

Editorial

Dear Readers,



Integrity is the essence of life. If it is lost then nadir is reached. When balance sheet do not reflect true and fair view, nadir is reached. Ramalinga Raju made his confession which

sounded more like an traitor's apology. What has happened to integrity for which father of our nation stood. THINK.

**L. Muralidharan
& Editorial Team of e-senze**

Designed by: Mr. G. Natarajan



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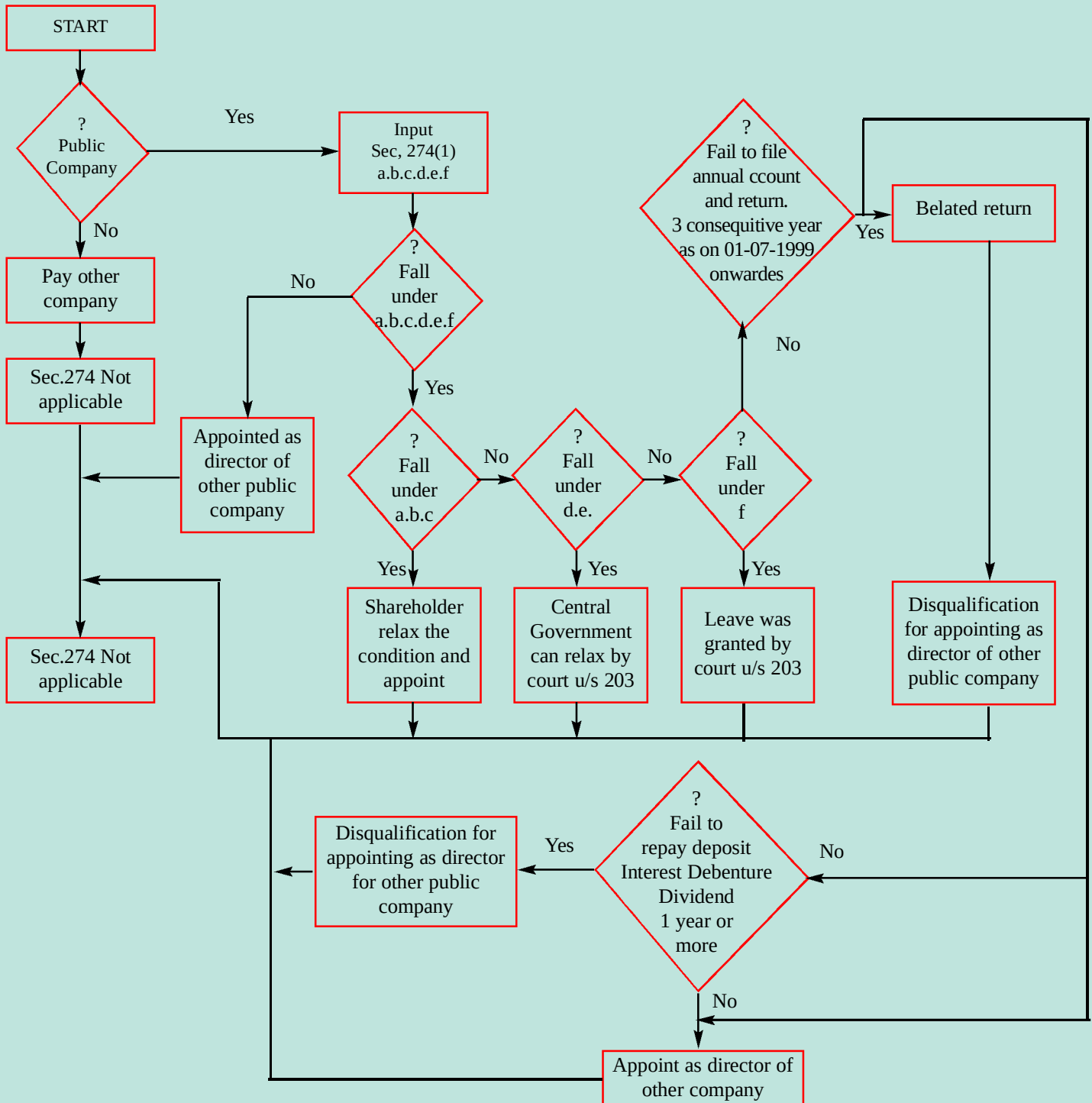
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Best articles will be
published.

Section 274 Disqualification of Directors by G. Rajathinakaran



WHERE INPUT SECTION 274(1)

a. Declared to be unsound mind by a court, b. Undischarge as Insolvent, c. Applied to be adjudged insolvent, d. Convicted by court offence involving moral turpitude and sentenced imprisonment not less than 6 months and 5 years from the date of expiry of the sentence, e. Not paid call money for more than 6 months from the last date fixed for payment of calls, f. Under Section 203.

Section 274(1)(g) fail to file Annual Accounts and Return from 21/07/1999 onwards up to 3 consecutive years. Any interest due from the company are deposit or redemption of debenture or payment or dividend is more than one year.

Any other company means: Private Company, Government Company, Section 25 of companies Act.

The Indian Partnership Act, 1932 - by Mr. S. Ramasubramanian



"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are individually called as "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm-name".

- an "act of a firm" means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm;
- "business" includes every trade, occupation and profession;
- "prescribed" means prescribed by rules made under this Act; (c-1)
- "Registrar" means the Registrar of Firms appointed under sub-section (1) of section 57 and includes the Deputy Registrar of Firms and Assistant Registrar of Firms appointed under sub-section (2) of that section;
- "Third party" used in relation to a firm or to a partner therein means any person who is not a partner in the firm;

CREATION OF RELATION

The relation of partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

TESTING THE EXISTENCE

In determining whether a group of persons is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation I: The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation II: The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not itself make him a partner with the persons carrying on the business; and, in particular, the receipt of such share or payment

- a) by a lender of money to persons engaged or about to engage in any business
- b) by a servant or agent as remuneration,
- c) by the widow or child of a deceased partner, as annuity, or
- d) by a previous owner or part-owner of the business, as

consideration for the sale of the goodwill or share thereof, does not of itself make the receiver a partner with the persons carrying on the business.

Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership-at-will".

PARTICULAR PARTNERSHIP

A person may become a partner with another person in particular adventures or undertakings. Partners are bound to carry on the business of the firm to greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner, his heir or legal representative.

Every partner has got the duty to indemnify the firm for any loss caused to it by his negligence/fraud in the conduct of

RIGHTS AND DUTIES OF PARTNERS BY CONTRACT BETWEEN THE PARTNERS

the business of the firm.

- (1) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing. Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing.

- (2) **AGREEMENTS IN RESTRAINT OF TRADE.** Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

CONDUCT OF THE BUSINESS

Subject to contract between the partners -

- (a) every partner has a right to take part in the conduct of the business;
- (b) every partner is bound to attend diligently to his duties in the conduct of the business;
- (c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners;
- (d) every partner has a right to have access to and to inspect and copy any of the books of the firm;
- (e) in the event of the death of a partner, his heirs or legal representatives or their duly authorised agents shall have a right of access to and to inspect and copy any of the books of the firm.

To be continued in next issue...

Continued from previous issue.

Are we Sincere & Truthful in whatever we do???



The same promoters who enjoyed those concessions are doing the same line of activity elsewhere thereby he personally profits where the Govt and the few hundreds of labourers suffer not knowing the loop holes in our operating systems. One recent example knowing fully well that the infrastructure , power will be the driving forces of new economy Reliance group company without having any past track record are vying for mega power and road / airport projects and luckily they have been denied the airport projects. One wonders why companies like L&T, Gammon India, Tatas who have wide experience in executing large infrastructure projects since the days of independence to till date and who have a solid net worth,

financials and technical skill and being one of the world's finest EPC commencement who have done many BOOT basis are being systematically denied some high end projects and new age entrepreneurs such as GVK, Nagarjuna, Navyuga, GMR whose resume do not match the above under any segment (the only common fact is that all of them are hailing from AP a state which is having the worst infrastructure among all Tier II & Tier I Cities of India despite having a very large scope for improvement and development since they are immense mineral resources, coal, cement, iron & steel industries and a fantastic coast line ; some sarcastically comment that AP is the Bihar of South India by any

measurement) which is ironically true in many ways.

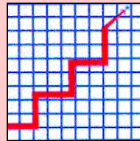
One expects the various Business men to come out clean and be pragmatic in their approach not only in their line of activity but also in the fields of honesty, sincerity and other aspects of meeting their commitments in repaying the debts they owe to various financial institutions. Their functioning should not be limited to availing various tax, import and export benefits but at the same time bring the wrong doers to toe the line and those who have defaulted must not be allowed to continue their line of activity if proved that the default was willful.

Dear Readers

The Second part of the

“Mera Bharath Mahan”

will be continued in the next edition.



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Where's the good word?

by Mr. L.N. Venkataraman

Words are alive; cut them and they bleed. - Ralph Waldo Emerson

A picture is worth a thousand words but what would you do with a picture without having words to share your thoughts on it? Most of human communication is considered to be non-verbal but only words can help extract the right meaning from the body language. How can anyone know the reasons behind your smile if you do not explain? Words however, are more than just instruments for communication. They help persuade and provoke thought, win an argument, arouse emotion or even motivate us to act.

We cannot control our feelings and thoughts or grasp their richness without the use of right words. We introduce a wrong word because of our inability to choose the right one. It leads to misunderstanding and conflict in our relationships. We mix languages to make up for the missing words. We use words loosely without giving due respect to their nuances or connotation. How many of us know the difference between a thief and a robber; envy and jealousy; foolish and stupid; or mock and jeer? For us, it is too hard to sound ignorant or



unclear in speech, so we blurt out anything. We appear to be always in a hurry to hide our weakness. Unfortunately those who listen to us usually look at silence or lack of words to be a sign of ignorance. Meaning can be preserved by leaving words unsaid, not by ambiguous words. We can secure the richness of our thought and feeling by keeping a touch of curiosity and mystery to it and express only when we find a better word.

As with our speech, our writing is equally fuzzy and lacks the power of rich words. We often use clichés and lose the central theme in the plethora of redundant words. How often do we really choose our words? How many times do we refer the thesaurus or the dictionary? Good writing is like a filter that cleans up our unorganized and confused thinking. It brings clarity to our best ideas. Writing gives us the

opportunity to make our point unambiguous and emphatic. The best devices for writing come from a richer stock of words. The better we combine words, the better we can express. To write well, a dictionary is an indispensable storehouse for words and the best toolbox for refining thought.

We observe more and think better with a larger vocabulary. Man could never have unravelled the mysteries and wonders of the world without a larger range of tools right from the nano microscope to the telescope. By not making use of more tools in the form of words, we are not tapping the richness of our language. We continue to speak defectively, write awkwardly and think with a narrow vision. We are moving around with myopic eyes assuming our blurred surroundings to be the real world. It is time to put on eyeglasses to see the better side of life and find a good word for it.

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Legal World - Corporate Laws - LW 164.12.2008 & LW 165.12.2008 by Mr. Kamal Garg

General Laws

LW 164.12.2008 UNITED INDIA INSURANCE CO. LTD. v. RAKESH KUMAR ARORA & ORS. [JT 2008 (11) SC 23] S.B. Sinha & Cyriac Joseph, JJ [Decided on 24.09.2008]

Motor Vehicles Act, 1988 - Sections 4 and 5 - Vehicle driven by minor - Accident resulted in death - Whether insurance company is liable to pay the compensation to the victim - Held, yes.

Brief Facts : One Balwant Singh filed an application claiming a sum of Rs.10,00,000/- (Rupees Ten Lakhs) by way of compensation for death of his son Virender Singh in an accident which took place on 5.2.1997. The owner of the vehicle contested the said claim. The Appellant Insurance company, inter alia, raised a contention before the Tribunal that the driver of the vehicle, namely, Karan Arora was a minor on the date of the accident and was not holding a valid and effective driving licence and thus it was not liable to reimburse the owner of the vehicle.

Digest of Legal Cases Legal World

Decision : Appeal dismissed.

Reasons : Section 4 of the Motor Vehicles Act prohibits driving of a vehicle by any person under the age of eighteen years in any public place. Section 5 of the Act imposes a statutory responsibility upon the owners of the motor vehicles not to cause or permit any person who does not satisfy the provisions of Sections 3 or 4 to drive the vehicle.

The vehicle in question admittedly was being driven by Karan Arora who was aged about fifteen years. The learned single Judge as also the Division Bench of the High Court did not put unto themselves a correct question of law. They proceeded on a wrong premise that it was for the insurance Company to prove breach of conditions of the contract of insurance.

In view of the above, the impugned judgment cannot be sustained. We direct that the appellant shall be entitled to recover the amount of compensation from the owner of the vehicle i.e. Respondent No.1.

LW 165.12.2008 MALLAVARAPU KASIVISWESWARA RAO v. THADIKONDA RAMULU FIRM &



ORS. [JT 2008(11) SC 43] Tarun Chatterjee & Harjit Singh Bedi, JJ. [Decided on 16.05.2008]

Negotiable Instruments Act, 1881 - Section 118(a) - Statutory presumption as to existence of consideration - Non-existence of consideration - Defendant to prove - Whether it can be discharged by preponderance of evidence - Held, Yes.

Brief Facts : The appellant introduced one Pynda Ramakumar to the respondents who agreed to advance monies to the respondents on the understanding that the respondents would repay the amount while the appellant would execute promotes as surety. The appellant accordingly executed certain promotes whose consideration was received by the respondents.

The appellant made several demands to the respondents for payment of the amounts due to Pynda Ramakumar but when the respondents could not pay the amounts, the Respondent No.2 executed two promotes for sums of Rs.2, 15,000/- and Rs.4, 72,000/- and a Kharamama in favour of the appellant whereby the Respondent No.1 agreed to repay amounts with interest at Rs.2.50ps. And Rs.1.50 ps., respectively per annum. After execution of such promotes, when, despite several demands, the respondents did not pay the amounts, a notice was issued to them by the appellant stating that the promotes and kharamama were executed by Respondent No.1 in favour of the appellant which may be discharged. The respondents replied to the notice wherein they did not specifically deny the execution of the promotes and the Kharamama but referred to the allegations made in such notice as false and vague.

Decision : Appeal allowed.

Reasons : Under Section 118(a) of the Negotiable Instruments Act, the Court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities

showing that the existence of consideration was improbable, doubtful or illegal.

If the defendant is proved to have discharged the initial onus of proof of showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who would be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. It is also discernible from the above decision that if the defendant fails to discharge the initial onus of proof by showing the non existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour.

In the written statements, the plea of the respondents was that on the face of the promotes, no cash was paid by the appellant and therefore, the respondents were not liable to pay the amount because the promotes were forged. It was a finding of the trial court, which was affirmed by the High Court in the impugned judgment that the promotes were indeed executed by the respondents. It was also a finding of the High Court that except in the reply notice issued by the respondents. It was also a finding of the High Court that except in the reply notice issued by the respondents, nowhere had they stated that the consideration had not passed. It is also an admitted position that the findings of the two courts below was that the execution of the promotes having been proved, the presumption under Section 118(a) must come into play. Since the initial burden on the respondents to show that the promote being exhibit A 21 was not supported by an consideration was not discharged by them, the High Court was not justified in not decreeing the suit of the appellant in respect of the amount covered by the promote exhibit A-21. The mere denial, if there by any by the respondents that no consideration had passed would not have been sufficient and something probable had to be brought on record to prove the non existence of consideration.

The author can be reached at his gmail ID: cakamalgarg@gmail.com

Continued in next edition

Uncanned (unbranded) Software - Indirect Taxation - by CA V. Sundararajan

Meaning

Unbranded software means customized software i.e., tailor made software. Software is developed as per customer's specification.

Unbranded software is 'Goods'

→ In the case of Tata Consultancy Service vs. State of Andhra Pradesh (2004) 137 STC 620 (SC) - S.B. Sinha J a member of constitution bench expressed a opinion that unbranded software can be goods. But the majority opinion in the said judgment held that as they were not dealing with the unbranded software when it is marketed/ sold as goods and are nor expressing any opinion on that issue.

→ Subsequently in the case of Bharat Sanchar Nigam Ltd., and another vs. Union of India and others (2006) 145 STC 91 the Supreme court categorically affirmed the opinion of Sinha J.

→ Madras High Court in the case of Infosys Technologies Ltd. Vs. SPL.C.C.T. & C.T.O. 2008-09 (14) TNCTJ 313 followed the view that unbranded software is goods.



Central Excise

- Unbranded software is "excisable goods" under the headings 8523 80 20.
- However it is exempt under notification no. 6/2006- CE dated 01.03.2006

Customs Duty

There is no customs duty on import of unbranded software.

VAT

Many states are imposing VAT on sale of unbranded software.

CST

Being unbranded software held as goods, dealers are eligible to make purchase of goods using "C" Form and avail the concessional rate of tax for using preparation of uncanned

software. Infosys Technologies Ltd. Vs. SPL.C.C.T. & C.T.O. 2008-09 (14) TNCTJ 313 (Madras High Court).

Service Tax

Information technology software (both branded and unbranded software) service is taxable service w.e.f. 16.05.2008.

VAT vis - a vis Service Tax

Many software companies are collecting both VAT and service tax on gross amount as abundant caution.

✓ In imagic creative Pvt Ltd., vs. CCT(2008) 12 STT 392 (SC) it has been held that service tax and VAT are mutually exclusive.

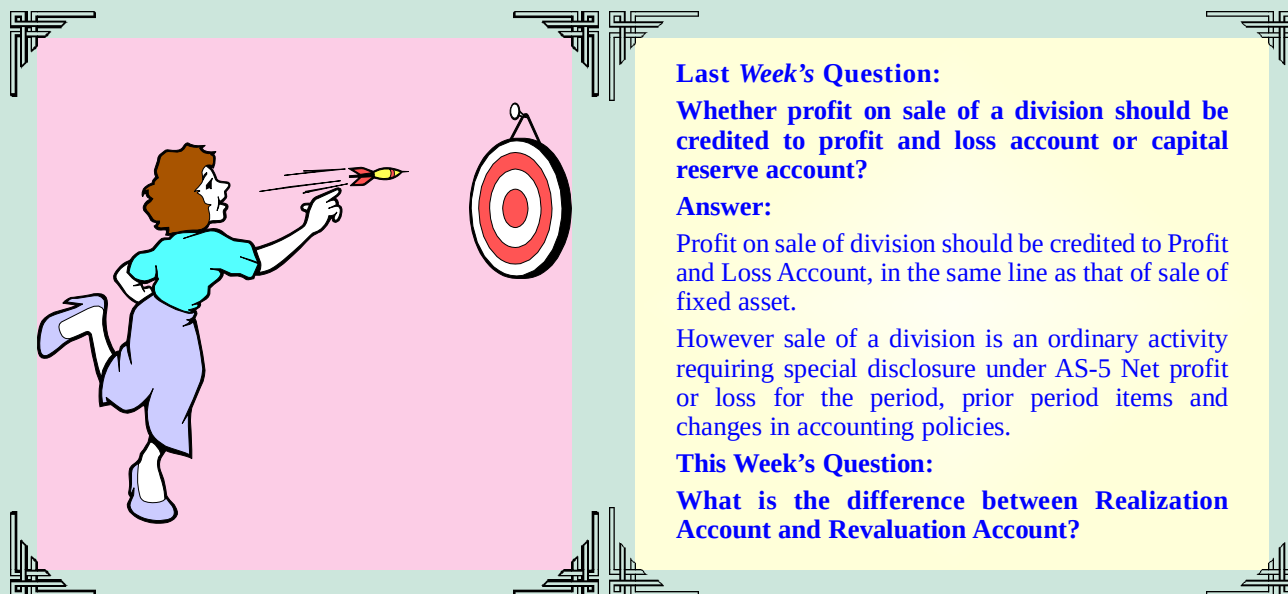
✓ In Bharat Sanchar Nigam Ltd., and another vs. Union of India and others (2006) 145 STC 91 the Supreme court held that various aspects of transaction can be taxed separately, but sales tax can not be imposed on service portion and service tax can not be imposed on value of goods.

In view of the above observations, once the software is treated as goods and liable to VAT, the question of attracting service tax does not arise.

This article analysis all the indirect tax aspects on uncanned software. Many software companies are collecting both VAT and service tax on gross amount. The author opined that for uncanned software only VAT would attract and not service tax with the help of decided cases.

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Dart-Board



Last Week's Question:

Whether profit on sale of a division should be credited to profit and loss account or capital reserve account?

Answer:

Profit on sale of division should be credited to Profit and Loss Account, in the same line as that of sale of fixed asset.

However sale of a division is an ordinary activity requiring special disclosure under AS-5 Net profit or loss for the period, prior period items and changes in accounting policies.

This Week's Question:

What is the difference between Realization Account and Revaluation Account?

Send your queries and suggestions to : joinsreeram@gmail.com

J o k e s

One day a bus gets an accident.

Man 1: [Crying and shouted] I have lost my hand! I have lost my hand!!

Man 2: "Why are you crying? Control yourself! Don't cry. See that man has lost his head. But he hasn't uttered even a single word, how silent he is!!!..."

== oo00oo ==

Once, a Lady had a habit of having long conversation over the telephone. Sometimes it may go for an hour also. One day she hung up after 25 minutes....

Husband: "Today you had less than half an hour conversation on the phone."

Lady [wife]: "I got a wrong number"!!!

== oo00oo ==

Wife caught her husband searching high and low all around his living room.

Wife: "What are you searching for?"

Husband: "Hidden camera!"

Wife: "And what makes you think that there are hidden cameras here?"

Husband: "That guy on TV knows exactly what I am doing. Why every few minutes he keeps saying, you are watching the Star World channel. How does he know that?"

== oo00oo ==

Judge: Why are you arrested?

Man: For shopping early!

Judge: Well, That's not a crime. Anyway, how early were you shopping?

Man: Before opening the shop

== oo00oo ==

Teacher told all students in a class to write an essay on a cricket match.

All were busy writing except one student.

He wrote "No match, due to rain!!!"

== oo00oo ==

Professor: Chemical symbol of Barium?

Student: BA

Professor: For sodium?

Student: NA

Professor: What will we get if 1 atom of BA & 2 atoms of NA combined?

Student: BANANA

== oo00oo ==

Teacher: Hitler says, "There is no word like IMPOSSIBLE in my dictionary".

Student: What is the question of complaining now? It should have been thoroughly checked at the time of purchase itself.

== oo00oo ==

A person saw a very high Airtel Tower & red light glowing on the top,

Seeing this he said: "India is developing fast". See there are traffic signals for Aeroplane in the air"

== oo00oo ==

