w.e.f.4th February, 2002, the specified books of account shall be kept and maintained for a period of six years from the end of the relevant assessment year.

However, if assessment is reopened u/s 147 within period specified in section 149 then all books and documents which were kept and maintained at the time of reopening shall be retained till the reopened assessment is completed.

04. Non maintenance of stock register by an assessee carrying on business amount to contravention of Section 44AA ?

Rule 6F(3) says that Medical Professionals has to maintained

(1) A daily case register in Form No 3C and

(2) Inventory Register of Stock of drugs, medicines and other consumable accessories.

Now the question is that if a Medical Professional does not maintain Stock Register, can Assessing Officer force him for maintenance of Stock Register ? Central Board of Direct Taxes has not specified for the maintenance of books of accounts for such professionals. Section 44AA provides assessee shall maintain such books of account as will enable the Assessing Officer to compute the business income. ***(Sujan Singh vs A.O.(2007) 110TTJ(ASR) 818 & ITO vs Dinesh Paper Mart 70 ITD 274 (Nag).***

05. If the gross receipt does not exceed Rs. 1,20,000 in any one of three preceding previous years of a specified profession be required to maintain books of account ?

Every person carrying on a specified profession is required to maintain books of account to enable the Assessing Officer to compute the total income irrespective of his gross receipts in ***any one*** of three years immediately preceding the previous year.

In the question, it has been informed that gross receipt does not exceed Rs. 1,20,000 in any one of the three preceding years, that means he has more than receipts of Rs. 1,20,000 in two years and has to maintained specified books of account as per Rule 6F. However if his gross receipts in all the three preceding previous years exceed Rs. 1,20,000 ***or*** if it is a new profession and it is likely to be exceed Rs. 1,20,000 in that previous year shall be liable to maintain specified books of account as per Rule 6F.

06. Assessees covered under section 44AD and 44AE required to maintain books of account ?

Section 44AD is a special provision for computing profits and gain of business on

presumptive basis. This provision is applicable to only an ***eligible assesseee*** that means an individual, Hindu Undivided Family or Partnership Firm who is a resident, but not a Limited Liability Partnership Firm and who has not claimed deduction under any of the sections 10A, 10AA, 10B, 10BA or deduction under any provisions of Chapter VI A.

If the profits and gains from the above assesses are lower than the profits and gains specified and whose total income exceeds the maximum amount which is not chargeable to income tax, shall be required to keep and maintain such books of account and other documents and get them audited and furnished a report of such audit as required under section 44AB.

Section 44AE is again a special provision for computing profits and gains of business of plying, hiring or leasing goods carriages .To calculate profits and gains from these type of business is to be calculated on the basis of ownership of goods carriages. Profits and gains from each goods carriage shall be an amount equal Rs. 7,500/ per month or a part of the month during which the carriage is owned by the assessee in that previous year or an amount claimed to have been actually earned from the vehicle, whichever is higher.

If the assessee wish to claimed claim lower lo wer profits and gains than the profit and gains specified as above. If he keeps and maintains such books of account and other documents as required u/s 44AA(2),and gets it audited and furnished a report of such audit as required under section 44AB.

07. What are the consequences of not maintain the accounts ?

Sec.271A prescribes penalty provisions for failure to keep and maintain books of account etc., and also for the prescribe period. The quantum of the penalty imposable is ***Rs. 25,000/***

In ***Mehta Parvesh vs.ITO(1998) 60 TTJ 278 (Del.Tri.)*** and in***Papelal Gaur (1994) 49 TTJ (Nag- Tri.) 126***it was held that no penalty can be levied if it is possible for the assesseing officer to compute the total income based upon the documents through the books of account were not maintained.

C.H.Aboobacker Haji vs ITO (2007) 109 TTJ (Coch-Tr.b) 408,it was held that the assessing officer cannot come to the conclusion that he was unable to compute the income of the assesseee due to the non maintenance of the day book and ledger without completing the assessment. Hence penalty u/s 271A can not be levied unless the assessment is completed.

Issues and Controversies under Section 56 (2) And Section 68 of Income-Tax Act,1961

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The Finance Act 2012 introduced a new clause in the Income Tax Act, 1961, according to which, with effect from April 1, 2013, that portion of consideration received for the issue of shares of a public unlisted company or private company to an Indian resident that is in excess of the fair market value of those shares, will be subject to tax in the hands of the companies under the head "income from other sources". The aim of this paper is to examine the legal effect of amendment made by the Finance Act 2012 to Section 56(2) of the Income Tax Act, 1961 by introduction of clause (viib). It highlights the impact on angel investors in light of the SEBI (Alternative Investment Fund Regulations) 2012. The AIF Regulations have further made it difficult for these investors to invest in startups as stricter requirements have been laid down by SEBI. The paper attempts to explain clause (viib) and its ambit in light of its applicability to closely held companies, residents, receipt of consideration for shares and method of determination of the fair market value. Simultaneous application of Section 68 and Section 56(2)(viib) has also been discussed.

1. Provision under the Income Tax Act,1961

Section 56(2) lists incomes chargeable to income tax under the head 'Income from Other Sources.' Finance Act, 2012 inserts clause (viib), with effect from 1-4-2013(assessment year 2013-14) to include 'share premium' received by a company in excess of its fair market value , as its income chargeable under the head ' Income from other sources.' The clause is as follows:

"where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares, in such a case if the consideration received for issue of shares exceeds the fair value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax under the head "Income from other sources".

Finance Act, 2012 simultaneously amends the definition of income in section 2(24) by inserting clause (xvi) to include the above consideration exceeding fair market value as 'income'.

With a view to safeguard the genuine investment by bonafide companies it is provided that this clause will not apply to.

(i) A venture capital undertaking receiving the consideration for issue of shares from a

venture capital company or a venture capital fund ; and

(ii) A company receiving the consideration from a class or class of persons ('Notified persons') as may be notified by Central Government.

The exception given to venture capital companies and venture capital funds appears to stem from the fact that these entities are regulated under the SEBI (Alternative Investment Fund) Regulations 2012 and hence there is some measure of scrutiny already in place over investments made by them. The explanation to Category I AIF under SEBI (AIF) Regulations provides that "Venture Capital Company" or "Venture Capital Fund" will be eligible for tax "pass through" benefits as per Section 10 (23FB) of the Income Tax Act, 1961.

As such this Clause (viib) introduced by the amendment will mainly affect the participation of private equity funds or high net worth individuals or risk capital. The clause will also impact genuine start-ups and other Small and Medium Enterprises (SMEs) looking to rapid growth particularly in the services sector, as they depend upon angel investors or private equity funds for their funding as they are thinly capitalized. Such funding is normally at a substantial premium as the underlying assets of the startup do not support a higher fair market value. Thus, such funding normally depends on future prospects of the company rather than the current value of the assets of the company. This provision could destroy the developing culture of angel investors and private equity funds; funding promising entrepreneurs, who have the skills or intellectual property but very few tangible assets. The provisions may therefore encourage companies to form Limited Liability Partnerships, to raise foreign exchange from angel investors residing outside India, subject to applicable FDI requirements or to raise funds from individual Indian resident investors by issuing convertible debentures of the company.

With a view to address concerns raised by the Angel investors, exclusion has been granted from levy of such tax to certain notified class of persons by way of an enabling provision [i.e. Clause (viib) Proviso 1 & 2]. Government of India – Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) has now issued notification dated 17th February,2016 and Ministry of Finance also circulated notification dated 14th June,2016 so as to include startup company being excluded from the above provision.

1. <u>SEBI AIF Regulations</u>

The SEBI AIF Regulations 2012 even make it difficult for Angel investors to register as Venture Capital Funds with it. The Regulations mention that VCF's have positive spillover effects on the economy, and that it may, along with the government and other regulators, consider granting incentives or concessions based on the need of the funds. [Meaning of Angel investor as provided under Chapter III-A , Rule 19A (2) of SEBI (AIF) REGULATIONS ,2012]

The AIF Regulations have substantially increased the minimum fund size from INR 5 Crores to INR 20 Crores and the minimum amount that can be accepted from an investor from INR 5 lakh to INR 1 crore. The increase is thus very significant and seems to be with a

purpose. They may not be able to constitute such a large fund and to pool these amounts. Further, there are additional restrictions on the tenure of the fund (at least 3 years) and heavy disclosure and record keeping requirements that will significantly add to the costs of operating as registered entities.

2. Importance of Section 56(2)

Under this section 56 (2) certain receipts which are effectively capital receipt in nature shall be treated as income under the deeming fiction of Section 56 (2) of the income tax Act. These amendments with effect from A.Y. 13-14 and onwards have been made to curb the conversion of black money and therefore let us appreciate these amendments.

Let us examine the provisions in the amended Sections and the background behind the same.

56 (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income e-tax under the head "Income from other sources" , if it is not chargeable to income-tax under any of the heads specified in section 14,

(2) In particular, and without prejudice to the generally of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely-

(i) to (iv) - Certain incomes to be taxed under the head Income from Other Sources.

(v) Gift received exceeding Rs. 25,000/-(from 1-9-2004 to 31-03-2006)

(vi) Gift received exceeding Rs. 50,000/- (from 1-4-2006 to 31-10-2009)

(vii) (a), (b) & (c) -

Section 56(2) (vii) applies when an Indi. / HUF in any previous year receives from any person or persons on or after 01.10.2009

Sum of money	**Amount liable under IFOS**
any sum of money without consideration, aggregate value of which exceeds Rs.50,000.	whole of the aggregate value of money received
any immovable property -	
*without consideration, the stamp duty value of which exceeds Rs.50,000;	Stamp duty value of immovable property
• for a consideration which is less than its stamp duty value by an amount exceeding Rs.50,000.	Difference between the stamp duty value and consideration
any property other than immovable property, -	
• without consideration, the aggregate FMV of which exceeds Rs.50,000;	whole of the aggregate of FMV (as per prescribed method) of movable property.
• for a consideration which is less than the aggregate FMV of the property by an amount exceeding Rs.50,000.	aggregate FMV (as per prescribed method) of movable property in excess of the consideration.

However there are six exemptions in this receipt of gift. The gift received form relative, on the occasion of marriage of an individual, or gift received under a Will / by way of inheritance or gift given in contemplation of death of the person i.e. Gift – Mortis Causa shall not be considered as income. The relative has been defined in the explanation and to understand the same, the chart given is as under:

List of Male Donors	List of Female Donors
Father (Papa or Pitaji)	Mother (Maa or Mummy)
Brother (Bhai)	Sister (Bahin)
Son (Beta or Putra)	Daughter (Beti or Putri)
Grand Son (Pota or Potra)	Grand Daughter (Poti or Potri)
Husband (Pati)	Wife (Patni)
Sister's Husband (Jija)	Brother's Wife (Bhabhi)
Wife's Brother (Sala)	Wife's Sister (Sali)
Husband's Brother (Dewar)	Husband's Sister (Nanand)
Mother's Brother (Mama)	Mother's Sister (Mausi)
Mother's Sister Husband (Mausa)	Wife's brother's wife
Father's Brother (Chacha or Tau)	Father's Brother's Wife (Chachi or Tai)
Father's Sister's Husband(Fufa)	Father's Sister (Bua)
Grand Father (Dada, Pardada)	Grand Mother (Dadi, Pardadi)
Daughter's Husband (Jawai)	Son's Wife (Bahu or Putra Vadhu)
Spouse Father (Sasur)	Spouse Mother (Saas)
Spouse Grand Father (Dada Sasur)	Spouse Grand Mother (DadiSas)
	Mother's Brother's Wife (Mami) Husband's Brother's Wife (Devrani or Jithani)

1. The gift received on the occasion of the marriage of an individual is exempt. Therefore gift received during wedding or reception as 'Chandlo' are exempt but only in the hands of individual i.e. bride or bridge groom and cannot be taken as receipt of HUF i.e. of husband and wife after the marriage rituals are over. The term on the occasion of the marriage is very important. Therefore gift received on engagement or ring ceremony strictly will not quality as gift on the occasion of the marriage. It does not strictly mean on the date of marriage but any gift received before or after some days which are associated with the event of marriage will certainly qualify for the exempted gift. If a relative from abroad or out of station sends the gift after some months/years even then it can be considered as gift received on the occasion of the marriage.

   Gift received by a person under a Will (or by inheritance) i.e. from the parents/relatives on inheritance are also capital receipt (2) (vi) of the Act. Such gifts by Will can take place only after the death of the person. Inheritance will be always form the family/relative but amount can be received under a Will from any person i.e. relative, friend or even unknown person. Hon'ble Supreme Court in case of K.K. Birla v. R.S. Lodha held that it is possible for a person to Will his/her property to any person including to anyone.

   Similarly gift received in contemplation of death, means the thought of dying, not necessarily from imminent danger but as the compelling reason to transfer property to another. It is known as Gift Maurtis Causa. This is different from the Will inasmuch as a gift is said to be made in contemplation of death where a person who is ill and expect to die very shortly of illness, delivers to another person the possession of any movable property to receive and keep as a gift in case the donor shall die of such illness.

2. ***After Making Gift:***

Clubbing of Income

If transfer of immovable property is made to spouse, son's wife, or any other person for immediate/deferred benefit of spouse or son's wife of the Donor, then any income/benefit arise from the use/investment of such property will be clubbed in the hands of Donor (i.e. Transferor) proportionately. [Sec. 64(1)].

Further, if the donee is minor child of donor, then any income arising from the use/investment of such immovable property will be clubbed in the hands of Parents. [Sec. 64(1A)].

Taxability in hands of Donee at the time of sale of such

immovable property - Sec. 49(1) & 49(4):

1. Cost of acquisition for the purpose of computation of Capital Gain will be Cost of previous owner if nothing has been taxable under sec.56(2)(vii).***[Sec. 49(1)]***

   However, Where the capital gain arise from the transfer of a property, the value of which has been subject to income tax under section 56(2)(vii) or 56(2)(viia), the cost of

acquisition of such property shall be deemed to be the value which has been taken into account for the purpose of the said section. ***[Sec. 49(4)].***

2. *Holding period for such asset will be counted from the date of acquisition of the previous owner [As per the decision by Bombay High Court in the case of Manjula J. Shah] ITA No.3378 of 2010, dt. 11.10.2011. Here Previous owner means – a person who have acquired such asset by way of otherwise than gift.*

3. **56(2)(vii)(b)(I) – Analysis**

Now most controversial sub section is 56 (2) (vii) (b) is discussed as under :

GIFT RECEIVED IN FORM OF IMMOVABLE PROPERTY (WITHOUT CONSIDERATION)

At the time of Making Gift :

Taxability in hands of Donee - Sec .56(2)(vii)(b)(I):

If any individual/HUF receives any immovable property, without consideration, the stamp value of which exceeds Rs.50,000 then stamp duty value of such immovable property shall be taxable. If stamp duty value of immovable property does not exceed Rs.50,000 then nothing is taxable in hands of Donee.

It is to be remembered that notwithstanding exemption or applicability of Section 56 (2) the provision of Section 54(1) and 64(1) and64(1A) shall continue to apply i.e. clubbing provisions.

Undoubtedly by inserting two provisos it has been intelligently provided that if the stamp duty value on the date of registration of sale deed is higher but the transferor had executed an agreement and sum has been paid by any mode other than cash then the stamp duty value shall be as per the date of agreement and not the date of registration.

Sub clause (c) of Section 56 (2)(vii) deals with the identical situation but in case of property other than immovable property the section as defined the term, fair market value, jewellery, property relatives, stamp duty and accordingly all such gifts in cash or in kind for a value exceeding Rs.50,000/- had been taken care of.

As the amendment was covering only Individual & HUFs vide this Amendment , the smart operators shifted the abuse by using the assessees in form of Partnership firms and Private Limited Companies. To cover such continuous abuse , further amendment has been made so as to cover such entities like Partnership firms and Private Limited Companies and Closely held companies.

The assessee like AOP are still not covered and one has to see whether such abuse is still continued by such smart operators.

· **Amendment from 1.6.2010:**

To curb the conversion of black money or other proceeding of income and wealth through media of firm and companies a new sub section (viia) have been introduced with effect from

(viia) where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June,2010, any property, being shares of a company not being a company in which the public are substantially interested,

(I) Without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) For a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of Section 47. (Sec. 47 not reproduced here).

This provision has been introduced to curb the practice of transferring the ownership of the company through shares at a price less than the fair market value and obtained the difference in cash. The receipt of such shares by individual is already covered the assessee like firm and companies this clause has been inserted.

To illustrate Mr. X sales his shares of a closely held company to a Partnership firm of Rs.50 lakhs, the fair market value as worked out under the definition provided to exception i.e. as per prescribed rules worked out to Rs.2 crore then the difference which is in excess of 50,000/- i.e. Rs.1.50 crore would be chargeable to tax in the hands of the Partnership firm M/s. X. Y, Z.

It is to be kept in mind that under this clause what is covered is only shares and not the Debentures, whether convertible or non convertible.

6. DISECTION OF THE SECTION
First / Second Proviso to Sec 56(2)(vii)(b)(ii) – Analysis

Exceptions:

a) In case the assessee has

b) entered into an agreement;

c) the agreement is for transfer of immovable property; and

d) the agreement fixes the amount of consideration;

e) the date of such agreement and the date of registration are not the same;

f) the amount of consideration referred to in the said agreement or

g) a part of the consideration has been paid by any mode other than cash on or before the date of the said agreement then, the stamp duty value on the date of

the agreement may be taken for the purposes of S. 56(2)(vii)(b)(ii).

» **Extract of Object Memorandum of Finance Bill, 2012**

The new clause will apply where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares. In such a case if the consideration received for issue of shares exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income-tax under the head "Income from other sources". However, this provision shall not apply where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.

Further, it is also proposed to provide the company an opportunity to substantiate its claim regarding the fair market value. Accordingly, it is proposed that the fair market value of the shares shall be the higher of the value—

(*i*) as may be determined in accordance with the method as may be prescribed; or

(*ii*) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value of its assets, including intangible assets, being goodwill, know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature.

This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.

Let us now understand Section 56(2)(viiib)

where a company,

- Ø not being a company in which the public are substantially interested,
- Ø receives,
- Ø in any previous year;
- Ø from any person being a resident,
- Ø any consideration for issue of shares that exceeds the face value of such shares,
- Ø the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received –

(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Explanation. – For the purposes of this clause, -

(a) The fair market value of the shares shall be the value –

Clause (I)

4. as may be determined in accordance with such method as may be prescribed; or

Clause (ii)

» As may be substantiated by the company to the satisfaction of the Assessing Officer,

» based on the value,

» on the date of issue of shares,

» of its assets,

» including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,

» whichever is higher.

(b)"venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a) (clause(b) and clause(c) of Explanation 1 to clause (23FB) of section 10,."

· Simultaneous amendment in definition of Income -

2(24)(xvi) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of sub-section(2) of section 56;

This clause has been inserted with effect from 1st April 2013 and is applicable form Assessment Year 13-14. It brings to tax the consideration received from resident by a company (other than a company in which public are substantially interested) which is in excess of fair market value. Such cases is to be treated as income of a closely held company which are normally received when shares are issued at a premium. In other words the shares issued by various companies (unlisted)/in which Public are not substantially interested) at a premium not justifying the same are hit by this clause. Of course with a view to encourage genuine companies two exceptions are provided. Normally it will not apply to shares received by a venture Capital undertaking receiving shares form Venture Capital Company/Venture Capital Fund or (2) such class or classes of companies may be notified by the Central Government.

5. <u>WHY SUCH AMENDMENT ?? :</u>

With a view to convert the black money Companies were issuing share premium without justifying the reserve or market value of the shares. Therefore to curb such practice it has been provided that fair market value of the shares shall be in accordance with the method as may be prescribed or as may be substantiated by the company to the satisfaction of Assessing Officer based on the value of its assets including intangible assets. Out of the above two whichever is higher will be the maximum premium allowed.

The working of the fair market value as provided in the rules are given in the Appendix. Thus various practices of money laundering or conversion of black money are attempted to be curbed by these amendments. May be that in some exceptional cases genuine buyers or genuine sellers of closely held companies are adversely hit but subject to that this is a provision where unjustified premium and thereafter reducing the price of the shares and suffering short term or long term capital gain of shares etc. will be curbed.

6. The Game behind:

India is having one of the most reasonable tax structure with 30% maximum Income-tax and more than that as per latest report of Parliamentary Committee the effective tax rate in India is just around 20%. That is the reasons that in last budget , Hon'ble Finance Minister allows gradual reduction of Income Tax on companies up to 25%. Of Course , by removing/ withdrawing certain exemptions and tax benefits. However, most unfortunately millions of citizens in our country are still not paying the Tax or are still not paying the true and correct tax honestly. Though avoidance of income tax is permissible under the law; but evasion certainly is illegal as well as immoral. Honest citizens paying true and correct tax notice that those who are dishonest citizens are able to generate unaccounted income and in turn plough them back in the Industry, and grow richer and richer and amas wealth as against they are at loss and they sometimes get frustrated. Definitely not in this part of the country i.e. in Gujarat / Maharashtra but in some of other States in of the country systematic chain and system is prevailing like parallel economy of black money for conversion of black money into white money. These kinds and modus operandi of conversion into white money by different modes were happening in front of the eyes /below the nose of Income tax Authorities. Even top most bureaucracy in Delhi and Finance Ministry and others are aware of all such practices. The Ministry having realized that Judicial Decisions and Executive actions are not sufficient to curb such rapid growth of conversion of unaccounted money into accounted one, Finance Ministry thought it fit and rightly so to make appropriate amendments to check and control such recognized approved and famous method of conversion of black money into white money popularly known as Calcutta Companies.

Illustration:

Let us understand what was hitherto happening. A person who is in control of such funds will incorporate and have his company the following assets and liabilities with duly audited accounts, directors' reports etc., as under:-

Assets	Amount	Liabilities	Amount
Equity share capital 1 crores shares of Rs.10 each. (Reserves & Surplus	10 crores 2 crores	Net Assets	12 crores
Total	12 crores	Total	12 crores.

The entire paid up share capital of the company is held by Mr.A and his family members.

Mr. B. (or his group) subscribes to 10 lakh shares of A Pvt. Ltd. of face value of Rs.10 each at Rs. 200 per share at a premium of Rs.190 per share. Therefore, Mr. B gives cheques of Rs.20 crores to the company and he is allotted 10 lakh shares of A. Pvt. Ltd. Mr. A in turn gives cash i.e. black money of Rs.20crores to Mr. B.

Now Balance Sheet of Company A Pvt. Ltd., is as under:-

Assets	Amount	Liabilities	Amount
Equity share capital 1.10 crores shares of Rs.10 each. Share Premium Reserves & surplus	11 crores 19 crores 2 crores	Bank Balance Other Net Assets	20 crores 12 crores
Total	32 crores	Total	32 crores.

Mr. A and his family have successfully converted black money of Rs.20 crores into white money of Rs.20 crores in the hands of their company. The share premium received is on capital account and being share capital receipt not taxable in the hands of company.

The shareholding pattern is:

Mr. A & his family	1 crores shares of Rs.10 each.
Mr. B.& his family	10 lakh share of Rs.10 each.
Total	110 lakh shares of Rs.10 each.

Mr. A and his family still have control over the company since shareholding pattern is as under:-

Mr. A & Family	90.91 %
Mr. B. & family.	9.09%

Practically, what was happening was that instead of Mr. B, there would be let's say 40 persons who have white money of Rs.50 lakhs, each then these 40 persons subscribes to 25,000 share each of Rs. 200 and A & Family gives black money of Rs.50 lakhs each to these 40 persons.

After this, the fair market value of shares of the company is derived as under;

Assets – Liabilities x Paid up value of unquoted equity share Paid up equity share capital 32,00,00,000 x 10= Rs. 29.00.

1,10,00,000 shares

Thereafter, Mr. B /40 people would sell their shares to A & family @ Rs.29.00 per share and there was no gift implications under section 56(2)(vii). Mr. B /40 people book loss under the head Capital Gains of Rs.200 – Rs.29.00 = Rs.171.00 per share. Mr. A and family purchases these 10,00,000 shares @ Rs.29.00 using their white money

ofRs.2,90,90,000. Therefore, Mr. A and his family have effectively converted Rs.17,09,10,000/- black money into white money and having 100% control over the company Mr. B/ 40 people are able to book loss of Rs.17,09,10,000 under the head Capital Gains either Short term or Long term as per their need / planning.

This kind of dubious planning has been nullified by introducing section 56(2)(viib) by Finance Act,2012. Section 56(2) (viib) provides as under:

Where a closely held company receives in any previous year from any person, being a resident any consideration for issue of shares that exceeds the face value of such shares then

- Aggregate consideration – Fair market value of the shares received for such shares shall be income from other sources in the hands of the company.

In the example given above the fair market value of shares before issue of 10 lakh shares is :

12 crore x 10 = Rs. 12 per share
10 crore

Therefore, Rs.20 crores – Rs.12 x 10 lakhs shares

Rs.20 crores – 1.20 crores = Rs.18.80 crores is taxable as income from other sources in hands of the company.

1. **Effects Now:**

- The above modus-operandi has been broken by introducing section 56(2)(viib) Therefore, now companies will stop issuing shares in the aforesaid manner.

- This section does not apply if a widely held company issues shares at a premium. The section applies only if a closely held company issues shares at a premium. The reason for not applying this section to a widely held company is that SEBI monitors and approves the price at which shares are issued by a widely held company.

- This section does not apply where a closely held company issues shares to a Non-Resident at a premium in excess of FMV. The reason seems to be that non-resident will not like to convert his white money abroad in dollars into black money in India. Moreover, the money received from non-resident is regulated by FEMA and also by rules of RBI.

In the example given above, the company is having net assets of Rs.12 crores. Let us say, the break-up of net assets is as under:-

Assets	Book value	Value substantiated by company to the satisfactio n of A.O. on the date of iussue of shares.
Land	2 crores	14 crores
Building	1 crore	13 crores
Goodwill	2 crores	5 crores
Know-how	1 crore	2 crores
Patents	1 crore	4 crores
Copyright	1 crore	7 crores
Trademarks	1 crore	2 crores
Licenses	1 crore	1 crores
Franchisees	2 crores	2 crores
Total	12 crores	50 crores

Fair market value works out to be:

$$\frac{\text{50 crores}}{\text{10 crores}} \times 10 = \text{Rs. 50 per shares.}$$

The FMV shall be taken to be Rs.50 per share.

Income from other sources in hands of company shall therefore be Rs.150 x 10 lakhs= Rs.15 crores.

The implications of proposed amendments-new clause (*viib*) and new first proviso to section 68 have been illustrated in the following Table:

	Face value of shares	***Consider ation received***	***FMV of shares determined***	***Whether and how much taxable under proposed new clause (viib) of Section 56(2) ?***	***If new first proviso to section 68 attracted***
Case 1	Rs. 10	Rs. 100	Rs. 120	Since consideration received does not exceed FMV, question of taxability under clause (*viib*) does not arise.	Entire amount of Rs. 100 taxable under section 68
Case 2	Rs. 10	Rs. 100	Rs. 80	Rs. 20 taxable[excess of consideration (Rs. 100) over FMV (Rs. 80)]	Entire amount of Rs. 100 taxable under section 68.

Case 3	Rs. 10	Rs. 10	Rs. 8	Although consideration exceeds FMV, nothing is taxable since consideration does not exceed face value and so shares not issued at a premium.	Entire amount of Rs. 10 taxable under section 68
Case 4	Rs. 10	Rs. 9	Rs. 8	Here shares are issued at a discount and not a premium. So, question of taxability under clause (*viib*) does not arise.	Entire amount of Rs. 9 taxable under section 68.

1. Issues Arising from section 56(2) (viib)

1. There are certain issues that arise as regards new clause (*viib*) which are dealt with as under:

(*i*)*Share application money received on 30-3-2012, but allotment of shares made on 30-4-2012. Whether any amount taxable under new clause (viib)?* - It appears that taxability will arise in the year of receipt of consideration for issue of shares(and not year of allotment) since the words "receives" is used in new clause (*viib*). Since, new clause comes into operation from A.Y. 2013-14, it appears that it will apply only if consideration is received on or after 1-4-2012. Hence, no question of taxability under new clause (*viib*).

(*ii*)*Company is widely held company at the time of receipt of consideration but is converted to a closely held company at the time of allotment of shares* -It appears that status of company at the time of receipt of consideration is relevant and not its status at the time of allotment of shares .Therefore, since company was not closely held co. at the time of receipt of consideration, no question of taxability under new clause (*viib*) arises.

(*iii*)*Company is closely held company at the time of receipt of consideration but is converted to a widely held company at the time of allotment of shares* - It appears that status of company at the time of receipt of consideration is relevant and not its status at the time of allotment of shares .Therefore, since company was closely held co. at the time of receipt of consideration, question of taxability under new clause (*viib*) arises.

(*iv*)*Consideration was received from a non-resident who became a resident at the time of allotment* - Since clause (*viib*) applies to consideration received from a resident, the residential status at the time of receipt of consideration by company and not

residential status at the time of allotment is relevant. Therefore, as person from consideration was received is non-resident at the time of receipt of consideration, no question of taxability under new clause (*viib*) arises.

(*v*)*Whether consideration received in kind taxable under new clause(viib)?* –New clause *(viib*) refers to "any consideration for issue of shares". The word "any" is very wide in scope and will take in its scope consideration received in kind also. However, new clause (*viib)* only speaks of how FMV of shares will be determined. It does not say how consideration in kind will be valued for comparison with FMV of shares. Since provision does not say how consideration in kind will be valued, a view is possible that it is not intended to apply where part or whole of consideration is received in kind. The object seems to be to target cash transactions as black money is generated through cash transactions as can be seen from new proviso to section 68.

Thus it can be seen that the clear intention behind this Amendment is to control the unwarranted or bogus or unjustified subscription to share premium. As explained in the example, it will certainly control and stop the menace of black money or unaccounted money being rotated and channelized through this mode of Companies. But while doing this controlling exercise it may hit certain genuine transactions of bonafide share premium also. There may be companies who cannot justify the share premium on the basis of existing valuation even if done on global valuation concept. The Rules of Valuation are clearly prescribed in Rule 11U and 11UA (See Appendix 3 & 4). Therefore, any other global valuation done by best of the firm of Chartered Accountant or a Management Consultant may not be accepted by the Income Tax Authorities if not done strictly as per the Rules. Particularly in cases of companies where software innovations are being conducted and are on pipeline or in cases where technology up gradation or a secret formula is planned to be sold through heavy share premium may be adversely affected by this Amendment.

v **Simultaneous Amendment in Section 68**

2. SECTION 68: CASH CREDITS.

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

3. Proviso added by Finance Act, 2012 w.e.f. Assessment Year 2013-14.

[Provided that where the assessee is a company,(not being a company in which the public

are substantially interested) and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless –

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.]

4. Let us understand what was happening and why such amendment: Company XYZ Pvt. Ltd. used to adopt the following modus operandi to convert black money into white money:

· 100 slum dwellers were contacted and their PAN cards were made and their bank accounts were opened. In the previous year 31-03-2011, Rs. 2,00,000 each cash was deposited in their bank accounts and cheque of Rs.2,00,000 was taken from them in the name of the company XYZ Pvt. Ltd. They were made to sign share application form that they are applying for 10,000 shares of 10 each face value at a premium of 10. They were also made to sign blank transfer deeds for share transfer. Each slum dweller's return was filed showing income of Rs. 2,00,000/- for previous year 31-03-2013 and tax thereon is NIL. For this process each slum dweller was paid Rs.2,000 in cash i.e. unaccounted money.

· In the above process company XYZ Pvt. Ltd. has deposited unaccounted cash of Rs.2,00,000 x 100 = Rs.2 crores. In the slum dwellers' bank account and received cheques of Rs.2 crores as share application money in the company XYZ Pvt. Ltd.

· The Fair Market Value/ issue price of shares of company XYZ Pvt. Ltd. is Rs. 20 per share.

· The company XYZ Pvt. Ltd. either shows Rs.2 crores as Share Application Money or allots 10,000 shares of Rs.10 each at a premium of Rs.10 to the slum dwellers however, physical custody of these shares is not given to the slum dwellers and company retains the same. The company is safeguarded by the blank share transfer deeds.

· Now the Assessing Officer takes the case of the company in the scrutiny assessment u/s. 143(3) for the above mentioned previous year. The Assessing Officer asks the explanation from the company for the nature and source of sum of Rs. 2 crores credited by the company in its books as share application money or asks share capital introduced and premium thereon. The A.O. asks for;

· (i) bank pass books of these 100 slum dwellers.

· (ii) personal appearance of these 100 slum dwellers

The company simply produces to the A.O.;

· (i) Name and address of slum dweller

· (ii) PAN of slum dweller

· (iii)ITR of slum dweller.

· The company does not produce the pass books of these slum dwellers and does not produce them personally before A.O. Assessing Officer to investigate the case and finds that cash of Rs. 2,00,000 was deposited in bank account of each slum dweller and finds that slum dweller has no financial standing. Slum dweller is not able to offer explanation about the source of Rs.2,00,000 or the explanations offered by him are found to be unsatisfactory by Assessing Officer.

The Assessing Officer invokes section 68 and adds Rs.2 crores to the income of the company as unexplained cash credits because the persons from whom share application money came were not able to prove the source of money in their hands. Such additions u/s.68 so made in the hands of the comp[any was not being sustained in Appeals because Hon'ble Supreme Court Lovely Exports (P) Ltd. [(2008) 216 CTR 195], has held as under:

"If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income under section 68 of the assessee-company. ***The Supreme Court held that there is no onus on the company to prove the source of money in the hands of shareholder or the persons making payment of share application money.*** *If company identifies the persons from whom money has been received, then section 68 cannot be involved in the hands of company."*

- Thus, by virtue of above Supreme Court Judgment, no income was possible to be added in hands of company under section 68.
- In hands of slum dwellers, the Assessing Officer applies section 68 as Rs.2,00,000 credited in bank account is unexplained. The slum dweller is not able to offer any explanation about the source of Rs.2,00,000 or the explanation offered by him are found to be unsatisfactory. But since the slum dwellers had no other source of income, the only income assessed was Rs.2 lakhs under section 68. Considering the slab limit of Rs.2,00,000 no tax/interest/penalty could be levied on the above slum dwellers.
- Thus, Rs.2 crores black money thus was possible to be converted into white money by the company with no tax implication.
- However, it is important to note the recent decision of Hon'ble High Court of Delhi in case of CIT vs. Nova Promoters & Finlease (P) Ltd.[(2012) 18 taxmann 217] wherein Hon'ble Justice Mr. R.V. Easwar held that "there is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income tax Officer is entitled to draw the inference that the receipt are of an assessable nature. Section 68 recognizes the aforesaid legal position. The view taken by the Tribunal on the duty cast on the Assessing Officer by section 68 is contrary to the law laid down by the Supreme Court in the judgment cited above. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was the coffers of the assessee, we are inclined that in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of Mukesh Gupta and Rajan Jassal, the entry provides, explaining their modus operandi to help assessee's having unaccounted monies convert the same into accounted monies affords sufficient material on the basis of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the statements given by the above persons to the investigation wring also, figured as share-applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assessee-company. The Tribunal, apart from

adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The CIT (Appeals) also fell into the same error. If such material had been kept in view, the Tribunal could not have failed to draw the appropriate inference.

- Finance Act, 2012 nullifies the above tax planning. Proviso to section 68 has been added by Finance Act, 2012 which over-rules the Supreme Court judgment in Lovely Exports (P) Ltd. as mentioned on the earlier page.

Thus, as per the Proviso inserted by Finance Act, 2012; in Section 68

- If in case of a closely held company any sum is found credited in its books of account as share application money, share capital, share premium or any such amount by whatever name called (Rs.2 crores in above example in case of XYZ Pvt. Ltd.) the explanation given by these residents (slum dwellers in above example) to the Assessing Officer is found to be unsatisfactory, then, it shall be deemed that the explanation offered by the assessee company about the sum so credited (Rs.2 crores in our example) is not satisfactorily explained and consequently Rs.2 crores shall be deemed to be income of the company as unexplained credit under section 68.
- The crux of amendment is that the closely held company receiving share application money/share capital/share premium/any such amount has to prove the source of funds in the hands of shareholder/person giving the share application money/share capital/share premium/any such amount.

  i.e. Now source of source is also required to be proved to the satisfaction of the A.O. Thus all the earlier decisions of several Tribunals and High Courts are nullified.

» The Finance Act, 2012 has placed onus of proof on the closely held company receiving the share application money/share capital/ share premium/any such amount has to prove that such money which is invested in the company belongs to the person who has given the money to the company. Otherwise, the money so received shall be taxable in hands of company as unexplained cash credit under section 68.

Further section 115BBE has been introduced by Finance Act, 2012 which provides as under:

1. Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of—

   · The amount of income-tax calculated on income referred to in section 68, section

69, section 69A, section 69B, section 69C or section 69D, **at the rate of thirty per cent**; and

- **Normal tax rate on the balance income.**

2. Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).

- The effect of section 115BBE will be that these 100 slum dwellers who have unexplained cash credit of Rs.2,00,000 will not get slab benefit of Rs. 2,50,000 and Rs. 200,000 shall be taxable at a flat rate of 30.90%. Therefore, each slum dweller will have to pay tax of Rs.61,800
- Section 115BBE hits these slum dwellers who were a party to the transaction of converting black money into white money.
- No expenditure shall be allowed from the income so deemed under section 68 and deductions under Chapter VI-A shall also be not allowed from such deemed income.

» **The proviso to section 68 added by Finance Act, 2012 and section 115BBE also nullifies the following tax planning:**

Cash of Rs.2,00,000 was deposited in account of a non-earning member of family or servant/driver in the house and it was shown as income from tuitions / boutique. Income tax returns were filed for these non-earning members/servant/driver showing income of Rs.2,00,000 and Nil tax thereon. Then, this Rs.2,00,000 was taken as a loan into the business from these people. Now, the Assessing Officer has the power to ask the source of Rs.2,00,000 from the non earning members/servant/driver being credited to their bank account. Assessing Officer will ask for name and addresses of student's to whom tuitions were given and names and addresses of persons to whom Ambroidery / Vadi / Papad / Khakhra services provided. If no explanation is given or explanation is found to be unsatisfactory by Assessing Officer, then, Rs.2,00,000 will be added as income from unexplained credit under section 68 in hands of non-earning member / driver / servant. As per section 115BBE this income will be taxed @ 30.90% without the slab of Rs. 2,50,000 i.e. tax of Rs. 61,800. Thus, the practice of converting black money into white money has been attacked.

Notes:

1. **Proviso to section 68 introduced by Finance Act, 2012 is not applicable to money received from non-residents since money received from non-residents is regulated by FEMA and rules of RBI.**

2. Proviso to section 68 introduced by Finance act, 2012, is not applicable to money received from Venture Capital Company and Venture Capital Fund since they are regulated by SEBI.

» So far as section 68 is concerned there are now numerous decisions of Hon'ble Tribunals and High Courts clearly holding that when such amounts are found credited in the books of accounts in the names of persons whose identity, genuineness and creditworthiness cannot be explained by the assessee to the satisfaction of the Assessing Officer then such sum so credited can be charged to Income Tax as income of the assessee of that previous year. But the decision of Hon'ble Supreme Court in case of Lovely Export (supra) came to the rescue of operators which were in a position to introduce unaccounted or black money in the modus operandi as illustrated above. By making amendment in the proviso of this section now it will be almost impossible to introduce unaccounted money in this manner. In a way it is a very welcome amendment as it is to curb introduction of black money in the guise of companies share capital. In view of this now every company (other than public company) in which public are not substantially interested shall have to maintain and in turn produce before the Income tax authorities the genuineness and creditworthiness besides the identity of the investors/shareholders in share capital. No doubt , there are numerous decisions of Tribunals as well as High courts , that even if additions are made u/s 68 of the I.T. Act , on account of such unexplained deposit/ Credits , penalty of concealment / inadequate particulars of income u/s 271(1)(c) is not leviable.

Decisions :

i. DCIT Vs. M/s. K. Bhanji Vanmalidas & Co. – ITA No. 743/RJT/2010 (ITAT Rajkot)

ii. ITO Vs. Shri Haribhai Devrajbhai Babariya – ITA No. 96/AHD/2011 (ITAT Ahmedabad)

iii. Mohd Haji Adam & Co, Vs. DCIT - ITA No.4341/Mum/2009 (ITAT Mumbai)

Now Section 271(1)© further amended for levy of penalty and Section 270A has been inserted vide Finance Act, 2016 defining Under Reported / Misreporting income.

Penalty for under reporting and misreporting of income.

270A. *(1) The Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner may, during the course of any proceedings under this Act, direct that any person who has under-reported his income shall be liable to pay a penalty in addition to tax, if any, on the under-reported income.*

(2) A person shall be considered to have under-reported his income, if—(a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;(b) the income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been

furnished;(c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;(d) the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;(e) the amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is greater than the maximum amount not chargeable to tax, where no return of income has been filed;(f) the amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;(g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

(7) The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

(8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of the amount of tax payable on under-reported income.

(9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—(a) misrepresentation or suppression of facts;(b) failure to record investments in the books of account;(c) claim of expenditure not substantiated by any evidence;(d) recording of any false entry in the books of account;(e) failure to record any receipt in books of account having a bearing on total income; and(f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.

» It shall be the duty of a Chartered Accountant also to ensure that such kind of unscrupulous practice of introduction of black money in the guise of share capital is not allowed to be slipped through. The Government is aware of almost parallel economy of black money and has its limitation to control and curb. The citizens are aware that the tax rate and structure is quite moderate in India and therefore, it is the duty of Chartered Accountants and professionals to join the hands and see that as a professional activism we all must try to stop such kind of abuse or dubious tax planning. It is equally our role like that of government/ Finance ministry, when we claim to be **partners in Nation Building** that circulation of Black Money is minimized and tax planning in the grab of avoidance done by giants through foreign companies and tax heaven entities are also controlled and checked.

The controversy of treatment of income arising from the share capital being a listed security or unlisted security, which never rests.

BY
ANKIT TALSANIA
ADVOCATE

In the Income Tax Act, 1961, the income arising from long term capital assets (being listed shares) is completely exempt whereas the income arising from short term capital gain is chargeable at concessional rate of 15% plus applicable surcharge and cess. Therefore, the transaction in share capital has always remained a top notch issue amongst the Assessees, Assessing Officers, the Practitioners, the CsIT(A), the Tribunal Members, the Judges and the CBDT.

If the genuineness of the transaction is doubted, the gain arising from the share capital is treated as either Income from Other Sources or the entire amount of receipt as Unexplained Cash Credit. However, where the transaction in share capital is found to be genuine, the controversy rests with the characterization of income from the said share capital as either Capital Gain as such or Business Income.

Time and again various authorities have tried to rest the issues arising from such capital gain and infact the CBDT has also come with the some Circulars/Notifications/Instructions so as to reduce the controversy or the litigation and to the large extent the authorities and CBDT have succeed.

In this Article, I have tried to summarize some of the issues alongwith the relevant authorities and CBDT guidelines.

A. Treatment of income arising from share capital as Business Income: It has always remained a controversy as to when to treat income from share capital as Capital Gain or Business Income.

1. Various guidelines of CBDT :

1.1 The first instructions were issued vide **Instruction No.1827 dated 31.08.1989** on taxation of surplus arising on sale of share guiding the tax authorities on various criteria to be applied for treating holding of shares as stock in trade or capital asset. The criteria to be applied are intention of the tax payer, volume and frequency of the transactions and treatment of the share in the books of accounts of the tax payer either as investment or stock-in-trade. Where the sole intention of

purchase has been to resale at a profit and the purchaser does not have any intention to hold the shares for himself or otherwise for enjoying it, the presence of such an intention is a relevant factor and it would raise a strong presumption that the transaction is in the nature of trade and such securities shall be treated as stock in trade and thus profit liable to be treated as business income. However where the sole purpose of investment is to earn dividends over the years, the same cannot be treated as stock in trade and any profit on sale of such asset will have to be treated as capital gains. Similarly where the volume and frequency of the transaction in shares are much higher than the normal level, then the presumption of having a trade in shares is high.

1.2 The CBDT further revised its instruction in 2007 vide **Circular No.4/2007 dated 15/06/2007**. It has further been provided that it is the substance of the nature of transactions which is important factor like how the books of accounts have been maintained or the magnitude of purchases and sales of such securities or the ratio between purchases and sales. All these factors evaluated together will help the tax payers as well as the revenue authorities to arrive at a valid and rational conclusion. It has further been provided that the assessee may have two portfolio together vis-à-vis investment portfolio and stock-in-trade portfolio.

1.3 Recently the CBDT came out with the new **Circular No.6/2016** on **29.02.2016** setting down certain guidelines to be followed by income tax officers in deciding whether profit/loss from sale of **listed shares/securities** would be treated as capital gains or business income. Several circulars and instructions have been issued previously regarding this matter however, this time the board has given the tax payer the option to decide the nature of his income arising on account of sale of listed shares/securities. The basic idea of issuing the circular is to halt the increasing litigation in this regard.

The said recent circular provides as under :

(a) In case of listed securities if the assessee wants to treat his securities as Stock in trade giving rise to Business income (or loss), then Assessing Officers should accept this without dispute.

(b) Where the listed shares are held for more than 12 months and if the assessee wants to treat the securities as Capital assets giving rise to Capital gains (or loss), then again the Assessing Officer is bound to agree with the claim made by the assessee.

(c) It is further provided that once the assessee treats the income as

capital gain in one assessment year, the same cannot be treated as business income in subsequent years.

(d) In all other cases, the principles laid down in instructions, circulars issued earlier would continue to apply.

1.4 The CBDT has further issued a directive bearing F.No.225/12/2016/ITA.II on 02.05.2016 in which it has been directed that the income arising from transfer of **unlisted shares** would be considered under the head 'Capital Gain', irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach. Paras 2 and 3 of the said directive reads as under :

2. Similarly, for determining the tax-treatment of income arising from transfer of unlisted shares for which no formal market exists for trading, a need has been felt to have a consistent view in assessments pertaining to such income. It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head 'Capital Gain', irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach.

3. It is, however, clarified that the above would not be necessarily applied in the situations where:

i. the genuineness of transactions in unlisted shares itself is questionable; or

ii. the transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil; or

iii. the transfer of unlisted shares is made along with the control and management of underlying business

and the Assessing Officer would take appropriate view in such situations."

4. Landmark decisions of various authorities :

4.1 The Lucknow bench of Tribunal in the case of **Sarnath Infrastructure (P.) Ltd. vs. ACIT 124 ITD 71** laid down certain tests to be applied to determine the character of income arising from the share capital, the relevant extract of the said decision reads as under :

***"13.** After considering above rulings we cull out following principles, which can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes :*

(1) What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account.

Whether it is treated as stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.

(2) Whether assessee has borrowed money to purchase and paid interest thereon ? Normally, money is borrowed to purchase goods for the purposes of trade and not for investing in an asset for retaining.

(3) What is the frequency of such purchases and disposal in that particular item ? If purchase and sale are frequent, or there are substantial transactions in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).

(4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation in its value ? Former will indicate intention of trade and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.

(5) How the value of the items has been taken in the balance sheet ? If the items in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.

(6) How the company (assessee) is authorized in memorandum of association/articles of association ? Whether for trade or for investment ? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity ? And vice versa.

(7) It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to Revenue to prove that apparent is not real.

(8) The mere fact of credit of sale proceeds of shares (or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.

(9) One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee

that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item ? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made ?

(10) It is permissible as per CBDTs Circular No. 4 of 2007 of 15th June, 2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.

(11) Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen."

4.2 The Gujarat High Court had also an occasion to consider this issue in the case of **CIT v. Riwashanker A. Kothari** [2006] 283 ITR 338/155 Taxman 214 (Guj.). Hon'ble court has made reference to the test laid by it in its earlier decision rendered in the case of **Pari Mangaldas Girdhardas v. CIT 1977 CTR (Guj.) 647.** These tests read as under:—

"After analyzing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.(a)The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.(b)The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.(c)The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.(d)The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.(e)The fifth test, normally applied in case of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.(f)The last but not the least, rather the most important test, is

as to the volume, frequency, continuity and regularity of transaction of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proposition to the strength of holding then an inference can readily be drawn that the activity is in the nature of business.

4.3 Various authorities have also taken a view that despite large volume of transactions and short period of holding of shares, STCG cannot be treated as business income and rules of consistency is required to be followed by the Assessing Officer.

- ***ACIT vs. Naishadh V. Vachharajani bearing ITA No.6429/M/2009***

The Hon'ble Tribunal has upheld the following finding of CIT(A).

"In the facts of the present case, the assessee is holding the shares as investment from year to year. It is the intention of the assessee which is to be seen to determine the nature of transaction conducted by the assessee. Though the investment in shares is on a large magnitude but the same shall not decide the nature of transaction. Similar transaction of sale and purchase of shares in the preceding years have been held to be income from capital

gains both on Long Term and Short Term basis. The purchase of shares is same as in the preceding years and the same merits to be accepted as Short Term Capital Gains. There is no basis for treating the assessee as a trader in shares, when his intention was to hold the shares in Indian companies as an investment and not as stock-in-trade. The mere magnitude of transaction does not change the nature of transaction, which are being assessed as income from Capital Gains in the past several years."

- ***Ramesh Babu Rao vs. ACIT bearing ITA No.3719/M/2009***

Ratio can be drawn down as under :

The assessee was an investor and the gains are assessable as capital gains because:

(a) The assessee was a good timer of purchase and sale of shares thereby substantially increasing his gains in the stock market;

(b) The large turnover was because of bulk purchases and sales in a scrip. There were very few transactions of purchase and sale, as the assessee was purchasing in block of a particular share in large volume. Accordingly, large volume cannot be a deciding factor to hold as a trader;

(c) the assessee was not a broker or sub-broker and did not have any office establishment;

(d) The assessee did not do any speculative activity nor indulge in any sales without delivery;

(e) The shares were shown as capital assets in the books of account;

(f) The assessee had not pledged any shares with any financial institutions, nor borrowed any fund

- ***DCIT vs. SMK Share and Stock Broking bearing ITA No.799/M/2009***

"xxx…..
13. CBDT, vide Circular No.4/2007 dated 15th June 2007, has observed that whether a particular holding of shares is by way of investment or form part of the stock in trade is a matter which is within the knowledge of the assessee who holds his shares and he should, in normal circumstances, be in a position to produce evidence from his records as to whether he is maintaining any stock-in-trade or holding the shares by way of investment. In the present case, it is not disputed that the assessee had maintained this distinction in its records. It is true that volume of transaction is an important indicator of the intention of the assessee whether to deal in shares as trading asset or to hold the shares as investor but certainly not the sole criterion. In our considered opinion, the Assessing Officer's conclusion that since sale and purchase had been determined by the volatility in the market, the same is against the basic feature of investor, is not based on sound rational reasoning. A prudent investor always keeps a

watch on the market trends and, therefore, is not barred under law from liquidating his investments in shares. The law itself has recognised this fact by taxing these transactions under the head "Short Term Capital Gains". If the Assessing Officer's reasoning is accepted, then it would be against the legislative intent itself. It is always a vexed question to find out as to whether the assessee was holding the shares as stock in trade or under an investment portfolio particularly because one has to infer the intention of the assessee which is primarily within his own knowledge. The conduct of the assessee assumes significance in this regard.
xxx….."

- ***ACIT vs. Vinod K. Nevatia bearing ITA No.6556/M/2009***

From this order, following ratio can be drawn down:

*(i) In Circular No. 4/2007 dated 15.6.2007 the CBDT has emphasized that **it is possible for a tax payer to have two portfolios, i.e. an investment portfolio and a trading portfolio**;*

*(ii) The assessee had maintained **separate books of account as well as separate demat accounts in respect of his trading & investment activity**. The manner in which books are kept is an important piece of evidence as per **Raja Bahadur Visheshwar Singh vs. CIT** 41 ITR 685 (SC);*

(iii) Whether the assessee's conduct is that of an investor or a trader depends on the facts and circumstances of the case. No single fact is decisive nor has any acid test been laid down in any judgment;

*(iv) Primarily, the **intention with which an assessee starts his activity** is the most important factor. If shares are purchased from **own funds**, with a view to keep the funds in equity shares to earn considerable return on account of enhancement in the value of share over a period then **merely because the assessee liquidates its investment within six months or eight months would not lead to the conclusion that the assessee had no intention to keep the funds as invested in equity shares** but was actually intended to trade in shares. Mere intention to liquidate the investment at higher value does not imply that the intention was only to trade in security. However, it*

cannot be held that in all circumstances if assessee has used its own funds for share activity then it would only lead to inference of investment being the sole intention. In such circumstances, frequency of transactions will have to be considered to arrive at proper conclusion regarding the true intention of the assessee. However, if the assessee, on the other hand, borrows funds for making investment in shares then definitely it is a very important indicator of its intention to trade in shares;

(v) On facts, the AO proceeded on the ***assumption that borrowed funds had been utilized for buying shares*** *on the ground that funds were common and could not be segregated. However, it was categorically pointed out before the CIT (A) that* ***no part of the borrowed funds was utilized for acquisition of shares on investment account****. Nothing was brought on record by the department to controvert this fact;*

(vi) Further, ***the AO accepted the assessee's claim of LTCG to the extent of Rs. 2 crores which implies that he has accepted the assessee's claim regarding holding investment portfolio****.*

- ***Shantilal M. Jain vs. ACIT bearing ITA No.2690/M/2010***

xxx…..

Thus, from the details furnished by the ld counsel for the assessee, we find from Assessment Years 2003-04 to 2008-09, the Assessing Officer has consistently accepted the STCG shown by the assessee except for Assessment Year 2006-07 i.e. the impugned assessment year. Under these circumstances, we are of the considered opinion that Rule of consistency aspropounded by the jurisdictional High Court in the case of Gopal Purohit (supra) will squarely be applicable to the facts of the present case.

9. In view of the above discussion, we are of the considered opinion that the income derived from the sale/purchase of share in the instant case has rightly been treated by the assessee as STCG. Therefore, we set aside the order of the CIT(A) and direct the Assessing Officer to accept the STCG as declared by the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed.

4.4 The Gujarat High Court in the case of **CIT vs. Niraj Amidhar Surti** in **Tax Appeal No.836 of 2009** has even held that merely because the shares have been purchased from borrowed funds obtained on high rate of interest would not change the nature of transaction from investment to one in the nature of an "adventure in the nature of trade", relevant extract of the said decision is as under :

"14. However, the reasoning adopted by the Assessing Officer loses sight of the fact that merely because the shares had been purchased from borrowed fundsobtained on high rate of interest would not change the nature of the transaction from investment to one in the nature of an "adventure in the nature of trade". Moreover, in the light of the findings recorded by Commissioner (Appeals) that the assessee had held the shares in question for fourteen months, which is a long period for the purpose of long term capital gain; the intention of the assessee had always been that of making investment in shares and not dealing in shares, which was also apparent from the fact that the shares had not been treated as stock in trade by the assessee; even after the sale, the assessee had made investment in bonds of NABARD, indicating that he had treated the same as long term capital gain; as well as the fact that the assessee had not split the shares in lots but had sold the same in one lot; it is not possible to agree with the contention raised on behalf of the revenue that the transaction in question is an "adventure in the nature of trade" and therefore, the income derived by the assessee from the said transaction is a business income and cannot be treated as capital gain. Insofar as the second ground for holding the transaction in question to be an adventure in the nature of trade, viz., that the assessee was not the legal owner of the shares and was not having physical possession thereof, is concerned, if the said ground were to be accepted, then, as had been rightly contended on behalf of the assessee, there was no transaction in the hands of the assessee and as such, there was no question of taxing the said transaction merely on the ground that the assessee had offered the same as capital gain. It is nobody's case that delivery of shares allotted was not taken at all. The shares were held by Maniram Consultants as security towards loan advanced to the assessee indicating that the assessee was the owner of shares which were offered and held as security."

5. The principles that emerge out from the CBDT guidelines and Landmark judgments can be summarized as under :

(a) The treatment which assessee has given in his books of

account, i.e., whether shown as investment or as stock in trade;

(b) The existence of power to purchase and sell shares in MOA is not decisive factor that it is stock in trade;

(c) Quantum of purchase and sale;

(d) Ratio between purchase and sale;

(e) Holding Period;

(f) Intention of the assessee (whether to resale at profit, or to earn long term appreciation and dividend income);

(g) Method of Valuation; and last but not the least

(h) It is possible for the assessee to maintain two portfolio together i.e investment portfolio and stock-in-trade portfolio.

B. Treatment of income arising from share capital as Income from Other Sources or entire receipt as Unexplained Cash Credit: when the transaction in share capital is found to be non-genuine the assessing officer treats the income arising from share capital as Income from Other Sources or the entire receipts as Unexplained Cash Credit. There are decisions in favour of the assessee as well as against the assessee depending upon the individual facts of the case. Some of the important decisions are as under :

1. Recently the Mumbai Tribunal in the case of **Farrah Marker vs. ITO in ITA No.3801/Mum/2011 dated 27/04/2016** has been held that LTCG cannot be treated as bogus & unexplained cash credit if the documents are in order and there is no allegation of manipulation by SEBI or BSE, relevant extract of which is as under :

(i) Documents pertaining to the purchase and sale of shares of M/s Shukun Constructions Ltd. such as contract notes of brokers, copies of physical share certificates, transfer of physical shares to the name of the assessee and consolidation by the company, the D-MAT account statement of the assessee with SHCIL confirming the said shares in the assessee's name, bank statements and summary thereof and financial statements of the assessee, viz., Balance Sheet of earlier years showing that the fact of holding these shares were furnished before the AO from 16.07.2007 onwards, i.e. well before the assessment was concluded on 31.12.2007. It is also seen that the show cause notice issued by the AO to the assessee on 13.11.2007 as to why the transaction in the said shares be not treated as a bogus/arranged one was replied to by the assessee vide letter dated 21.11.2007 addressed to the AO. In our considered view, after an

appreciation of the material on record, we find that no proper investigation has been carried out by the AO to controvert the material evidence brought on record by the assessee. Even the statement recorded on 31.12.2007 by the AO from one Sir Niraj Sanghvi, which was strongly relied upon by the AO, we find has no evidentiary or corroborative value as it is of a person who has no role in the said share purchase transactions. Further, the said statement, recorded on the day the order of assessment was concluded, i.e. 31.12.2007, was recorded behind the back of the assessee and neither copy of the same was given to the assessee for rebuttal, nor was the assessee allowed due opportunity to cross-examine Shri Niraj Sanghvi. It is seen from the record that no statement was recorded from Smt. Charu Sanghvi, Proprietor, Falgun Invest from whom the assessee purchased the said shares of M/s. Shukun Constructions Ltd. In this factual and legal matrix as discussed above, we find that the statement of Shri Niraj Sanghvi, which was so strongly relied upon to form the basis of the AO's conclusion, is fatally flawed and has no corroboratory or evidentiary value since it was recorded behind the back of the assessee and was used to arrive at an adverse finding in respect of the assessee's purchase of the 'said shares' without putting the assessee on notice by affording her opportunity of rebuttal of the statement and/or cross-examination of Niraj Sanghvi.

(ii) There is no evidence on record to show that any action or enquiry was carried out either by the SEBI or BSE in respect of the alleged manipulation or propping up of the price rate movement of the 'said shares' of Shukun Constructions Ltd., as has been assessed by the AO. The shares of Shukun Constructions Ltd. is listed on BSE and that the sale transaction of the 'said shares' by the assessee is at the rate quoted on the date of sale has been confirmed both by BSE and the concerned stock broker M/s. Khambatta Securities Ltd. It is strange that the AO has made the addition under section 68 of the Act treating the entire sale proceeds of the 'said shares' received by the assessee through regular banking channels from stock broker registered with SEBI, M/s. Khambatta Securities Ltd., which facts have been confirmed by the said stock broker. In our considered view, the assessee has discharged the onus required under section 68 of the Act as she has established the identity of the payer, source of funds received on sale of the same shares and the genuineness of the transaction.

(iii) The addition under section 68 of the Act in the case on hand, it appears, has been made only because the AO presumed that the

purchases of the 'said shares' of M/s. Shukun Constructions Ltd. were not made on the date as disclosed by the assessee, but was backdated and an arranged transaction, and not because there was any irregularity in the sale of the said shares. We find from the material on record that the purchases of the said shares were duly disclosed under the head investment in the audited Balance Sheet as on 31.03.2004 relevant to A.Y. 2004-05. In this context we concur with the averments of the learned A.R. for the assessee that if there was any adverse material in respect of the purchases of the 'said shares', the AO ought to have or would have proceeded to initiate proceedings for reopening the assessment for A.Y. 2004-05 while concluding the assessment for A.Y. 2005-06, the year under consideration, on 31.12.2007 or thereafter till 31.03.2011, which he has not done.

2. In most of the penny stock cases, the survey / search takes place and the broker / intermediates make a statement that they were indulged into providing accommodation entries to the beneficiaries. On the basis of such statement, the cases of the beneficiary assessees are reopened and the addition is made merely relying on such statement and without granting an opportunity of cross-examination to such beneficiary assesses. The Ahmedabad Tribunal in the case of **Chartered Motors Pvt. Ltd. vs. ACIT in IT(SS)A No.26/Ahd/2012** had also such an occasion to address such kind of an issue where all the evidences were placed on record, however, the addition was made merely relying on the statement of one of the broker / intermediate who was allegedly indulged in providing accommodation entries. However, the Ahmedabad Tribunal considering all the documents / evidences on record held that addition cannot be made merely relying on the statement of broker / intermediate, if the opportunity of cross-examination of such statement is not given to the assessee. The Tribunal following various decisions of Gujarat High court and held as under :

"17. We find that in the instant case, the addition is made u/s. 68 of the Act on the ground of unexplained cash credit. As per the provisions of section 68, the initial onus lies upon the assessee to prove the nature and source of amount credited in his books of account. We find that this initial onus was discharged in the instant case by the assessee by furnishing documents like MOA, AOA, share application & board resolution, Certificate of Incorporation, Certificate of Commencement, acknowledgements of ITRs, audited accounts etc. of concerned companies. Thereafter, in our view, the onus shifted upon the Department and it was for the Department to bring on record relevant

material to show that why inspite of the above stated documents, the addition is still to be made in the hands of the assessee. In the instant case, the Department has endeavoured to discharge its burden on the basis of statements recorded by it of the persons mentioned above.

18. We find that the assessee requested for cross-objection of the maker of the statement. Further, we find that the Assessing Officer also made an attempt to allow the assessee opportunity to cross-examine the makers of the statement by issuing summons to them. However, the cross-examination could not take place because of failure on the part of the makers of the statements to appear on the appointed date. But strangely, thereafter, the Assessing Officer did not take any step to allow effective opportunity to the assessee to cross-examine the makers of the statements. The Assessing Officer did not pursue the matter further. Thus, we find that the assessee was not allowed any real opportunity to cross-examine the persons who made the statement at the back of the assessee. In our considered view, in the circumstances, the statement of those persons cannot be read against the assessee. Our above view finds support from the decision of the Hon'ble Jurisdictional High Court in the case of

(i) Heirs and Legal Representatives of Late Laxmanbhai S. Patel Vs. Commissioner of Income Tax (supra)

(ii) CIT Vs. Indrajit Singh Suri (supra)

(iii) DCIT Vs. Mahendra Ambalal Patel (supra)

(iv) CIT Vs. Kantibhai Revidas Patel (supra)

In view of the above settled position of law, we find force in the argument of the assessee that the statements of the persons mentioned above are not admissible evidence against the assessee. In absence of these statements, we find that no other material has been brought on record by the Revenue to show that why still the amount in question should be treated as income of the assessee when the assessee furnished all the documents which were available with it to discharge the onus which was upon it u/s. 68 of the Act. In the above circumstances, in our considered view, the addition was made solely based on the inadmissible and unreliable material and therefore addition so made cannot be sustained. We, therefore, delete the addition of Rs 2,00,00,000/- made in the case of M/s Charted Motors Pvt. Ltd. as well as addition of Rs 70,00,000/- made in the case of M/s. Chartered Speed Private Limited.

19. In the result, both the appeals of the assessee are allowed."

The said order of Ahmedabad Tribunal in confirmed by the Gujarat High Court in Tax Appeal Nos.126 and 127 of 2015.

3. There are various authorities who have taken a view that where the Assessee has proved genuineness of share transactions by contract notes for sale and purchase, bank statement, DEMAT account showing transfer in and out of shares, as also abstract of transactions furnished by stock exchange, Assessing Officer is not justified in treating capital gain arising from sale of shares as income from other source. The said authorities are as under :

- CIT vs. Maheschandra G. Valil 40 taxmann.com 326 (Guj.)
- CIT vs. Pushpa Malpani 20 taxmann.com 597 (Raj)
- Smt. Durgadevi Mundra vs. ITO in ITA No.1175/Mum/2012 (Mum.)
- ITO vs. Smt. Navneet Mehra in ITA No.3632/Mum/2010 (Mum.)
- ACIT vs. Ravindrakumar Toshniwal in ITA No.1356/Mum/2010 (Mum.)
- ITO v. Rasila N Gada in ITA No.1773/Mum/2010 (Mum.)
- Manojkumar Sarwangi HUF vs. ACIT in ITA No.3233 & 3156/Ahd/2010 (Ahd.)

4. However, recently the CBDT has issued a letter dated 16.03.2016 in which it has noted that an investigation has been conducted by Kolkata Investigation Directorate in respect of large number of penny stock companies, whose share prices were artificially raised on the Stock Exchanges in order to book bogus claims of Long Term Capital Gains or Short Term Capital Loss by various beneficiaries. It is stated that extensive investigation, including search and seizure/survey action on entry providers, riggers, beneficiaries etc. was conducted by the Investigation Directorate in such cases. Based upon outcome of such investigation and analysis of the data, the Systems Directorate has now uploaded details of such information in respect of individual assessees who have made transactions in such penny stocks. The CBDT has directed that the information relating to the “Penny Stock” should be considered by AO's for making assessments u/s 143(3) and

reopening assessments u/s 148 of the Act.

5. It is going to long drawn litigation with fresh set of evidences emerging out of the investigation taken place / taking place across the India in to such alleged penny stock activities. Now in the coming months it is be seen that how the judicial authorities, taking into consideration various precedents and CBDT guidelines, take a view regarding the large number of penny stock companies, whose share prices were artificially raised on the Stock Exchanges in order to book alleged bogus claims of Long Term Capital Gains or Short Term Capital Loss by various beneficiaries.

Goods and Service Tax
One Country
One Tax
One Market

FAQs on Goods and Services Tax (GST)

Question 1. What is GST? How does it work?

Answer: GST is one indirect tax for the whole nation, which willmake India one unified common market.

GST is a single tax on the supply of goods and services, right from the manufacturer to the consumer. Credits of input taxes paid at each stage will be available in the subsequent stage of value addition, which makes GST essentially a tax only on value addition at each stage. The final consumer will thus bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages.

Question 2. What are the benefits of GST?

Answer: The benefits of GST can be summarized as under:

For business and industry

Easy compliance: A robust and comprehensive IT system would be the foundation of the GST regime in India. Therefore, all tax payer services such as registrations, returns, payments, etc. would be available to the taxpayers online, which would make compliance easy and transparent.

Uniformity of tax rates and structures: GST will ensure that indirect tax rates and structures are common across the country, thereby increasing certainty and ease of doing business. In other words, GST would make doing business in the country tax neutral, irrespective of the choice of place of doing business.

Removal of cascading: A system of seamless tax-credits throughout the value-chain, and across boundaries of States, would ensure that there is minimal cascading of taxes. This would reduce hidden costs of doing business.

Improved competitiveness: Reduction in transaction costs of doing business would eventually lead to an improved competitiveness for the trade and industry.

Gain to manufacturers and exporters: The subsuming of major Central and State taxes in GST, complete and comprehensive set-off of input

goods and services and phasing out of Central Sales Tax (CST) would reduce the cost of locally manufactured goods and services. This will increase the competitiveness of Indian goods and services in the international market and give boost to Indian exports. The uniformity in tax rates and procedures across the country will also go a long way in reducing the compliance cost.

- **For Central and State Governments**

Simple and easy to administer: Multiple indirect taxes at the Central and State levels are being replaced by GST. Backed with a robust end-to-end IT system, GST would be simpler and easier to administer than all other indirect taxes of the Centre and State levied so far.

Better controls on leakage: GST will result in better tax compliance due to a robust IT infrastructure. Due to the seamless transfer of input tax credit from one stage to another in the chain of value addition, there is an inbuilt mechanism in the design of GST that would incentivize tax compliance by traders.

Higher revenue efficiency: GST is expected to decrease the cost of collection of tax revenues of the Government, and will therefore, lead to higher revenue efficiency.

For the consumer

Single and transparent tax proportionate to the value of goods and services: Due to multiple indirect taxes being levied by the Centre and State, with incomplete or no input tax credits available at progressive stages of value addition, the cost of most goods and services in the country today are laden with many hidden taxes. Under GST, there would be only one tax from the manufacturer to the consumer, leading to transparency of taxes paid to the final consumer.

Relief in overall tax burden: Because of efficiency gains and prevention of leakages, the overall tax burden on most commodities will come down, which will benefit consumers.

Question 3. Which taxes at the Centre and State level are being subsumed into GST?

Answer: At the Central level, the following taxes are being subsumed:

a. Central Excise Duty,
b. Additional Excise Duty,
c. Service Tax,
d. Additional Customs Duty commonly known as Countervailing Duty, and
e. Special Additional Duty of Customs.

At the State level, the following taxes are being subsumed:

a. Subsuming of State Value Added Tax/Sales Tax,
b. Entertainment Tax (other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States),

c. Octroi and Entry tax,
d. Purchase Tax,
e. Luxury tax, and
f. Taxes on lottery, betting and gambling.

Question 4. What are the major chronological events that have led to the introduction of GST?

Answer: GST is being introduced in the country after a 13 year long journey since it was first discussed in the report of the Kelkar Task Force on indirect taxes. A brief chronology outlining the major milestones on the proposal for introduction of GST in India is as follows:

a. In 2003, the Kelkar Task Force on indirect tax had suggested a comprehensive Goods and Services Tax (GST) based on VAT principle.
b. A proposal to introduce a National level Goods and Services Tax (GST) by April 1, 2010 was first mooted in the Budget Speech for the financial year 2006-07.
c. Since the proposal involved reform/ restructuring of not only indirect taxes levied by the Centre but also the States, the responsibility of preparing a Design and Road Map for the implementation of GST was assigned to the Empowered Committee of State Finance Ministers (EC).
d. Based on inputs from Govt of India and States, the EC released its First Discussion Paper on Goods and Services Tax in India in November, 2009.
e. In order to take the GST related work further, a Joint Working Group consisting of officers from Central as well as State Government was constituted in September, 2009.
f. In order to amend the Constitution to enable introduction of GST, the Constitution (115th Amendment) Bill was introduced in the Lok Sabha in March 2011. As per the prescribed procedure, the Bill was referred to the Standing Committee on Finance of the Parliament for examination and report.
g. Meanwhile, in pursuance of the decision taken in a meeting between the Union Finance Minister and the Empowered Committee of State Finance Ministers on 8th November, 2012, a 'Committee on GST Design', consisting of the officials of the Government of India, State Governments and the Empowered Committee was constituted.
h. This Committee did a detailed discussion on GST design including the Constitution (115th) Amendment Bill and submitted its report in January, 2013. Based on this Report, the EC recommended certain changes in the Constitution Amendment Bill in their meeting at Bhubaneswar in January 2013.
i. The Empowered Committee in the Bhubaneswar meeting also decided to constitute three committees of officers to discuss and report on various aspects of GST as follows:-
   (a) Committee on Place of Supply Rules and Revenue Neutral Rates;
   (b) Committee on dual control, threshold and exemptions;
   (c) Committee on IGST and GST on imports.

j. The Parliamentary Standing Committee submitted its Report in August, 2013 to the Lok Sabha. The recommendations of the Empowered Committee and the recommendations of the Parliamentary Standing Committee were examined in the Ministry in consultation with the Legislative Department. Most of the recommendations made by the Empowered Committee and the Parliamentary Standing Committee were accepted and the draft Amendment Bill was suitably revised.

k. The final draft Constitutional Amendment Bill incorporating the above stated changes were sent to the Empowered Committee for consideration in September 2013.

l. The EC once again made certain recommendations on the Bill after its meeting in Shillong in November 2013. Certain recommendations of the Empowered Committee were incorporated in the draft Constitution (115th Amendment) Bill. The revised draft was sent for consideration of the Empowered Committee in March, 2014.

m. The 15th Constitutional (Amendment) Bill, 2011, for the introduction of GST introduced in the Lok Sabha in March 2011 lapsed with the dissolution of the 15th Lok Sabha.

n. In June 2014, the draft Constitution Amendment Bill was sent to the Empowered Committee after approval of the new Government.

Based on a broad consensus reached with the Empowered Committee on the contours of the Bill, the Cabinet on 17.12.2014 approved the proposal for introduction of a Bill in the Parliament for amending the Constitution of India to facilitate the introduction of Goods and Services Tax (GST) in the country. The Bill was introduced in the Lok Sabha on 19.12.2014, and was passed by the Lok Sabha on 06.05.2015. It was then referred to the Select Committee of Rajya Sabha, which submitted its report on 22.07.2015.

Question 5. How would GST be administered in India?

Answer: Keeping in mind the federal structure of India, there will be two components of GST — Central GST (CGST) and State GST (SGST). Both Centre and States will simultaneously levy GST across the value chain. Tax will be levied on every supply of goods and services. Centre would levy and collect Central Goods and Services Tax (CGST), and States would levy and collect the State Goods and Services Tax (SGST) on all transactions within a State. The input tax credit of CGST would be available for discharging the CGST liability on the output at each stage. Similarly, the credit of SGST paid on inputs would be allowed for paying the SGST on output. No cross utilization of credit would be permitted.

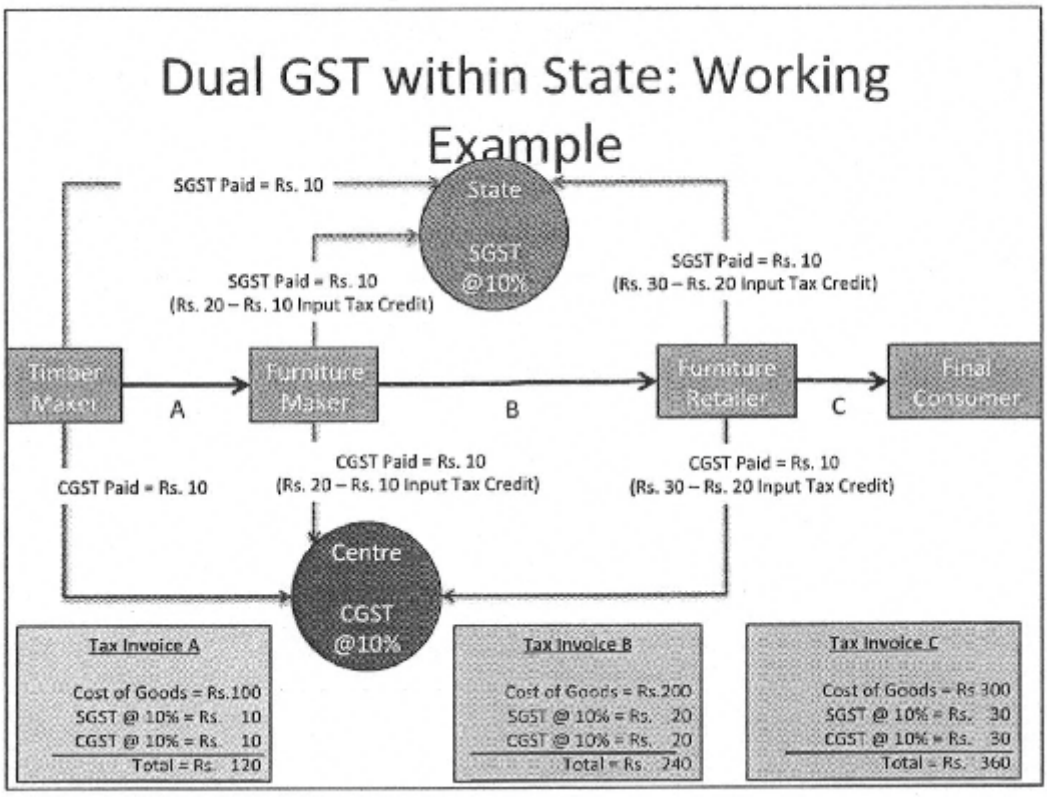
Question 6. How would a particular transaction of goods and services be taxed simultaneously under Central GST (CGST) and State GST (SGST)?

Answer : The Central GST and the State GST would be levied simultaneously on every transaction of supply of goods and services except on exempted goods and services, goods which are outside the purview of GST and the transactions which are below the

prescribed threshold limits. Further, both would be levied on the same price or value unlike State VAT which is levied on the value of the goods inclusive of Central Excise.

A diagrammatic representation of the working of the Dual GST model within a State is shown in Figure 1 below.

Figure 1: GST within State



Question 7. Will cross utilization of credits between goods and services be allowed under GST regime?

Answer : Cross utilization of credit of CGST between goods and services would be allowed. Similarly, the facility of cross utilization of credit will be available in case of SGST. However, the cross utilization of CGST and SGST would not be allowed except in the case of inter-State supply of goods and services under the IGST model which is explained in answer to the next question.

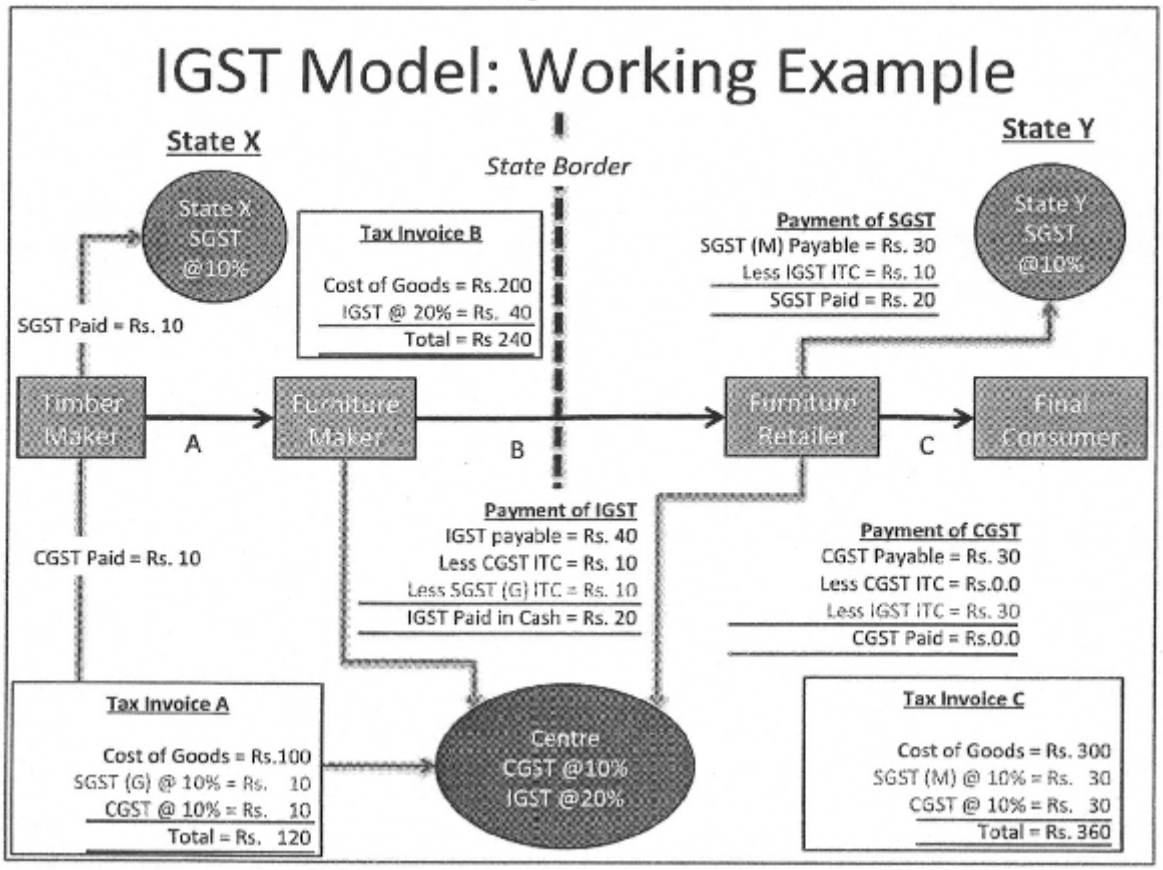
Question 8. How will be Inter-State Transactions of Goods and Services be taxed under GST in terms of IGST method?

Answer: In case of inter-State transactions, the Centre would levy and collect the Integrated Goods and Services Tax (IGST) on all inter-State supplies of goods and services under Article 269A (1) of the Constitution. The IGST would roughly be equal to CGST plus SGST. The IGST mechanism has been designed to ensure seamless

flow of input tax credit from one State to another. The inter-State seller would pay IGST on the sale of his goods to the Central Government after adjusting credit of IGST, CGST and SGST on his purchases (in that order). The exporting State will transfer to the Centre the credit of SGST used in payment of IGST. The importing dealer will claim credit of IGST while discharging his output tax liability (both CGST and SGST) in his own State. The Centre will transfer to the importing State the credit of IGST used in payment of SGST. Since GST is a destination-based tax, all SGST on the final product will ordinarily accrue to the consuming State.

A diagrammatic representation of the working of the IGST model for inter-State transactions is shown in Figure 2 below.

Figure 2



Question 9. How will IT be used for the implementation of GST?

Answer: For the implementation of GST in the country, the Central and State Governments have jointly registered Goods and Services Tax Network (GSTN) as a not-for-profit, non-Government Company to provide shared IT infrastructure and services to Central and State Governments, tax payers and other stakeholders. The key objectives of GSTN are to provide a standard and uniform interface to the taxpayers, and shared infrastructure and services to Central and State/UT governments.

GSTN is working on developing a state-of-the-art comprehensive IT infrastructure including the common GST portal providing frontend services of registration, returns and payments to all taxpayers, as well as the backend IT modules for certain States that include processing of returns, registrations, audits, assessments, appeals, etc. All States, accounting authorities, RBI and banks, are also preparing their IT infrastructure for the administration of GST.

There would no manual filing of returns. All taxes can also be paid online. All mis-matched returns would be auto-generated, and there would be no need for manual interventions. Most returns would be self-assessed.

Question 10. How will imports be taxed under GST?

Answer : The Additional Duty of Excise or CVD and the Special Additional Duty or SAD presently being levied on imports will be subsumed under GST. As per explanation to clause (1) of article 269A of the Constitution, IGST will be levied on all imports into the territory of India. Unlike in the present regime, the States where imported goods are consumed will now gain their share from this IGST paid on imported goods.

Question 11. What are the major features of the Constitution (122nd Amendment) Bill, 2014?

Answer : The salient features of the Bill are as follows:

g. Conferring simultaneous power upon Parliament and the State Legislatures to make laws governing goods and services tax;

h. Subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, and Special Additional Duty of Customs;

I. Subsuming of State Value Added Tax/Sales Tax, Entertainment Tax (other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry tax, Purchase Tax, Luxury tax, and Taxes on lottery, betting and gambling;

j. Dispensing with the concept of 'declared goods of special importance' under the Constitution;

k. Levy of Integrated Goods and Services Tax on inter-State transactions of goods and services;

1. GST to be levied on all goods and services, except alcoholic liquor for human consumption. Petroleum and petroleum products shall be subject to the levy of GST on a later date notified on the recommendation of the Goods and Services Tax Council;

m. Compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period of five years;

n. Creation of Goods and Services Tax Council to examine issues relating to goods and services tax and make recommendations to the Union and the States on parameters like rates, taxes, cesses and surcharges to be subsumed, exemption list and threshold limits, Model GST laws, etc. The Council shall function under the Chairmanship of the Union Finance Minister and will have all the State Governments as Members.

Question 12. What are the major features of the proposed registration procedures under GST?

Answer: The major features of the proposed registration procedures under GST are as follows:

i. Existing dealers: Existing VAT/Central excise/Service Tax payers will not have to apply afresh for registration under GST.

ii. New dealers: Single application to be filed online for registration under GST.
The registration number will be PAN based and will serve the purpose for Centre and State.

iv. Unified application to both tax authorities.

v. Each dealer to be given unique ID GSTIN.

vi. Deemed approval within three days.

vii. Post registration verification in risk based cases only.

Question 13. What are the major features of the proposed returns filing procedures under GST?

Answer: The major features of the proposed returns filing procedures under GST are as follows:

a. Common return would serve the purpose of both Centre and State Government.

b. There are eight forms provided for in the GST business processes for filing for returns. Most of the average tax payers would be using only four forms for filing their returns. These are return for supplies, return for purchases, monthly returns and annual return.

c. Small taxpayers: Small taxpayers who have opted composition scheme shall have to file return on quarterly basis.

d. Filing of returns shall be completely online. All taxes can also be paid onine.

Question 14. What are the major features of the proposed payment procedures under GST?

Answer: The major features of the proposed payments procedures under GST are as follows:

I. Electronic payment process- no generation of paper at any stage

ii. Single point interface for challan generation- GSTN

iii. Ease of payment – payment can be made through online banking, Credit Card/Debit Card, NEFf/RTGS and through cheque/cash at the bank

iv. Common challan form with auto-population features

v. Use of single challan and single payment instrument

vi. Common set of authorized banks

vii. Common Accounting Codes