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UDAAN...A STEP FORWARD

VOLUME 2

AUGUST 2012

LEAD STORY

• General Anti-Avoidance Rules

GAAR is a simple rule which allows the Indian tax authorities to levy tax if the arrangement or transactions done are 'impermissible avoidance arrangements'. The term 'impermissible avoidance arrangements' comprises two tests: the first one is the main purpose test and the second is the specified condition test. The main purpose test is to obtain tax benefit .

OTHER TOPICS

WHAT'S INSIDE

GENERAL ANTI-AVOIDANCE RULES

"Tax avoidance like tax evasion, seriously undermines the achievements of the public finance objective of collecting revenues in an efficient, equitable and effective manner."

It has now been more than two months after the elections got over. And while the voting mark of the same is about to vanish from the voters' hands, the expectations from the government have already gone askew. A month after the election process commenced there came the Union Budget which lacked the much-needed reforms which could have revived the economy and brought growth back on track. The policy-paralysed government gave nothing to cheer about in the budget and merely pushed the scenario in an even more chaotic state. Meanwhile, an announcement about the General Anti-Avoidance Agreement (GAAR) in the Union Budget 2012 led to panic among investors.

GAAR has been hitting the headlines with regular frequency in recent times. However, investors still lack basic informative knowledge about the same. We usually hear or read that GAAR implementation will have a negative impact on the market but do we know how? In this article we have tried to explain the impact of GAAR in simple terms for our readers.

While examining a legally valid transaction, the Revenue authorities should proceed objectively and not hypothetically attribute 'motives' behind the taxpayer's action.

GAAR is a simple rule which allows the Indian tax authorities to levy tax if the arrangement or transactions done are 'impermissible avoidance arrangements'. The term 'impermissible avoidance arrangements' comprises two tests: the first one is the main purpose test and the second is the specified condition test. The main purpose test is to obtain tax benefit. And in addition to the first condition, there is a specified condition test which must satisfy any one or more of the following four conditions:

- There has been misuse or **abuse of the provisions** or
- The transaction or agreement is **non-arms length** or
- The transaction or agreement is **not bonafide** or
- The transaction or agreement **lacks commercial substance.**

It may be advisable to appreciate and adapt the two part inquiry in terms of the provisions and the arrangement rather than restrict it to determining the whether main purpose of the arrangement was a 'tax benefit'.

In simple terms, the above points mean that one should not get into any agreement for which the main purpose is to obtain tax benefit. For example, many of the companies are now converting into limited liability partnership (LLP) where there are tax benefits like lower tax rate, absence of dividend distribution tax and minimum alternative tax (MAT), etc. Hence, companies that have converted into LLP might face adverse consequences if the arrangement is not for bonafide (true faith, authentic) commercial purpose. Therefore the burden of proof would lie on the tax payer.

The Finance Bill has provided very little guidance as to what the misuse and abuse of the provisions mean. For example, it could be considered as cross-border mergers wherein foreign companies take over Indian companies for tax benefits or vice versa. This may be considered as an exposure to GAAR. Hence, proper business rationale and proof should be documented to avoid any such situation.

A transaction or agreement is known as arm's length when buyers and sellers trade considering their own self interest. Both should be an independent entity and should have no relation with each other. For example, if a parent company has made any transaction with its subsidiary firm resulting into avoidance of tax, this would be considered exposure to GAAR risk.

"A broad spectrum GAAR carries a real risk of undermining the ability of business and individuals to carry out sensible and responsible tax planning and that on the other hand introducing a moderate rule which does not apply to responsible tax planning, and is targeted at abusive arrangements would be beneficial."

Further, under the provisions of GAAR no clear definition of commercial substance has been provided which further gives unrestricted powers to the tax authorities to interpret the term, resulting into a losing situation for the tax payers. The proposed GAAR provisions in the budget are not clear about whether the structured set-ups before March 31, 2012 are exempt from the provisions.

The provisions made under GAAR still do not have much clarity but may impact many companies. This has led to creating negative sentiments in the environment. Foreign institutional investors, which were the net buyers in the initial months of 2012, are now being the sellers as there is still high uncertainty about their investments. There is also news in the market that the investments made through the Mauritius route might also come under the eyes of the GAAR.
Every new and better provision or clause must work towards benefitting the economy. But the government should also keep in mind that to tax almost each and every thing to bulge its own pockets is not the right approach. Readers must note that this is just an initial study of GAAR and an endeavour to help the investor community understand the more complex and intricate details that could affect the markets. As time goes by, we shall attempt to further simplify such complex laws and rules and present it to our readers in a simple-to-understand format.

Compiled By: PRATIK ARORA

269SS AND 269T– A SYNOPSIS

Section 269SS

No Person shall, take or accept from any other person (herein after called "depositor) any loans or deposits otherwise than by an account payee cheque or account payee draft if:-

- The amount of such loan or the aggregate amount of such loan and deposit, is Rs.20,000/- or more, or
- On the date of taking or accepting such loan or deposit, any loan or deposit accepted earlier by such person from the depositor is remaining unpaid is Rs.20,000/- or more
- The aggregate of the amount of loan or deposit to be taken and the amount of loan or deposit taken earlier which is outstanding on the date on which loan or deposit is to be taken is Rs.20,000/- or more.

The provisions of this section shall not apply to any loan or deposit taken or accepted from or any loan or deposit taken or accepted by,

- Government
- Any banking company, post office saving bank or cooperative bank
- Any corporation established by a central, state or provincial act.
- Any government company

Provided further that provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and none of them has any income chargeable to tax under the income tax act.

<u>Analysis</u>

This section gets applicable in following situation as per clause a, b and c

- Where a person accepts a two cash loan and/or deposit of Rs.10,000 each from a single person
- Where a person has taken a loan of Rs.20,000 by cheque and he wants to take another loan from the same person, say for Rs.3000.
- Where a person has taken a loan of Rs.14000 by cheque and he wants to take further a loan of Rs.6000 or 8000

The second proviso to this section shall not be applicable in case the either lender or borrower have any income other than agriculture income i.e. if either lender or borrower have any income chargeable under head income from other sources (either PGBP/Capital gain/other sources) than this section shall not be applicable.

Explanation.—For the purposes of this section,—
[6][(*i*) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in section 51 of that Act ;]
(*ii*) "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949) ;
(*iii*) "loan or deposit" means loan or deposit of money.

Section 269T

No branch of a banking company or cooperative bank and no other company or cooperative society and no firm or other person shall repay any loan or deposit made with it otherwise than by an account payee cheque or account payee draft drawn in the name of the person who has made the loan or deposit if-

- The amount of the loan or deposit together with interest payable thereon is Rs.20,000 or more or
- The aggregate amount of the loan or deposits held by such person with the branch of a banking company or
- cooperative bank of other company or cooperative society or firm or other person, either in his own name or jointly

- with any other person on the date of such repayment together with interest if any payable on such loan or deposit is Rs.20,000/- or more.

Nothing contained in this section shall apply to repayment of any loan or deposit taken or accepted from :-

- Government
- Any banking company, post office savings bank or co-operative bank
- Any corporation established by a central, state or provincial act
- Any government company as defined in section 617 of the companies act 1956.

Explaination:- Loan or Deposit means any loans or deposit of money, which is repayable after notice or repayable after a period and, in the case of a person other than a company, includes loan or deposit of any nature.

Analysis

In the second clause Where if assessee made a fixed deposit with the bank for Rs.18000/- and after one year the bank has to repay RS.21000/- , then the bank cannot pay such amount in cash.

Penalty

If any of the above provisions are violated then the penalty shall be equal to the amount of loan or deposit taken or accepted or repaid.

Issues on 269SS and 269T

⇒ **Whether current account transactions between sister concerns or related parties(Directors) amounts to violation of section 269SS and 269T**

Any payments or repayments made pursuant to current account maintained between parties cannot be considered as violation of 269SS and 269T ***CIT V. Idhayam Publications Ltd., (2006) 285 ITR 221 (Mad)***
In this case there was a current account in the books of the assessee in the name of the one of the directors who used to pay money into the current account and also withdraw money from the same. The department treated these payments and withdrawals as violation of section 269T as they were made in cash. Disapproving the action of the department the High court has held that "the deposit and withdrawal of money from the current account could not be considered as a loan or advance. Accordingly the order of the tribunal by which the penalty was cancelled was affirmed.
Similar view taken by ITAT Bench, B, Banglore in the case of M/s CANARA HOUSING DEVELOPMENT CO. Vs. ACIT ITA No.1425/Bang/2008.

⇒ **Whether the provisions of above section applies to payments or receipt by way of journal entries.**

Provisions of section 269SS and 269T are not applicable in case where there are journal entries and payment was ultimately paid through account payee cheque. ***Commissioner Of Income-Tax vs Noida Toll Bridge Co. Ltd. (2003) 184 CTR Del 266.*** Further acknowledgement of debt by the assessee company by passing a journal entry in the books of accounts would not come within the ambit of the words "loans or deposits of money" as mentioned in Section 269 SS., ***Sunflower Builders Pvt. Ltd. 61 ITD 227, V.N. Parekh securities Pvt. Ltd. (ITA No.3316 & 3317/Mum/2004)***

⇒ **Whether when the loan or deposit is treated as the undisclosed income of the assessee, penalty can be im posed on the same transactions:-**

In the case of **CIT Vs. Standard Brands Ltd. (2006) 285 ITR 295**, it has been held that where deposit received in cash has been treated as undisclosed income in the hands of the assessee, no substantial question of law arises from the order of Tribunal wherein penalty u/s 271D is deleted.

⇒ **whether receipt of share application money in cash amounts to violation of section 269SS**

No, share application money in case is neither a loan nor a deposit as duly held by the Delhi High Court in the **Case of CIT Delhi IV Vs. I P India Pvt. Ltd. 2011-TIOL-811-HC-DEL-IT** observing that *"the receipt of share application monies from the three private limited companies for allotment of shares in the assessee-company cannot be treated as receipt of loan or deposit. Reliance was placed on the decision of Director of Income Tax (Exemption) vs ACME Educational Society wherein it was held that a loan grants temporary use of money, or temporary accommodation, and that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it has been made, on fulfillment of certain conditions"*

However the transaction should be bonafide and shares should have issued or otherwise if the shares have not been issued and money is repaid the intention of receiving the money as share application money should be clear which can be established by showing that authorized capital has been increased or later on shares has been issued.

⇒ **Whether receipt and payment of Partners Capital by partnership firm amounts to violation of section 269SS and 269T** .

No, Says the Ahemdabad Income Tax Appellate Tribunal in the Case of **ITO, Ward 2(1) vs. Universal Associates, 2011-TIOL-498-ITAT-AHM**, as partners capital is neither a loan nor a deposit.

⇒ **Whether Payments made on behalf of lender considered as repayment of loan by the assessee fall within the purview of Section 269SS and 269T**

As the repayment will be made in these cases through journal entries provision of section 269SS and 26T will not be applicable, as discussed above in point no. 2

⇒ **Disclosure in Auditor's Report under Tax Audit**
Auditor's are required to disclose the payment of a **loan or deposit along with Interest** Rs.20000 or more. (Guidance note on Tax Audit issued by ICAI)

Compiled By: **SAMIR AGARWAL & RAJENDER HANDA**

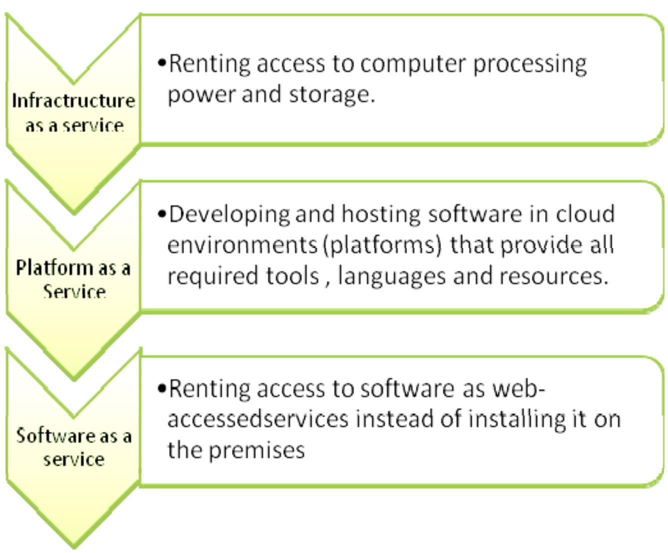
HEAD IN THE CLOUDS

AN OVER VIEW ON CLOUD COMPUTING

The rapid growth in communications technology coupled with the reducing cost of hardware has lead to the emergence of newer models of computing which involve processing/ storage of data on remote servers ('the cloud') rather than the user machine. In simple terms – cloud computing is the shifting of data / processing from the client's computer to a 'central cloud', cloud being an all encompassing term for infrastructure provided by the service provider. Users get to see it imbibed in commonly used applications such as Google documents where documents are stored on the internet rather than the client's computer or Picasa/Facebook where pictures are hosted on the internet rather than actually being stored on the client's computer. Not only does this lead to significant savings in hardware costs for multinationals, it encourages greater mobility for the employees as the data is located centrally. The cloud computing phenomenon is not only prevalent in the B2B space but in the B2C with players like Google Drive, Drop box ,Box.net etc offering customers online storage at affordable rates.

Cloud computing is all set to be integrated in the corporate ecosystem and will constitute a chunk of the corporate budget, in this backdrop it becomes important to explore the applicability of relevant tax laws to transactions made for providing cloud computing as a service.

Cloud computing services are provided on demand as opposed to licensed or purchased software, the resources are often offered on a 'pay for a service' basis or 'subscription based'. Furthermore, cloud computing encompasses three major delivery methodologies:



- **INFRASTRUCTURE AS A SERVICE :** Primary objective of an organization is to reduce time & money required to procure, provision, and install new hardware systems. IaaS fulfills this primary objective i.e. equipment is outsourced to support operations. This is a provision model in which service provider is responsible for the housing, running and maintenance of the equipment.
- **PLATFORM AS A SERVICE:** PaaS provides computational resources through the platform such as Operating System. PaaS is built upon the principals of Infrastructure as a Service by providing an environment where applications can be built and deployed in a secure, rapid and high quality manner. The business needs Information Technology to rapidly develop, deploy, and maintain new applications to remain competitive and PaaS helps organizations in the same. PaaS eliminates the hardware dependency and capacity concerns. It also provides a simplified deployment model.
- **SOFTWARE AS A SERVICE:** SaaS is the most basic form of cloud computing. It includes implementation of specific business functions, customized business applications, etc. The major benefit of SaaS is that there is no licensing risk involved and neither there is any version compatibility issue. It reduces the hardware cost as well. You pay for the software and the underlying infrastructure and do not require technical know-how. Typical examples of SaaS application software are ERP, CRM, Google Docs, etc. SaaS ensures lower capital, better cash flow and reduced IT support cost.

An example of a typical cloud computing business model may include a company A paying service fees to another Company B which hosts the cloud for usage ERP software hosted by B on it's servers, this can be characterized as a software as a service delivery model.

TAXABILITY

With the recent amendments (i.e. in 2010) in Section 9 of the Income Tax Act,1961, the test for taxability of services rendered in India (Technical and professional services) and royalty has been shifted to the site of utilization of the services rather than where the services are rendered. In this regard it seems that software as a service rendered and utilized in India as per section 9 should be taxable in India.

Complicating the situation further the tax authorities have adopted the approach that service income received by foreign service providers in most cases is in the nature of royalty and hence would attract a withholding tax as per the relevant Double Taxation Avoidance Agreement existing between the countries.

However a contrary position can be taken which allows for classification of such service payments as business income and hence being taxable on the basis of there being a Permanent Establishment (PE) of such service provider in India, in absence of which the the income would be not be rendered taxable in India.

Though it seems that payment is being made by the service receiver for a transfer of the right to use certain intellectual property rights in certain software stored on the cloud server which maybe commercially exploited by the client. This kind of transaction is essentially covered in the definition of Royalty as per various DTAAs and as per Section 9 of the Income Tax Act 1961, which includes right to use Intellectual property and scientific equipment

The nature of cloud computing service and payments relevant to it still remains a debatable point for tax authorities and tax payers.

Compiled By : DHRUV DUA

WITHDRAWAL OF PROVIDENT FUND AND ITS TAXABILITY - SYNOPSIS

PF withdrawal is taxable if a person has worked in the company for less than 5 years. Tax cannot be saved even by investing in any govt schemes / bonds. It just gets added to income from salaries, and then the taxability will depend upon the Gross Income of the assessee.

Head	Statutory PF	Recognized PF	Unrecognized PF
Employers contribution to PF	Exempt from tax	Exempt up to 12% of salary (Basic +DA)	Exempt from tax
Deduction under sec 80C	Available	Available	Not available
Interest credited on PF account	Exempt from tax	Exempt up to 9.5%	Exempt from tax
Lump sum payment received at the time of retirement or termination of service	Exempt from tax	Exempt from tax:	Only employees share of contribution is exempt
		a. If the employee has worked for at least 5 years with the employer	
		b. If the service is terminated on account of ill-health or by contraction or discontinuance of the employer's business or any other reason beyond control of employee	
		c. If the employee transfers the balance in his PF to his new PF a/c maintained by his new employer	

If you withdraw before completing a period of 5 years, **then all your previous years income gets recomputed as if the fund was unrecognized from the very beginning (i.e., the tax benefits you received on your own contribution u/s 80C/88 in earlier years will get forfeited) and further the employer contribution and interest received will be added to your current income subject to relief under section 89**. In other words Payment received by the individual in respect of the employer's contribution along with the interest accrual thereon is taxed as "salary". Interest on the employee's contribution is taxable as "other income". Payment received in respect of the employee's own contribution is exempt from tax (to the extent not claimed as a deduction earlier).

I-T provisions provide that the trustees of a recognized PF or any person authorised by the regulations of the fund to make the payment of the accumulated balance to the employee should deduct tax at source (TDS) while paying the amount. Further, the person liable to deduct tax has to issue the certificate of tax deducted at source (Form 16) within the specified time frame to the employee depicting the details of taxes withheld from the accumulated PF balance and also comply with other salary-related compliance necessities

Compiled By: PRATIK ARORA

E-VOTING BY SHAREHOLDERS OF LISTED ENTITIES

(PRESS RELEASE NO. 67/2012, DATED 26-6-2012)

Securities Exchange Board of India (SEBI), the Stock market regulator, on 26 June 2012 in line with the budget proposal mandated listed companies to use electronic voting for seeking share-holder approvals. To begin with, the SEBI diktat will be applicable to the top 500 companies by market capitalization on the NSE and the BSE.

Meaning of E- Voting:

Voting through an electronic system where shareholders can vote on resolutions of companies requiring voting hrough Postal Ballot as per extant rules and regulations without making the effort of sending their votes throu post.

Main objective:

This Paperless mode of casting vote will enable greater shareholder participation in decision -making. E-Voting System brings a). Flexibility b). Convenience and c). Ease of operation.

Benefits:

- E voting would lead to saving of all time, money and effort.
- Reduction in administration cost viz. Postal correspondence
- Verification of signatures
- Storing of physical ballot papers would become easier
- Accuracy in counting of votes and elimination of postal ballots getting lost in-transit and
- Availability of sufficient time for shareholders to vote till the end of voting cycle is other additional benefits.

Legal Source and Provisions:

Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 _ "Postal Ballot as voting by shareholders by postal or electronic mode instead of voting personally by presenting for transacting businesses in a general meeting of the company", thereby recognizing e mode for postal ballot approval.

The time defined in the Postal Ballot Rules, 2001 for Postal Ballot is same as that for e-Voting.
The concepts nature removes the need of appointment of proxy as vote can be cast through internet anywhere by the shareholder himself. Vote once casted will be considered final and cannot be modified.

Procedure: E-Voting through NSDL

Green Initiative in the Corporate Governance MCA- MCA has allowed to send documents such as notices of general meeting(s), annual report and other communications to the shareholders through e-mail.
NSDL & CDSL is authorized for setting up an electronic platform to cast vote in electronic form through internet, they obtain a certificate from Standardisation Testing and Quality Certification (STQC).
NSDL facilitates voting from all shareholders i.e., shareholders holding shares in physical and demat mode with either NSDL or CDSL, as on the record date.

Declaration of results

The Scrutinizer will download and collate the votes casted by the shareholders through the e-Voting System of NSDL and though other means to declare the final results.

Compiled By: PRATIK ARORA

FILING OF I-T RETURNS MADE EASY

As we all are aware of the fact that , Income Tax Department has relaxed the due date of filing the income tax return for individuals and other categories of assesses who are required to file their return on or before 31st july of the assessment year to 31st august of the assessment year .

Here are the steps that are to be followed to to file the return hassle-free .Tax payers have an option to file their tax returns through incometaxindiaefiling.gov.in, the tax portal run by the Income Tax Department. You don't have to pay anything to file returns through this site.

Document check

1. A basic document check before starting the filing process could be helpful. "For salaried individuals, Form 16 is a crucial document.

2. If you have taken any housing loan, you should have the bank statement which mentions the exact amount of interest paid in a financial year, "If you are filing for HRA, you would need the rent receipts," he adds.

3. Self-employed individuals need a profit or loss statement in case they run a strategic business unit in which they remunerate themselves through a profit sharing model. "In case self-employed individuals follow a salary model in their own company, they require Form 16 to file their returns online,"

Steps for e-filing

1. Register your personal details to choose a login ID. At this stage the portal will take you to the next stage to complete the registration process.

2. Enter the income particulars in ITR software tool, which would generate the ITR form in electronic format(XML file).

3. As you finish the process, a copy of your XML file will be sent to your email address. It will tell you if you are eligible for a tax refund or you are liable to pay taxes.

4. An acknowledgement, called ITR Form-V, would be generated and mailed to your email ID. You have to download the form and mail it to the Central Processing Unit in Bangalore within 120 days of e-filing.

5. IT Department will send you the final acknowledgement which is the final step for e-tax filing.

Points to remember

1. "The tax department's e-filing website becomes almost inaccessible (due to server overload) during the last few days of July, forcing many to file their returns offline," Also, if you are using the tax department's template, make sure you save the incompletely filled file on your computer's disk. In case you're using private portals, make sure you have saved your changes before you log out.

2. Enter details on housing loan, HRA, tuition fees for children, medical insurance, bank interest income and capital gains to ensure you file the accurate return. Even if you have missed out on filing these details in your investment declaration submitted to the employer, ensure you fill these details at the time of online filing. You will be eligible for a tax refund at a later stage.

Compiled By : PRATIK ARORA

NATIONAL ELECTRONIC FUNDS TRANSFER (NEFT) SYSTEM - RATIONALIZATION OF CUSTOMER CHARGES

RBI/2012-13/131 DPSS CO (EPPD) /98/04.03.01/2012-13

Rationalizing the customer charges applicable on electronic payment products.

The NEFT system, introduced in 2005, has seen exponential growth in recent years reflecting its popularity as well as increasing customer acceptance. Despite such growth, it is, however, observed that many banks continue to levy the maximum permissible charges to their customers. It is desirable that the benefits accruing on account of increasing volume of transactions are passed on to the customers so as to incentivize greater use of the electronic payment system in place of cumbersome paper-based mechanism like cheques/DDs. It is also considered necessary to provide the large number of people being covered under the financial inclusion programmes affordable financial services through an efficient remittance mechanism like the NEFT.

Accordingly, on a review in consultation with stakeholders, it has been decided to rationalize the customer charges levied by the banks for NEFT transactions as under:

Value Band	Maximum Charges (exclusive of service tax)
Amounts up to ` 10,000/-	`2.5/-
Amounts from ` 10,001/- to ` 1 lakh	`5.0/-
Amounts above ` 1 lakh up to ` 2 lakh	`15.0/-
Amounts above ` 2 lakh	`25.0/-

It may be noted that the charges indicated above are the maximum that can be recovered by banks from their customers, if they so desire. All member banks are advised to encourage customers to take advantage of this facility. These charges will be effective from August 01, 2012. These directions are issued by the Reserve Bank of India, in exercise of the powers conferred by Section 18 of the Payment and Settlement Systems Act, 2007 .

Compiled By : PRATIK ARORA

TAX TREATMENT OF DERIVATIVE INCOME/LOSS UNDER THE INCOME TAX ACT 1961

As per Proviso 'd' to section 43(5) Eligible Derivative Transactions are not a speculative Transactions

Eligible Derivative Transactions: To qualify for being Eligible Derivative transactions, Transaction should fulfil the following conditions

I. It should be carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognised stock exchange; and

II. It Should supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A) and permanent account number allotted under this Act;

III. Recognised Stock Exchange: "recognised stock exchange" means a recognised stock exchange as referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified by the Central Government for this purpose;] (Commodity Exchange NCDEX does not falls under the list of Recognised Stock Exchange for this purpose)

IV. Test of Eligible Transactions on Different Derivative Transactions

Type of Transaction	Whether falls under the main definition of Speculative Transaction explained under Section 43(5)	Whether fall under the definition of Derivative	Whether conducted through Recognised Stock Exchange	Tax Treatment
Currency Derivative	Yes (One Approaach)	Yes	Yes	Treat it as Non Speculative Business Income/Loss as it fulfils all the conditions of Eligible Transactions for proviso 'd' to Section 43(5)
Currency Derivative	No (second Approach)	Not Applicable	Not Applicable	Treat it as Non Speculative transaction as it does not falls under the main definition of Speculative Transaction
Stock/Index Derivative	Yes	Yes	Yes	Treat it as Non Speculative Business Income/Loss as it fulfils all the conditions of Eligible Transactions for proviso 'd' to Section 43(5)
Commodity Derivative	Yes	Yes	No	Treat it as Speculative business Income/Loss as does not fulfils the conditions of eligible transaction Given Above

Compiled By: ANAND VERMA

AMENDMENT IN RESPECT OF GOODS TRANSPORT OPERATOR AGENCY SERVICE

As you know, Central Government vide Notification No. 36/2012-ST dated 20th June, 2012 has amended ***Rule 2(1)(d) of Service Tax Rules, 1994.*** The changes, applicable from 01.07.2012, inter alia include amendment in respect of Goods Transport Operator Agency Service. Team Udaan has made an attempt to summarize these changes in tabular form produced below:-

<table>
<tr><th>S. No.</th><th colspan="3">Amendment with their implications</th></tr>
<tr><td>1.</td><td colspan="3">Change in the person specified as “person liable to pay service tax”, in the rule:</td></tr>
<tr><td rowspan="2"></td><td>Earlier</td><td>Reverse charge was applicable, where the consignor or consignee of goods falls under specified category.</td><td rowspan="2">Earlier if the consignor or consignee falls under the specified category and the freight is paid by individual then it is the individual who is required to pay service tax under reverse charge.
This hardship is now removed as reverse charge is applicable only when the person liable to pay freight falls under specified category.
(please see illustration 1 also)</td></tr>
<tr><td>w.e.f. 1/07/2012</td><td>Reverse charge is applicable, where the person who is liable to pay freight falls under specified category.</td></tr>
<tr><td>2.</td><td colspan="3">Change in the “specified category”, as given in the said sub-rule:</td></tr>
<tr><td></td><td>Earlier</td><td>Any partnership firm registered, by or under any law</td><td rowspan="2">W.e.f. 01.07.2012 provision of reverse charge is applicable even if person liable to pay freight is unregistered partnership firm.</td></tr>
<tr><td></td><td>w.e.f. 1/07/2012</td><td>Any partnership firm whether registered or not under any law including association of persons.</td></tr>
<tr><td>3.</td><td colspan="3">Inclusion of a new proviso to the said rule:</td></tr>
<tr><td></td><td>W.e.f. 1/07/2012</td><td>Provided that when such person is located in a non-taxable territory, the provider of such service shall be liable to pay service tax.</td><td>The implications are explained with the help of an example as given in illustration 2.</td></tr>
</table>

Illustration 1: In relation to transport of goods by road the consignor and consignee are Mr. A (individual) and M/s. ABC Ltd (body corporate registered under Companies Act, 1956), respectively. As per mutual understanding of the parties Mr. A the consignor is liable to pay freight to the goods transport agency.

Earlier: Since, the consignee M/s ABC Ltd. falls under specified category as mentioned in the rule, the person paying freight to GTA was liable to pay service tax under reverse charge under Section 68(2) of Finance Act, 1994. Accordingly an individual was required to take service tax registration and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

W.e.f. 1/07/2012: Since the person paying freight i.e. Mr. A (individual), is not a person who falls under specified category as mentioned in the rule, hence reverse charge provision is not applicable for such individual and service tax for the same shall be paid by the service provider under Section 68(1) of Finance Act, 1994i.e. GTA shall pay the service tax in such case.\

Illustration 2: A goods transportation agency ABC located in Delhi transports a consignment of new motorcycles from the factory of XYZ in Gurgaon (Haryana), to the premises of a dealer in Jammu (non-taxable territory). Say, as per mutually agreed terms between ABC and XYZ, the dealer in Jammu is the person liable to pay freight. Here, in terms of amended provisions of rule 2(1)(d), since the person liable to pay freight is located in non-taxable territory, the person liable to pay tax will be ABC. Accordingly, the place of provision of the service of transportation of goods will be the location of ABC i.e. Delhi.

Compiled By: **SAMIR AGARWAL**

COLUMBIA SPORTSWEAR COMPANY VERSUS DIRECTOR OF INCOME TAX, BANGALORE DATED 30TH JULY 2012

- Income accrues or arises in India - liaison office in India of company incorporated in USA - special leave petitions filed against the advance rulings of the Authority
- Held that:- As Section 245S expressly makes the Advance Ruling binding on the applicant, in respect of the transaction and on the Commissioner and the income tax authorities subordinate to him, the Authority is a body acting in judicial capacity and the transaction would not affect the jurisdiction of either this Court under Article 136 of the Constitution or of the High Courts under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling pronounced by the Authority.

It cannot be hold that an advance ruling of the Authority can only be challenged under Article 136 of the Constitution before this Court and not under Articles 226 and/or 227 of the Constitution before the High Court -the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is part of the basic structure of the Constitution. Therefore, to hold that an advance ruling of the authority should not be permitted to be challenged before the High Court under Articles 226 and/or 227 of the Constitution would be to negate a part of the basic structure of the Constitution no substantial question of general importance arises in SLP - dispose of this SLP granting liberty to the petitioner to move the appropriate High Court under Article 226 and/or 227 of the Constitution.

Article 226 & 227 of constitution provided constitutional remedy by way of writs.

"245S. (1) The advance ruling pronounced by the Authority under section 245R shall be binding only-

a. on the applicant who had sought it;
b. in respect of the transaction in relation to which the ruling had been sought;
c. on the Commissioner, and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction.

The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."

Verdict of the Supreme court

In this special leave petition , we don’t find that a substantial question of general importance arises or is it shown that a similar question is already pending before this court for which the petitioner should be permitted to approach this court directly against the advance ruling of the authority. We accordingly dispose of this Special Leave Petition granting liberty to the petitioner to move the appropriate High Court under Article 226 and/or 227 of the Constitution.

Compiled By: **SAMIR AGARWAL**

PROVIDENT FUND SCHEME FOR INTERNATIONAL WORKERS IN INDIA

The Employees' Provident Fund Organization is a legislative body of the Government of India under the Ministry of Labor and Employment. It manages a mandatory contributory Provident Fund (PF), pension and an insurance scheme for the Indian work force. It is one of the biggest social security units in the world in terms of members and volume of financial transactions.

The Employees' Provident Funds and Miscellaneous Provisions Act came (1954) into existence on March 4, 1952. The association is governed by a Central Board of Trustees, made up of representatives of the Government of India, provincial governments, employers and employees. The Board is presided over by the Union Labor Minister of India.

The EPF & MP Act was approved by Parliament and came into effect with effect from March 1, 1952 as part of a series of legislative interventions made in this direction. Currently, the following three schemes are in operation under the Act:

- Employees Provident Funds Scheme, 1952 (Provident Fund Scheme)
- Employees Pension Scheme, 1995 (Pension Scheme)
- Employees Deposit Linked Insurance Scheme, 1976

Contribution

Membership is mandatory for employees in enterprises coming under the scope of the law. As per law, most enterprises in India is obligatory to have a registration with the basic standard being employment of 20 or more persons. Contribution is at present 12 percent of basic salary as employee's share and a matching contribution by the employer, with the sum to be 13.61 percent of the total wages of the employees. Among the many benefits offered in addition to the compulsory Provident Fund (where the present rate of interest is 9.5 percent) are service Pension on retirement, death or disablement and a lump sum insurance payout in case of death of the member, to his nominee/family.

Provident Fund for international workers

International workers employed by a company in India to whom the Provident Fund Act applies would be required to become a member of the Provident Fund, unless he/she qualifies as an "Excluded Employee."Let me explain the meaning of "Excluded Employee. *"A "detached worker" employed by a company in India but contributing to the social security program of the source country in terms of the mutual social security agreement signed between that country and India shall be an "excluded employee" under these provisions.*
Detached worker-An international worker, being not an Indian employee, offering to the social security program of the source country in terms of the mutual social security agreement signed between that country and India and exempt from making any contribution to the Indian system for the period and terms as set out in such an agreement is a "detached worker" for the purpose of compliance under the Indian system.

Contribution by international workers

The international workers (except excluded employees) are mandatory to contribute 12 percent of their salaries (not subject to any cap) to the Indian Provident Fund scheme. The exemption from making contributions for employees earning salary in excess of Rs.6, 500 per month does not apply to international workers. Additionally, the employers are also compulsorily to pay an equal amount, i.e., 12 percent of salary as their contribution to the scheme

Applicability

Provident Fund payment is not payable by any employee, including a foreign employee of an company who is otherwise not liable to PF under The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (PF Act) for any reason, (for example, if the number of employees is less than 20). The PF regulations will be relevant to total salary irrespective of whether the salary is remunerated in India or outside India, split payroll, or multiple country sources. Every eligible international worker has to be registered from the first date of his employment in India. For existing international workers, the accountability started from November 1, 2008.

The type of visa held by the employee may help in determining the purpose of his or her visit to India, e.g., an overseas national coming into India under an employment visa is "working" in India. It is relevant to note that the Indian government has freshly issued guidelines prescribing tough enforcement of employment visa requirements for foreign nationals entering India for contractual or project work, as well as clarifications on what the appropriate visa is, depending upon the exact nature of activities undertaken in India.

Social Security Agreements (SSAs)

Considering the monetary advantage and agreement relief for expatriates coming from countries with which India has signed SSAs, there has been momentous activity recently regarding the signing of SSAs between India and other countries as a result of these amendments to the PF schemes. Presently, India has signed mutual Social Security Agreements with Belgium, France, Germany, Netherlands, Luxembourg, Switzerland, and Hungary; of these, only the agreements with Switzerland, Belgium and Germany are in effect. It is casually understood that similar agreements with other nations such as the Czech Republic, Sweden, and Norway are underway. Talks have also been started with the United States, U.K., Bulgaria, and several other countries.

Key Features of SSAs

An SSA offers the following types of benefits:

- Detachment — Employees on an assignment up to specified periods are excused from making social security contributions in the host country provided they continue to make social security contributions in their home countries
- Exportability of Pension — Normally, employees on assignment for more than the specified period and making social security contributions under the host country laws, will be permitted to "export" the benefits under the SSA to the home country on completion of their assignment or on retirement. However, this is not provided for under the social insurance agreement with Germany
- Totalization of Benefits — The period of service rendered by an employee in the host country will be measured for his or her benefits "eligibility" purposes, and the payment of benefits to the individual from the social security systems of each country will be restricted, generally, to the length of service, on a pro-rata basis

Latest amendments

The employees' Provident Fund organization, which controls provident and pension funds for the organized sector employees in India, freshly stiffened the rules. According to the rule, international workers would be permitted to withdraw their accumulated balance only after they turn 58. Although input to PF and Employees' Pension Scheme (EPS) which accounts to 12 percent of the monthly pay, was mandated in 2008 withdrawals were permitted at the expat's employment in India. At this time, withdrawal is only allowed in case of permanent and total incapacity to work or in case of these suffering from cancer leprosy or tuberculosis.
An exception towards EPFO contribution has only been made in case of employees from countries with which India has signed Social Security agreements and the list includes three nations. The alteration, and the suddenness with which it has been made effective, is bound to cause key problems to all International Workers coming from non SSA countries as well as their employer companies. The suggestion to acclaim the accumulated balance of PF to an Indian bank account would also make difficulty as International Workers would need to hold the Indian bank account until the age of 58, which may not be practically possible.

Also, for the expatriates, an Indian bank is a prerequisite to be able to get their funds. Therefore, holding a bank account in India is compulsory for all overseas workers employed in India.

Outcome of amendment
As most countries do not permit export of social security benefits, the amended scheme may have an optimistic effect on the Indian citizens working overseas, as they may no longer be requisites to donate to the social security scheme of the countries with which India has signed into Social Security Agreement.
This modification may also require various countries looking to enter into Social Security Agreements with India, mainly since such an amendment creates contribution to provident fund for expatriates working in India, thereby resulting in an increase in the expatriate related expenses.

The amendment is a welcome change. Though the disparities and confusions that have come hand in hand with the alteration must be given a serious thought and attempts must be made at the earliest to clear such confusions.

Other important points for International workers

The Provident Fund regulations will be valid irrespective of whether the salary is remunerated in India or outside India. In case of a divide payroll, the payment is required to be made on the total salary earned by the employee. Even where an overseas worker has numerous country tasks and spends some part of his time outside India, his full amount salary will be measured for Provident Fund contribution. There is no minimum period of stay in India for activation of Provident Fund compliance. Every eligible international worker has to be registered from the first date of his employment in India.

Compiled By : PRATIK ARORA

COMPLIANCE TAX CALENDAR– AUGUST2012

Date	Act	Form No	Particulars
05/08/2012	Service Tax	Challan No.GAR-7	Payment of Service Tax for July'12 by Companies
07/08/2012	Income Tax	Challan No.ITNS-281/17	Payment of TDS/TCS deducted/collected in July'12
10/08/2012	Excise	ER-1	Return for Non SSI assessees for July'12
10/08/2012	Excise	ER-2	Return for EOUs for July'12
10/08/2012	Excise	ER-6	Return by units paying duty > 1 crore (CENVAT + PLA) for July'12
15/08/2012	D-VAT	DVAT-20	Deposit of DVAT TDS for the month of July;12
15/08/2012	Providend Fund	Electronic Challan cum Return (ECR)	E-Payment of PF for July'12(Cheque to be cleared by 20th)
21/08/2012	D-VAT	DVAT-20 & Central	Deposit of VAT & CST Tax for July'12
21/08/2012	ESI	ESI Challan	Payment of ESI of July'12
21/08/2012	M-VAT	MVAT Challan	Payment of VAT & WCT TDS under MVAT for July'12
22/08/2012	D-VAT	DVAT – 43	Issue of DVAT Certificate for deduction made in July'12
25/08/2012	D-VAT	Form 16 and CST 1	E- Return of VAT for July'12
28/08/2012	D-VAT	16 & 1 & Ack	Physical Return of VAT & CST for July'12
31/08/2012	Income Tax	Form 61-A	AIR by Banks, Credit card companies etc for last Financial Year

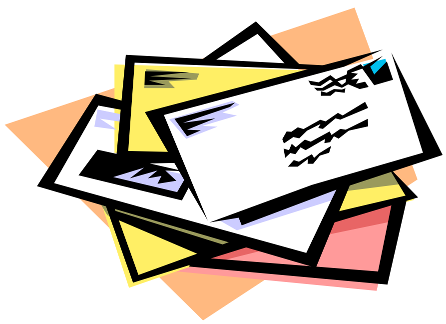
RECENT CASE LAWS

CIT VS. CARGIL GLOBAL TRADING PVT. LTD (SUPREME COURT)

S. 194A TDS: Discounting Charges Is Not "Interest"

Summary of the case :

The assessee paid Rs. 3.97 Crores to an associate concern in Singapore on account of discounted charges for getting the export sale bills discounted. The AO held that that the discounting charges was "interest" u/s 2 (28A) and that as there was no TDS, the expenditure had to be disallowed u/s 40(a)(i). This was reversed by the CIT (A) and Tribunal. The High Court (335 ITR 94 (Del) *included in file*) relied on Circular No.65 dated 2.09.1971, Circular No.674 dated 22.03.1993 & **Vijay Ship Breaking** 219 CTR 639 (SC) held that as the discounting charges were not in respect of any debt incurred or money borrowed and were



merely discount of the sale consideration on sale of goods, it was not "interest" u/s 2 (28A) and there was no obligation to deduct TDS thereon. On appeal by the department to the Supreme Court, HELD

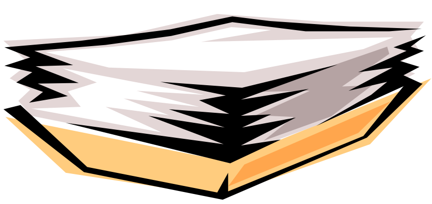
Delay condoned. The special leave petitions are dismissed.

UOI VS. VODAFONE INTERNATIONAL HOLDING (SUPREME COURT) (REVIEW PETITION)

Review Petition dismissed

Pursuant to the judgement in **Vodafone International Holdings B.V. vs. UOI** holding that Vodafone was not liable to pay capital gains on the transfer of shares, the Union of India filed a *review petition* in the Supreme Court seeking a review of the aforesaid judgement. HELD by the Supreme Court dismissing the review petition:

We have carefully gone through the review petition filed by the Union of India on 17th February, 2012. We find no merit in the review petition. The review petition is, accordingly, dismissed.



SHANKAR TRADING (P) LTD. VS. CIT, ITA JUDGMENT PRONOUNCED ON: 09.07.2012, HIGH COURT OF DELHI

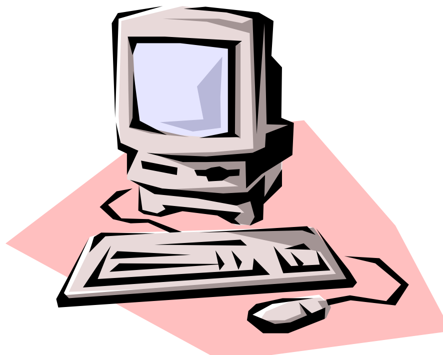
"Whether the provision of section 40A(2) of the Income Tax Act, 1961 is applicable in respect of the lease rent paid by the Assessee to M/s Mehta Charitable Pranjnalaya Trust?"

Held: In CIT v. Venu Suresh Sanjay Trust: (1996) 221 ITR 649 (Madras), it was held that in the case of a discretionary trust, neither the trustees nor the beneficiaries can be considered as having come together with the common purpose of earning income. It was observed that the beneficiaries have not set up the trust and the trustees derive their authorities under the terms of the trust deed. Therefore, neither the trustees nor the beneficiaries come together for a common purpose, they are merely in receipt of income. It was further held that the mere fact that the beneficiaries or the trustees, being representative-assessee, are more than one, cannot lead to the conclusion that they constitute "an association of persons". We, therefore, hold that since Mehta Charitable Trust is not "association of persons" within the meaning of Section 40(A)(2) of Income-tax Act, the aforesaid provision is not attracted to the transaction which is the subject-matter of these appeals and consequently lease rent was allowable as revenue expenditure

RECENT CASE LAWS

CIT VS. CARGIL GLOBAL TRADING PVT. LTD (SUPREME COURT) S. 194A TDS: DISCOUNTING CHARGES IS NOT "INTEREST"

The assessee paid Rs. 3.97 Crores to an associate concern in Singapore on account of discounted charges for getting the export sale bills discounted. The AO held that that the discounting charges was "interest" u/s 2(28A) and that as there was no TDS, the expenditure had to be disallowed u/s 40(a)(i). This was reversed by the CIT (A) and Tribunal. The High Court (335 ITR 94 (Del) *included in file*) relied on Circular No.65 dated 2.09.1971,

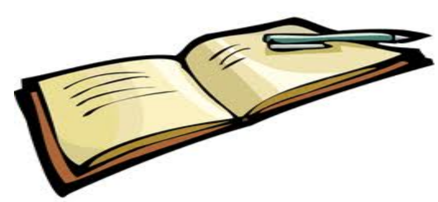


Circular No.674 dated 22.03.1993 & **Vijay Ship Breaking** 219 CTR 639 (SC) held that as the discounting charges were not in respect of any debt incurred or money borrowed and were merely discount of the sale consideration on sale of goods, it was not "interest" u/s 2(28A) and there was no obligation to deduct TDS thereon. On appeal by the department to the Supreme Court, HELD

Delay condoned. The special leave petitions are dismissed.

ACIT VS. TULIP STAR HOTELS LTD (SUPREME COURT) S. 36(1)(III): S. A. BUILDERS 288 ITR 1 (SC) TO BE RECONSIDERED

The assessee borrowed funds and used it to subscribe to the equity capital of its subsidiary company. The subsidiary company used the said funds for the purpose of acquiring the Centaur Hotel, Juhu Beach, Mumbai. The assessee paid interest on the borrowed money and claimed that a deduction u/s 36(1)(iii). The AO rejected the claim though the CIT (A), Tribunal & High Court (338 ITR 482) allowed it by relying on S. A. Builders Ltd vs. CIT 288 ITR 1 (SC). It was held that as the assessee, being a holding company had a deep interest in its subsidiary, and hence if the holding company advanced borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would be entitled to deduction of interest on its borrowed loans. On appeal by the department, HELD by the Supreme Court: Issue notice on the applications for condonation of delay as also on the special leave petitions. In our view, S.A. Builders Ltd. vs. Commissioner of Income-Tax (Appeals) and Another, reported in 288 ITR 1, needs reconsideration.



<u>CIT vs. Societex (Delhi High Court)</u> NO S. 271(1)(C) PENALTY IF WRONG CLAIM CAUSED BY "BONAFIDE MISTAKE"

The AO levied s. 271(1)(c) penalty in respect of two issues: (i) claim of depreciation in respect of properties that were assessed under the head "house property" and (ii) claim of deduction in respect of provision for income-tax. The Tribunal deleted the penalty on the ground that the claim for deduction in respect of income-tax was a "*human bonafide clerical mistake*". HELD by the High Court dismissing the appeal: Accordingly s271(1)(c) penalty is not leviable.

A Step Forward

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You deserve it.....

You deserve a great life. So demand it from yourself.

You deserve respect, consideration, inspiration, achievement and fulfillment. So demand those things from your own thoughts and actions.

You deserve a life that's overflowing with joy and richness. And you deserve to be the person who makes it happen.

You deserve the best life you can imagine, and you deserve the experience of taking full responsibility for that life. You are worthy of great and wonderful things, and able to bring those things about if you so choose.

You deserve the very best, but life does not owe it to you. You owe it to yourself.

Get busy, get inspired and get yourself totally committed to fulfilling your greatest possibilities. After all, you deserve to give that to yourself.

UDAAN….
a step forward

Udaan … a step forward is an initiative to enrich every professional. we , at Udaan, have tried to bring down all the necessary info under one shelter. It is our pleasure and honor to present to you an Udaan….a step forward, a step to make everyone of us one step ahead. Being updated is the need of the hour. We at Udaan, focus on the necessary aspects of professional updated. Knowledge has no bars.
With the recent updates we also focus on enhancing your knowledge and your understanding towards various topics .

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Thanks & Regards

CA PRATIK ARORA
(Founder & Editor-in-chief)

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