guwahati@icai

E-Newsletter of the Guwahati Branch of EIRC of ICAI

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Contents

Write to Editor

'Information is Power' and our ever-evolving profession needs more and more of that today than ever before. Do you have any relevant points to make, experiences to share, and views to spread among the CA fraternity? If yes, e-mail us at newsguwahati.icai@gmail.com.

Chairperson's Message ...

Dear Professional Friends, Colleagues & my dear Students,

"Bare branches of each tree
on this chilly January morn
look so cold so forlorn.
Gray skies dip ever so low
left from yesterday's dusting of snow.
Yet in the heart of each tree
waiting for each who wait to see
new life as warm sun and breeze will blow,
like magic, unlock springs sap to flow,
buds, new leaves, then blooms will grow."
- Nelda Hartmann, January Morn

As I sit this evening to pen down the second last Message for the newsletter, I look back at the months gone by and I recall the moments this afternoon when I was taking a stroll around the Institute's building. Saraswati puja was organised by the students in the basement & GMCS classes was going on in the second floor. The banner of the Indoor sports meet still hung in the class where this meet had concluded a week back. It was frenzied activity this month when the sports meets were organised in which there was active participation from the members cutting across age barriers. The highlight of this indoor meet was that CA. Vivek Jalan apart from being instrumental in the organization, also walked away with three leading honours.

The President ICAI was in the region for attending the inauguration ceremony of the Dibrugarh & Tinsukia branches in upper Assam and on his way back, paid a visit to the Guwahati branch. The CA students were thrilled to have his blessings on the event of Saraswati Puja being organised in the branch premises and it was indeed very motivating to hear him complement about the newly developed infrastructure at the branch and the décor. *"Our prime purpose in this life is to help others. And if you can't help them, at least don't harm them" – Dalai Lama.*

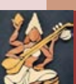
The enthusiasm of the Guwahati members' cricket team ran high in their encounter with the Siliguri branch in the T-20 cricket match organised by them. Guwahati managed to grab the Best Batsman & the Man of the Match award. Though we could not come up triumphs, but "*it is not in winning or losing, but in participating that matters."*

Earlier in the month, on 11^{th}–12^{th} of January, we had the outdoor sports meet between the members & students cricket team under flood light at the Judges field where the latter team came out victorious. CA. Samikhya Das as always was the catalyst behind the event which was very professionally managed and appreciated by one and all.

"I don't believe you have to be better than everyone else. I believe you have to be better than you ever thought you could"- Ken Venturi. Results of the CA exams held in November 2014 were also declared in this month, and we congratulate Ms. Priyanka Jain & Ms. Divya Mittal for securing the 29^{th} & 45^{th} rank in the Final & IPC exams respectively.

"Every noble work is bound to face problems & obstacles. It is important to check your goals & motivation thoroughly. Once a positive goal is chosen, you should decide to pursue it all the way to the end. Even if it is not realized, at least there should be no regret" – Dalai Lama.

– CA. Kaberi Bhuyan



A little learning is a dangerous thing, but a lot of ignorance is just as bad

Face of the month

Only those who attempt the absurd can achieve the impossible

Give me an inch
I promise I'll take a mile
Danger is beauty
I'll face it with a smile

These are lines of a song by Willow Smith that tell us of what not a 21st century girl can achieve.

A lady indeed has loads of patience and endurance to face hardships and accomplish her dreams. And when she dreams, it brings some kind of romance to her life since she tries in a way or the other to create a better world for herself.

CA. Priyanka Jain

One such dream is being lived by one of the future stars of our profession, Ms. Priyanka Jain. Daughter of very proud parents Mr. Prasanna Jain and Mrs. Babita Devi Jain of Guwahati, Priyanka passed out the CA. Finals in November, 2013 securing 29th Rank nationally. She has thus brought immense glory not only to her parents but also to the entire CA fraternity of the Guwahati Branch. She has maintained an enviable consistency throughout her academic career starting from her matriculation all the way through to her graduation (from one of the most prestigious colleges in India - Shri Ram College of Commerce, Delhi) and beyond. She also got an all India 6th rank in the Integrated Professional Competence Examination (IPCE) conducted by ICAI in November, 2010, proving her true worth.

Priyanka has proved that with proper planning and untiring efforts, one can reach their goals. What are required the most are hard work and the need to walk out of one's comfort zone. After all *"the roughest road often lead to the top"*.

We convey our heartiest congratulations to Priyanka and wish her success in the years to come. May she dream bigger and achieve them all.

readers write

Dear Editor,

A Very Happy NEW YEAR – 2014!!

Received December issue of our Branch e-Newsletter 'Guwahati@icai'. Quality, contents and presentation of all the newsletters are very good, informative, educative and of very high standards.

I take this opportunity to congratulate you and your team for these relentless regular efforts.

First time such regularity is being maintained. Keep it up.

Thanks
With best wishes
CA. Nirmal Kotecha
Past Chairman, Guwahati Branch of EIRC

Editor's Desk...

Dear Colleagues and Student Friends,

hello!

"All glory comes from daring to begin"

It's the time for new resolutions, new ideas, new thoughts and new imaginations. It's January, the first month of a brand new year 2014. As I pen my thoughts for this editorial, I realize that another year has ticked over, with a new one knocking at the doors. Many of us might be thinking about how to make this year better than the previous one and have probably even made a new year's resolution or two; but for any real change to occur, there has to be a long term commitment. The New Year is a great time to review the challenges undertaken in the past and to plan for a better tomorrow. Be unusual this year and make your new year's resolution a living resolution that remains a part of your life for longer than just for the month of January.

Putting aside the "challenges" of the New Year, the month of January is also a time to cherish the festivities of harvesting — Bhogali Bihu, Makar Sankranti, Lohri, Pongal—whatever name you call it by! Let this festivity open up our hearts and minds towards divinity and wisdom, and cherish the beginning of warmer and longer days. The harvest festival is followed by the Swaraj festival of the country. We stepped into the 65th year of India becoming a Republic. This is when regional identity takes a backseat and the universal appeal of unity and brotherhood projected by all Indians together comes to the forefront. I convey my belated wishes to all our readers on this occasion of festivities. Let these festivals carry with us the message of mutual love and affection! Let these be instrumental in establishing a classless society where all people are able to live with equal honour and freedom!!

In between the festive season, however, there were one or two measures of things which might well prove to be an eye opener for the ones who are said to be the biggest celebrator of the days — the vibrant youths of our fraternity. The recently announced CA Exam result is one such wakeup call for all. The meagre pass percentage of around 3 percent in the CA Final is there for all to see. Amidst such gloomy results though, we are delighted at the news of success of Ms. Priyanka Jain and Ms. Divya Mittal who bagged 29th Rank and 45th Rank in the CA Finals and CA IPC Exams respectively. So, it's about time that the old funda of concentrating on practical training and self study from study materials is once again resorted to.

Another appalling news that stained the beginning of the year was the tragic death of Sunanda Tharoor, wife of Union Minister Mr. Shashi Tharoor. The bruising Twitter saga that unfolded before her sudden and mysterious death, begs the question: ***is the wonderful world of social media a double-edged sword, a scalpel that can also turn into a knife?*** It has yet again opened up the debate over how social media is used and should be used with several questions being raised about social media etiquette.

Hope the blessings of Maa Saraswati endow one and all with true knowledge and appreciation of science, art and music.

Happy Reading!
– CA. K P Sarda

SERVICE TAX

CAN TAX BE RECOVERED FROM THE SERVICE RECEIVER IN ABSENCE OF SPECIFIC AGREEMENT?

By: CA. MANOJ NAHATA*

In general, liability of service tax rests upon the service provider except in the case of certain services under reverse charge /joint charge mechanism where the statutory liability is either fully or partially shifted on the service receivers. In most cases, service tax is charged separately in the invoice raised by the service provider in accordance with their terms of agreement. But dispute arises in cases where either there is no agreement or where the terms of the agreement are silent in respect of payment of service tax or where the terms fix liability upon the service provider only. In such cases the service receiver takes the plea that the service value agreed upon should be considered as inclusive of service tax and thus tax has to be paid by the provider of service. It seems logical and legal too because if service tax is not charged separately, the value should be assumed to be inclusive of service tax in terms of the provisions of section 67 of the Finance Act, 1994.

Such disputes are more likely to arise in cases where the receiver of the service is person who does not take input credit or is the ultimate consumer of the service. Such category of service receivers always tend to oppose if service tax not specifically agreed upon is charged in the bills raised by the service provider. This type of disputes crept in a majority of cases when service tax on 'Renting of Immovable property' was levied in the year 2007. In most cases, existing rent agreements did not have any clause on service tax and in the absence of such clause it was not easy for landlords to recover service tax from the tenants. The landlords being the service providers were liable to pay service tax to the Government under the service tax laws. The landlords were the ones required to be registered and the recipient of demands raised by the service tax department. Even where a tenant refused to reimburse the service tax to the landlord, the landlord could not make it an excuse for not paying service tax. The only remedy that remained with the landlords then was to file a suit for recovery of service tax from the tenants. On many occasions the judiciary was called upon to examine this matter.

> **……..most judgments have been delivered in favour of the service providers. This is mainly by virtue of application of the provisions contained in Section 12A and 12B of Central Excise and Salt Act, 1944 which creates a statutory presumption that the person paying the service tax has passed on the liability to the recipient of the service.**

Let us take a look at a few case laws to understand the view of the judiciary which seemed more inclined to favour the service provider.

The Delhi High court had an occasion to deal one such issue in case of **Pearey Lal Bhawan Association Vs. Satya Developers (P.) Ltd. [2011] 31 STT 51 (Delhi).** The plaintiff-society was owner of a building Pearey Lal Bhawan. The plaintiff entered into a lease deed with the defendant in respect of an area. The parties also entered into an agreement for maintenance of common services and facilities in respect of the leased premises. With effect from 1-6-2007 the Central Government, by amending Chapter-V of the Finance Act, 1994, levied service tax on the renting of immovable property for business purposes. On filing a suit, the plaintiff contended that the levy of service tax is in the nature of an indirect tax, which has to be deposited by the service provider after collecting the same from the user of the service i.e., the lessee-defendant in the instant case. The defendant, on the other hand, denied the suit claim pointing out to the relevant clauses of the lease deed, which read that the lessor would continue to pay all or any taxes, levies or charges, rates, ground rent, house-tax charges, fire-fighting tax, easements and outgoing charges imposed by the Government, Local Authority, etc.

It was held by the Court that:

- The parties did not visualize that this kind of levy would be made in respect of a lease, or rental of commercial properties. It was also undisputed that the levy was made effective in 2007, after the parties had entered into the agreement.
- The Supreme Court in **All India Federation of Tax Practitioners v. Union of India [2007] 10 STT 166**, has held that service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, associations, firms, body of individuals, etc. It was further held that sales tax and service tax are consumption specific duties which do not constitute a charge on the business but on the client.
- Sections 12A and 12B of the Central Excise Act, which are also made applicable by virtue of section 83 of the Service Tax Act, prescribe that the provider of goods (in the instant case, service) has the obligation to indicate the quantum of tax, on the goods or services, sold or offered for sale.
- It was true that the contracts entered into between the parties in the instant case, spoke of the plaintiff-lessor's liability to pay municipal, local and other taxes, in at least two places. Service tax is a species of levy which the parties clearly did not envisage while entering into their arrangement. Leasing and renting premises were included as a 'service' and made exigible to service tax by an amendment. If the overall objective of the levy - as explained by the Supreme Court was to be taken into consideration it is the service which is taxed and the levy is an indirect one which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumers have contacts with the users; it is from them that the levy would eventually be realized, by including the amount of tax in the cost of the service (or goods).
- Further, section 64A of the Sales of Goods Act, 1930 clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. Although there is no explicit provision to that effect, enabling lessors such as the plaintiff, to the service tax component, there is sufficient internal indication in the Act through section 83, read with section 12A and section 12B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee).

  The issue was therefore answered in the Landlord's favour and against the defendant tenant.

Similarly, in case of **Kishore K.S. Vs. Cherthala Municipality [2012] 18 taxmann.com 41 (Ker.)** the petitioners had taken rooms on rent from the respondent Municipality. They were called upon to pay service tax. It was their case that the demand for service tax is illegal.

The Honb'le Kerala High Court held that :

- Service tax can be passed on by the service provider. The service tax is clearly an indirect tax. It is open to the Legislature even if it is an indirect tax to provide that it shall not be passed onto the consumer. There is no such prohibition in the matter of service tax. That apart, the High Court in other decisions specifically declared that service tax can be passed on by the service provider. Therefore, there is no merit in the contention that service tax cannot be passed on by the municipality to the tenants.

Members' Section

- The second question is whether in the absence of the contract, it is open to the municipality to pass it on. The tax is primarily on the service provider. As already noted, it does prevent passing on of the tax to the tenants. A statutory right exists in favour of the municipality to pass it on as already noted. It is open to the municipality to decide not to pass on the burden. But, when the municipality elects to demand the payment of tax, it may not be open to the petitioner particularly in a writ jurisdiction to point out that it is in violation of the contract to demand payment of service tax. There was no merit in the said contention and it is rejected.

  In view of this the writ petition was dismissed and the case was decided in favour of the landlord municipality.

In the case of **Swapan Kumar Paul Vs. Oil & Natural Gas Corporation [2008] 17 VST 332 (GUWAHATI)** the Agartala Bench of Hon'ble Gauhati High Court held that service provider has only the limited liability of collecting the service tax and paying it to the department. Hence, ONGC (the service receiver) was liable to make payment of service tax to the contractor (service provider).

Similar to the Gauhati High Court's view (supra), the Allahabad High Court in a more recent case of **Bhagwati Security Services (Regd.) Vs. UOI 2013 (31) STR 537 (All.)** held that service tax being a statutory liability as statue is imposing tax upon the persons to whom service is being provided and the service provider is merely a collecting agency. Hence, HC directed the reimbursement of service tax to the petitioner.

The author has also noticed a few contrary rulings too. In case of **Brahamputra Infrastructure Vs. Delhi Development Authority (DDA) (2010) 251 ELT 488(Del HC)** wherein it was held that once there is no provision for collection of service on basis of written agreement the service provider is not entitled to recover the amount as reimbursement from DDA.

In the case of Raghubir Saran Charitable Trust v. Puma Sports India Pvt. Ltd. 2012(191) DLT 183, an award was passed by the arbitrator requiring the landlord (petitioner before the Court) to bear the liability of all property taxes and other outgoings including service tax liability. The arbitrator had distinguished the decision of this Court in Pearey Lal Bhawan Association (supra)on the ground that clause 7.1 of the lease deed in that case was worded differently from the relevant clauses of the lease deed in Pearey Lal Bhawan Association (supra.). Therefore it is the contract, and not the nature of the levy, which will determine which party, the service provider or recipient, is liable to bear the burden of service tax. In the present case, the wording of Clause 7.1 of the lease reflects the intention of the parties that it is the Petitioner who would bear the incidence of all taxes.

It is thus observed that most judgments have been delivered in favour of the service providers. This is mainly by virtue of application of the provisions contained in Section 12A and 12B of Central Excise and Salt Act, 1944 which creates a statutory presumption that the person paying the service tax has passed on the liability to the recipient of the service. The legislative intent, therefore, seems quite clear i.e. the service tax is to be ultimately borne by the recipient of the service though it is the service provider who is statutorily liable to pay the said tax to the exchequer.

The liability of service receiver is however not a statutory liability. It is purely contractual in nature. Where the terms of the contract are explicit, liability will have to be determined accordingly. However, in absence of any contract, the nature of levy will determine who will bear the burden of service tax. Section 83 of the Finance Act read with Sections 12A and 12B of Central Excise and Salt Act, 1944, in my view, gives ample legal right to the service provider to recover the amount of service tax paid by him from the recipient of the service. Further the author is of the opinion that the recovery can be made from other party only to the extent the liability has not become barred by limitation.

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Members' Update

No TDS on Service Tax Component

The Central Board of Direct Taxes has decided that wherever in terms of the agreement/contract between the payer and the payee, the service tax component comprised in the amount payable to a resident is indicated separately, tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid/payable **without including such service tax component**.

For details visit:

http://law.incometaxindia.gov.in

Service Tax on Storage and Cargo handling of Rice :

It has been clarified by the Ministry of Finance vide its letter dated 08.11.2013 and the Administrative Ministry on 27.11.2013 that Rice is not covered in the definition of Agricultural Produce as found in section 65B (5) of Finance Act and cannot be exempted from the purview of service tax. As a result, the Storage and Cargo Handling Charges of Rice are subject to Service Tax w.e.f. 01.07.2012 for all the depositors. Hence the service tax on Storage and Transportation of rice is outside the purview of the Negative List Regime.

Click here for details

Empanelment of Chartered Accountants firms with the office of C & AG for the year 2014-2015 :

Applications are invited online from the firms of Chartered Accountants and Chartered Accountants Limited Liability Partnerships (LLPs) who intend to be empanelled with this office for appointment as auditors of Government Companies/Corporations for the year 2014-2015. The format of application will be available on the website:www.saiindia.gov.in from 1st January 2014 to 15th February 2014.

Convocation of the newly enrolled Members :

It has been decided by the Institute of Chartered Accountants of India that newly enrolled members who, due to any reason, could not participate in the Convocation held in the month of January, 2014 at Delhi, Kolkata, Bengaluru, Mumbai and Kanpur will now be given opportunity to participate in the next convocation scheduled to be held in the month of May/June' 2014 at various cities under Regional Offices of ICAI.

Such participants are advised to be in touch with Regional offices in the matter.

– Compiled by CA. Bikash Kr. Agarwala

Clarification on Validity Period of Stamp Papers

"The Indian Stamp Act, 1899 nowhere prescribes any expiry date for use of a stamp paper. Section 54 merely provides that a person possessing a stamp paper for which he has no immediate use (which is not spoiled or rendered unfit or useless), can seek refund of the value thereof by surrendering such stamp paper to the Collector provided it was purchased within the period of six months next preceding the date on which it was so surrendered. The stipulation of the period of six months prescribed in Section 54 is **only for the purpose of seeking refund of the value** of the unused stamp paper, and **not for use of the stamp paper**. Section 54 does not require the person who has purchased a stamp paper, to use it within six months. Therefore, there is no obstacle for a stamp paper purchased more than six months prior to the proposed date of execution, being used for a document."

Supreme Court Judgement : **Thiruvengada Pillai Vs. Navaneethammal & Anr. [2008]**

– Compiled by CA. Sushil Kr. Agarwal

Section 185 of Companies Act 2013: Straight answer to some nagging questions

By Vinod Kothari

Section 185 is one section of the Act that has created the maximum concern. And for most obvious reasons, as the section puts a blanket bar on granting of loans or making of guarantees. There is no scope for any approval, whether by the company or by the central government. The section has already come into force. Offence of the section makes not only the lender but even the borrower liable for prosecution. With these very serious questions, there are numerous questions in peoples' minds about the section. This write up below takes lots of these questions headlong.

If you have any further questions, please feel free to post them on https://www.facebook.com/groups/337067759763667/.

1. What is the legislative intent of the section?

The intent of section 185 is to ensure that directors, who are sitting in the position of trustees for the shareholders, do not use their powers to benefit themselves by lending the money of the company to themselves or their directors' entities. The purpose of the section is evidently to avoid a conflict of interest.

2. What is the implication of the words "save as otherwise provided in this Act" at the start of the section?

The implication is obvious – if there is any other provision of the Act permitting lending as covered by the section, then such specific permission shall prevail over this section. However, there is apparently nothing that permits the lending sought to be restrained by the section. Section 186 (2) talks about lending upto a percentage of the company's networth/paid-up capital, but the section starts with "without prejudice to the other provisions". In any case, section 186 is not a conflict-of-interest provision, hence, the specific sanction of section 185 cannot be said to be excluded by section 186. The provisions of section 188 on related party contracts do not apply to loan transactions. Hence, there is no provision other than section 185 pertaining to lending to directors or directors' entities.

3. Is the section applicable to a private company?

Unless there are exemptions u/s 462, every company is covered by the section.

4. Is the section applicable to a banking company?

No, by virtue of proviso (b) to sub-section (1), a banking company will be excluded.

5. Is the section applicable to a non-banking financial company?

Proviso (b) to sub-section (1) provides exemption from the section for any loan granted, or security provided, where the company in the ordinary course of its business grants such loans or makes guarantees, etc. Not every NBFC is engaged in the business of granting loans or giving guarantees in the ordinary course of its business. For example, if the company is an investment company, its business consists of making of investments, and not loans. In such a case, the exemption in proviso (b) to sub section (1) will not be available. But if making of loans is the ordinary business of the NBFC, the section will not be applicable to the company.

6. What is the meaning of "ordinary course of business" for the purpose of the exemption in proviso (b)? Does it depend on the object clause of the Memorandum, or does it depend on the assets or income of the company? If it depends on assets or income, is there any particular percentage of assets/income that must come from the lending business, to regard the business as forming part of the ordinary course of the company's business?

Before we discuss what is "ordinary course of business" for the purpose of proviso (b), it is important to understand what it is NOT.

The expression does not mean "main business", "principal business" or "main object". Hence, mere insertion of an object in the objects clause does not make lending business an ordinary business of the company. At the same time, there is nothing to imply that the lending business should be carried as the principal or main business.

Similar exception, for loans made in ordinary course of business is there in sec. 2 (22) (e) of the Income-tax Act as well and there have been score of rulings under that section as to what is the meaning of the ordinary course. Given the commonality of intent, that is, to exclude such loans as the company would ordinarily give; the rulings under the Income-tax law will be quite relevant here as well.

There may possibly be an extreme argument to say that whatever is not extra-ordinary is ordinary course of business. Income from extra-ordinary activities is required to be separately disclosed in the profit and loss account. Such profit/loss from extra-ordinary activities is different from "other income". "Other income" includes such items which may not be forming part of the operating income, yet cannot be said to be completely beyond the scope of the operations of the company. Interest income is specifically included in the scope of "other income", and not "extra-ordinary items". This is clear from the format of Profit and loss account given in Schedule III. By this argument, every interest income will be ordinary, since it is not extra-ordinary.

However, such an extreme argument would not be proper in the context of sec. 185.

Sec. 185 is a "conflict of interest" provision – the interpretation should serve the purpose of the section. Hence, in light of this, the section should exclude such lending where the company lends not only to directors/directors' entities but also to arms' length parties. If the company is lending merely to directors/directors' entities, even if such lending happens to be recurring, lending cannot be regarded as ordinary business of the company.

The true meaning of "ordinary course" for the purpose of the exception will not be excluding the section if lending is the ordinary business of the company. In other words, the company is engaged in lending activities with regularity and frequency to imply that the company is carrying lending as its business and not as a mere device to do financial accommodation of directors or related parties.

7. Does the section apply to deposits?

The distinction between loans and deposits is well understood in law. There is a large body of case law under Moneylending laws, sec. 2 (22) (e) of the Income Tax Act, and section 370 of the Companies Act 1956 prior to its amendment in 1989, whereby courts have distinguished 'loans' and 'deposits'. Succinctly, where the *have-not* approaches the *have*, and seeks accommodation, the transaction is called a loan. Where a *have* approaches a *have-not*, and seeks parking of money, it is called a deposit. The distinction is highly circumstantial. However, given the fact that the section does not employ the language given in section 370 of the Companies Act 1956, "loans" under the section cannot include deposits. Also note that auditor of a company is specifically required to report whether the company has shown loans made by it as a deposit, which is intended to nab any effort by a company to describe a loan as a deposit.

8. For the purpose of the section getting attracted, is it important that the loan must carry interest?

According to Black's Law Dictionary 'loan' means a lending, advance of money with absolute promise to repay, a borrowing with a promise to repay delivery of money by one party and receipt by another on agreement, express or implied, to repay, or a deposit. It is not necessary for a loan to carry interest.

9. Does the section apply to advances?

Loan is a bailment of money. Therefore, the four elements of a loan are:

1. an amount, a sum which may be in the shape of money or kind;
2. placing of it with another, called borrower;
3. an agreement to repay, once again, in form of money; and
4. a recognition of liability on the part of the borrower, to return it with or without interest.

An advance is given for a specific purpose, on the condition that either the money will be adjusted to offset obligation of the maker of the advance, or otherwise refunded. While a loan is a money-for-money transaction, an advance is intended to be for some specific pre-identified commercial transaction, for instance, advance for purchase of goods, advance for purchase of services. The goods or the services, for which the advance is given, are usually pre-identified, as it defies commercial reality that one will provide an advance without any purpose.

In *Raja of Venkatagiri vs. Krishnayya Rao Bahadur*[1] AIR 1948 PC 150, the Privy Council has held that normally an advance is not repayable as an advance usually conveys an idea of a prepayment, that is, paying something in advance before it is actually due.

The section is clearly applicable only to loans and not advances. If an advance has been given to a director or directors' entity, the transaction may well be covered by section 188.

10. Does the section apply to book debt?

The section is applicable only when there is loan in substance. The provisions of section 296 of the 1956 Act have been subsumed in section 185. Hence, if a book debt is prolonged beyond the usual credit period, so as to allow more time to a debtor, such a debt may also amount to a loan.

11. Does the section apply to subscription of debentures issued by another company?

The section is applicable only to loans, and not to subscription of debentures. If the director's entity issues debentures, to which the company subscribes, the company is acquiring a security, and not making a loan. Hence, the section does not apply in such a case.

12. Does the section apply to a loan given to a wholly owned subsidiary?

At the first blush one would say yes. But, on analysing the meaning of "any other person" under clauses (a) to (e) of the explanation [corresponding to section 295 (1) (a) to (e)], we conclude that wholly owned subsidiaries will, in fact, not be governed by the said section. We need to analyse each of the clauses as below:

As the loan, advance or security will be given to subsidiaries and not to directors, the stated clause (a) and (b) will not come into picture. With regard to applicability of clause (c), it is to be noted that the borrower must be a private company.

In order to be regarded as such, the borrower must be an Indian company, and must be registered as a private company.

As body corporate includes a company incorporated outside India, applicability of clause (d) and (e) needs to be analysed.

Clause (d) gets attracted where two or more *directors* ***'exercise or control'*** 25% or more shareholding in a body corporate. The phrase 'exercise or control' includes direct and indirect shareholding of the individual director(s) in the borrowing company. Thus, the clause gets attracted when the director himself or through his relatives or through any other company in which he holds shares is able to exercise or control 25% of shareholding in the subsidiary, being the borrowing or beneficiary company. Since WOSs are the companies which have 100% control with their holding company, there is no question of any director or directors holding any control over the shareholding of the subsidiary. If at all they exercise any voting, they do so only on behalf of the holding company, and they are bound by their duty to the holding company. There is no self-interest of the directors in the subsidiary company at all.

Clause (e) becomes applicable where the board or managing director or manager of the borrowing company is ***'accustomed to act'*** in accordance with the instructions of board or directors of lending company. The meaning of the expression "accustomed to act" here essentially means that the board of the borrowing or beneficiary company does not use its prudence or wisdom while taking any decisions but merely acts according to the whims of the board of the lending company. The said clause (e) is purely circumstantial – in order to attract the section, it has to be made out that:

(a) instructions were consistently given by the board of company A to the board of company B; and
(b) the board of company B, without examining the rationale of such instructions or determining whether such instructions are in the best interest of the company; abided by the same.

There is no prima facie circumstance to presume the existence of such a situation. If at all there is any assertion that the board of the subsidiary is "accustomed to act" as per provisions of the Explanation, the onus of proving the assertion lies on the person making the same.

Hence, with all the above analysis, we may say that WOS may not be covered under the section.

13. What is the true meaning of "accustomed to act in accordance with the directions or instructions" as given in Explanation (e) below sec. 185 (1)?

The question above discussed at length the essence of the phrase 'accustomed to act' in accordance with the instructions of board or directors of lending company. Moreover, the MCA on vide its circular dated 12th May 2011[2] clarified that approval of Central Government should be sought only if the provisions of sub-Section (d) or (e) of Section 295 of the Companies Act are attracted. The intent of the above circular is that sec. 295 (1) (e) cannot be taken as applicable merely due to the presence of common directors. There may, of course, be prima facie situations where one may contend that the board of the borrower company is nothing but a subset of the board of the holding company. But such a prima facie contention may be rebutted with circumstantial evidence.

14. Is the section applicable to a letter of comfort given by the company?

The section is applicable to giving of guarantee. The word guarantee is defined in the Contracts Act to imply the undertaking of the liability of a principal debtor by the guarantor. It will be a case of a guarantee where the guarantor undertakes to pay the debt of the principal debtor. However, where the commitment of the so-called comforting party is merely to the extent of introducing the principal debtor, or prevailing upon the principal debtor to pay, etc., there may be a moral or reputational obligation, but there is no contractual obligation of the comforting party, and hence, there is no guarantee. The distinction between guarantee and LoC is not merely one of language – it is language and intent put together. If there is a clear contractual liability being assumed by the contracting party, then it is a guarantee irrespective of the nomenclature.

15. If a loan is given by a lender in violation of the section, is the borrower also liable?

The language of sub-section (2) of section 185 makes it very clear that not only the lender is liable for contravention of any of the provisions of sub-section (1) but also the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.

It should also be clear that where a law provides a prosecution by way of imprisonment, and the offender is a company, the obligation attaches to the officers/persons responsible for the offence.

Check at: http://india-financing.com/staff-publications.html for more write ups.

Disclaimer: This write up is intended to initiate academic debate on a pertinent question. It is not intended to be a professional advice and should not be relied upon for real life facts.

[1] http://indiankanoon.org/doc/567642/

[2] http://www.mca.gov.in/Ministry/pdf/Circular_24-2011_12may2011.pdf

Winning Strategies in Financial Markets

CA. Ankit Jallan

Are you one out of ten?

The statistic of the people winning or losing money in the financial markets is not very encouraging. Only about 10% of the total players end up making profits – the remaining 90% tends to end up on the losing side. A very dis-heartening ratio indeed, especially for those who aspire to enter this zone. Those classifying themselves as winners have something uncommon from the rest of the community. With this article, I wish to take a drive into what makes them different.

"Winners don't do different things, they do things differently"- Shiv Khera

Statutory Warning:

Let me start off with a few words of caution: Trading in stocks, futures, forex, and options does involve considerable risk, so caution must always be utilized. One cannot guarantee profits or freedom from loss. You assume the entire cost and risk of any trading you choose to undertake. You are solely responsible for making your own investment decisions. Hypothetical or simulated performance results have certain limitations. Past performance is not necessarily indicative of future results. No stock, futures, forex, or options method can guarantee profits. The risk of loss is inherent in stock, futures, forex, and options trading.

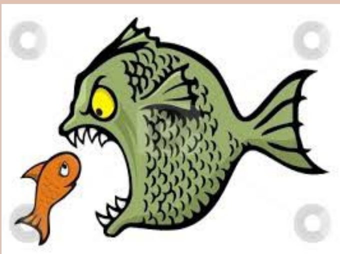
With that disclaimer in place, I wish to lay down the following strategies to end up on the winning side.

Strategy # 1: Conquer Emotions. Get your Fundamentals Correct:

Something which is often missed by a trader or investor in securities which I believe is the most important ingredient for success in financial markets is "Training the mental self – Conquering emotions". We all understand that before getting into any business, one has to be clear about the fundamentals. Only after having attained the basic insight should one venture into that field. Unfortunately, this is not true for most of the people in the domain of financial markets. It is often seen that a mere phone call from our relative or our financial broker is incentive enough to put our hard earned money into the markets (and often regretting later having done so). A careful scrutiny of why and when to invest money into markets, if done, may however erode most of the sorrowful stories and can turn them into potential success stories. Success is all about consistency around the fundamentals.

"If stock market experts were so expert, they would be buying stock, not selling advice."

Strategy # 2: Accept what the market is willing to give:



One thing which everyone interested to trade in or track the market should understand well is, *"Market is always right"*. It is more like the giant fish in the sea which is fast, powerful and has its own ways of moving, unaffected by others. Rather, it has a fierce attitude and ruthlessness towards whatever comes in its path. A small investor with little experience seldom knows of how dominant the winds can be and how mighty the stroke he may have to bear. It is very important for every investor to understand that market has its own way. One should be ready to accept what the market is willing to give instead of fighting against it and attempting more.

Strategy # 3: Visualize the Future:

Visualizing the future the way you want it, is much more likely to make that future a reality. "Thoughts are things". Just see yourself living the "Life of Riley" (i.e. "the good life") and have people around you who recognize you as that successful trader whom everybody is talking about.

For those who are already into financial markets, be as a trader or as an investor, they often tend to talk all good things about how risky things can be on the trading floor and how such risks can be mitigated. However, when trading real-time, not many of us remember the golden rule: "Let the winners run and limit your losses." In practice, people often do wrong things like taking off stop losses where the price comes near to it or not taking profits when your system tells you to, thus becoming inconsistent with the picture of who they initially visualized of.

Strategy # 4: Be in Control:

As a new trader, you have got to pay your pound of flesh—dues in form of learning experiences gained from trading in various market situations, losses suffered in the course of managing greed and fear, and so on. Seasoned traders know this and that's why they love the new trader so much. Who do I refer to as a new trader? A new trader is either someone who is yet to make his mistakes as a beginner (and learn from it) or someone who keeps making the beginner's mistake over and over again and never learns. To some, it is impossible and they wind up walking away blaming the "volatility" or the "institutional traders" for their failures. The difference is that the successful trader is *in control*. The new trader is not. The beginner is controlled by emotions and fears and has not learnt that trading the market is more of a math game. However, all this is easier said than done. Fears and emotions can easily overtake us. We are humans, not machines. We must train our minds to be disciplined and that's what seasoned traders do.

"Part of overall winning is taking losses along the way."

Strategy # 5: Keep Track of your Mistakes:

Keeping a Journal is yet another thing which is common with most of the seasoned traders. They keep note of all their experiences along the way. Keeping track of what made them win or lose helps them not to repeat the mistakes and understand the strengths and weaknesses of their style of sustaining in the markets. A simple approach to earning money in financial markets is to sustain. If you can sustain during rough times, you are bound to make money during easy times. Stocks and securities often show visible patterns of reversals and breakouts, which should be taken up as opportunities and encashed upon. Soon after you force yourself to start writing your day's trading experiences, you will see the power of the technique.

Strategy # 6: Discipline Yourself:

Investing requires continuous learning from the market. Like driving a car, investment is more of learning practically and hands on. It requires discipline. When driving a car, what speed to drive and which lane to drive in are decided by the driver. Similarly, in case of investment, you must know how much to invest, where to do so and when to sell. The best is to have a disciplined approach, combined with an investment philosophy. Some of the great investors like Warren Buffet or George Soros have been successful as they have a disciplined way of investing. There is no easy way to make money. All of us have to learn lessons in investing in the same market and in the same way. Each time, investors are put to different tests. Only the learned investors will succeed. Be a 'smart' investor. You need to find a system that suits your personality, back-test the system, appropriate the money to trade the system, and then *go for it.* The "go for it" part won't actualize without the mental strength to take the good with the bad.

You must win the battle within yourself *first, before you can win in the markets.*

Wish you Happy Investing!

With extracts from "Mental Fitness for Traders" by Norman Hallett.

CA. Ankit Jallan is a young practising Chartered Accountant and can be reached at ankitjallan@gmail.com

Outdoor Sports Meet :

A Two-Day Outdoor Sports (**CRICKET MEET – 2014**) for **CA Members & CA Students** was organized by Guwahati Branch on 11TH & 12TH of January, 2014 at the Gauhati University Field and the Judges Field. A total of 3 teams from the CA Members

Both the finalist teams posing with the Branch MC Members

contested against each other and **Team B** lead by CA. Sudhir Sarawgi qualified for the finals to play against the winner of CA Students team. In a keenly contested match under the flood lights at Judges filed in the Final, CA Students team came out as winners. One of the bright student talent from the branch Mr. Ashish Agarwal was declared Man of the Match in the Finals and for his all round consistent performance throughout the meet, CA. Salil Agarwal was declared as the Man of the Series. The winning team was greeted by Winner's Trophy and all the members of the team were given Gold Medal as gesture for their performance. The runners up team members were greeted with Silver Medals. All in all, the Cricket Meet proved to be a very successful one. CA. Sudeep Maheshwari and CA. Samikhya Das were the chief architect behind the grand success of the Outdoor Sports Meet.

Inauguration of the Indoor Sports Meet (L-R) : CA. Vikash K. Jain, CA. Kaberi Bhuyan, CA. Saurabh Agarwal & CA. Sanjoy Kr. Das

Indoor Sport Meet :

Guwahati Branch of EIRC of ICAI organized a Two-Day Indoor Sports meet on 18th and 19th January, 2014 for its members.

Participants with organizers at the event venue

Jubilant winners with the organizing committee

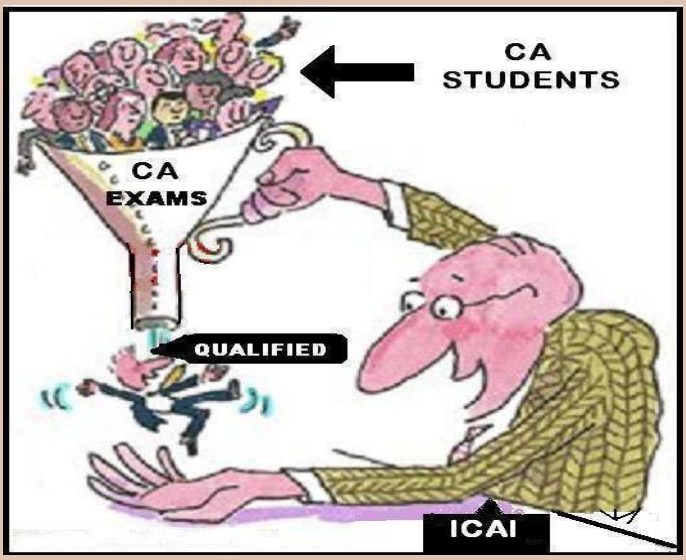
The event included Badminton which was played at Kanaklata Indoor Stadium, Ulubari in the first half of both days and Chess, Carrom and Table Tennis which were played in the Branch premises in the second half of both days. 132 participants contested for 21 trophies across all the categories of the games. The winners were as follows:

Game	Winner	Runner up
Chess	Amit Jain	Vivek Jalan, Biswajit Baruah
T T Singles	Amit Nahata	Samikhya Das
TT Doubles	Amit Nahata & Uday Bhartia	Suresh Beria & Saurav Agarwal
Badminton Singles	Vivek Jalan	Sudhir Sarawgi
Badminton Doubles	Vivek Jalan & Sudhir Sarawgi	Samikhya Das & Bikash Agarwala
Carrom Singles	Sudeep Maheshwari	Pankaj Jain
Carrom Doubles	Sudeep Maheshwari & Arun Singh	Parambir Singh Sandhu & Salil Agarwal

All present during the event praised the Coordinator CA. Vivek Jalan, for his brilliant effort in successfully organizing the event.

CA CPT/Final Results: A wake-up call for the students??

The results for the CA CPT and CA Final were declared on 15th day of January, 2014 while that of IPC Exams were announced on 31st January, 2014 . Unlike the previous few term results, lot of surprises were in store for the students fraternity as only a meager 3.11 % students passed in the CA Final Examinations across the country. The pass percentage of CPT and IPC Exams was satisfactory in which around 35 % and 8.12 % students



respectively came out with flying colors. The results of the Guwahati Branch under both the centres (Guwahati & Tinsukia) are as under:

Level of Examination	Total Students Appeared	Total Students Passed	Pass Percentage
CA Final – Both Groups	194	8	4.12 %
CA Final – Group I	320	15	4.68 %
CA Final – Group II	351	36	10.26 %
CPT	596	207	34.73 %
CA IPC – Both Groups	220	19	8.64 %
CA IPC – Group I	518	150	28.96 %
CA IPC – Group II	588	119	20.23 %

Republic Day Celebration:

The branch celebrated the 65th Republic Day of India on 26th January' 2014 with great pomp and joy. The celebrations began with the hoisting of the National Flag at the branch premises by the chairperson of the Branch CA. Kaberi Bhuyan. It was followed by the distribution of Sweets to children. The presence of all the MC Members along with other members and students of the branch made the celebration a great success.

Teleconferencing Programme

In addition to this, arrangements were also made for viewing of teleconferencing programme on the following dates –

Date/ Day	Topic	Faculty
03-01-2014	CPE Teleconference on TDS on payment to non-residents	CA. Dhinal Shah Ashvinbhai
17-01-2014	CPE Teleconference on Code of Ethics – Practical Issues	CA. C.N. Vaze

Forthcoming Events:

A 6 CPE hours seminar on "Companies Act 2013" is scheduled to be organized on Saturday 8th February, 2014 at the Auditorium, ICAI Bhawan from 10.00 AM to 5.00 PM. Renowned speakers like CA. Ganesh Balakrishnan from Hyderabad, CS. Mamta Binani from Kolkata ad CA. Devajit Sharma from Guwahati will deliver their thoughts on the various provisions of the New Companies Act' 2013. The seminar will also be graced by the presence of Mr. G C Yadav, ROC, Shillong.

या देवी सर्वभूतेषु बुद्धिरूपेण संस्थिता।
नमस्तस्यै नमस्तस्यै नमस्तस्यै नमो नमः॥

May Goddess Saraswati,
Who is fair like the jasmine-colored moon,
And whose pure white garland is like frosty dew drops;
Who is adorned in radiant white attire,
On whose beautiful arm rests the Veena,
And whose throne is a white lotus;
Who is surrounded and respected by the gods, protect me.
May you fully remove my lethargy, sluggishness, and ignorance!

Saraswati, the goddess of knowledge and arts, represents the free flow of wisdom and consciousness. She is the mother of the Vedas, and chants to her, called the 'Saraswati Vandana' often begin and end Vedic lessons.

It is believed that goddess Saraswati endows human beings with the powers of speech, wisdom and learning. She has four hands representing four aspects of human personality in learning: mind, intellect, alertness and ego. She has sacred scriptures in one hand and a lotus – the symbol of true knowledge – in the second. With her other two hands she plays the music of love and life on a string instrument called the Veena. She is dressed in white – the symbol of purity – and rides on a white swan – symbolizing Sattwa Guna or purity and discrimination.

Take a Break !!

"I believe that a simple and unassuming manner of life is best for everyone, best both for the body and the mind"

Albert Einstein

Etiquette refers to guidelines which control the way a responsible individual should behave in the society. Etiquette seems like a bunch of rules made up by old ladies who care about which spoon people use. It transfers a man into a gentleman.

But when it comes to social media, proper etiquette is important stuff that can mean the difference between building a respectful, authentic online presence that shows you in your best light, versus one ridden with embarrassing gaffes that could potentially end your career or relationship. Social media users must understand the proper ways to behave online. Just because one is behind a computer monitor in his basement doesn't mean all social etiquette goes out the window.

These are simple things which we know are acceptable or not but even then we tend to forget. These have to be reminded. So here are given below a few important points to be taken care of while using social media sites:-

1. **Upload a professional profile picture.** Rather than a weekly "selfie" of yourself with arm extended and mirror behind you to catch the full view, consider one good snap of the camera and call it a day for a few months. Feel free to be selective in choosing a picture that reflects how you would like to be perceived by your friends, fans and business associates. Smile like you mean it by utilizing your mouth and eyes to show you are genuine and authentic.

2. **Eat it, think it, but please don't post it.** Every meal or random thought is not post-worthy. Before hitting "post" or "tweet," ask yourself what value your comment offers and what your motivation might be as an end result. The information you share should ultimately be the type of content other people are interested in passing along to their own followers. Your tone should be interesting, informative, unique and conversational.

3. **Could a pastor discuss this at his Sunday service?** While your posts need not be medicinal and dry, consider the potential eyes on your profile. Would you be comfortable if your boss, client, spouse, pastor or children's teacher read and shared your views?

4. **Not everything is personal.** There are people who seem to live and die by Facebook. If someone doesn't friend them, they think there's secretly a huge war brewing between them and this now former friend. But sometimes it's not about you, Facebook or any perceived slight. Sometimes someone missed your request or just isn't signing on as much. Do not tag or mark the geo-location of the person/ people you are with, without his/her permission.

5. **Tag your friends with consideration.** It may be the best picture you have ever taken, but your friend's hair is looking like a rooster's tail or he has made a face unknowingly. Do you say "what the heck, I look good..."? Absolutely not, you skip posting that particular picture and do a courtesy delete -- unless you can crop yourself and use it for your personal profile picture.

6. **Take your complaint offline.** It may be tempting to tear into someone on Twitter, or slam them on their Facebook account, but contact them privately instead to settle the issue. If you do, tweet something that is truly bothering

you in real time, don't step over the line into slanderous territory.

7. **Consider the tone.** Humble-bragging, outright bragging, constant complaining and endless rhetorical questions never go over well with readers. If you find your tone slipping into these territories, it may be time to consider whether this is the right outlet for you. If Twitter has become your only place to vent, people may start to associate you and your business with that tone of voice. When it doubt, try to represent an accurate and realistic range of tones. No one expects you to be happy all the time, but no one wants you to be a fake either.

8. **It's not all about you!** Engage with your audience and encourage them to talk back, ask a question, answer a question, or share pertinent and high quality links other than your own. Make a point of commenting on your followers tweets and liking their posts to reciprocate the social media love. Reach out to people that are not currently in your circle of followers and when possible, call people by name because everyone loves the sound of their own name in conversation.

9. **Skip the call-outs.** Let's be honest. As fun as it can be to discover internet gossip (I'm pretty sure there are enough sites devoted to that), it's more fun to avoid the hurt feelings, damaged reputation and upset readers that come with calling people out, vaguely or directly. Just skip it. Talk to that person privately or just let it go. Readers really don't want to hear most people's dirty laundry.

10. **No private discourse.** Do not live tweet or quote something someone just said without first asking for their permission, (unless that person is on a stage.)

11. **Ignoring trumps engaging.** It is very offending to be mean online. No matter *what* you write about (people, furniture, kids, pets), someone out there will hate you for it. And those people seem to love attacking on social media outlets the most. It's easy to trip and fall into a Twitter war or a Facebook comment battle, but when in doubt, let it go. Twitter seems to be the main battle ground for online fights. It's best to stick to the facts.

12. **Be social.** As social media has evolved, more people are using the tool as a purely one-way communication channel to showcase themselves. Their feed read like the cross between their diary and their resume. Social networks are joined to socialize and network, so do not forget to talk to people too.

13. **Respect people's work/ life boundaries.** One might be using social media for purely professional reasons. Try to respect those boundaries by always following your friend's lead in the language they use in a conversation.

14. **Attribution to others.** If you share someone's original content or quote them, always give them an attribution. Direct attribution may not always be possible but do try to give in your best effort.

15. **Avoid passive-aggressive posting**. Social media is an awesome place for being passive aggressive. The wrong person may wrongly interpret it. So be direct when you talk. And if you want to call out to someone's behavior, do that directly too. . in private.

16. **Always say please and thank you.** There's a reason this rule has been an etiquette standby since we were talking about the proper way of being while online. Please and thank you are powerful words. Whether they help you get ahead in the rat race is irrelevant. They help you be a better person and leave the world in a better place then you found it.

17. **Do not use any social network to share highly private information.** Major gaffes in social media usual revolve around someone accidentally sharing something publicly that they meant to keep private. There is one way you can ensure this NEVER happens to you: don't post sensitive information on social networks.

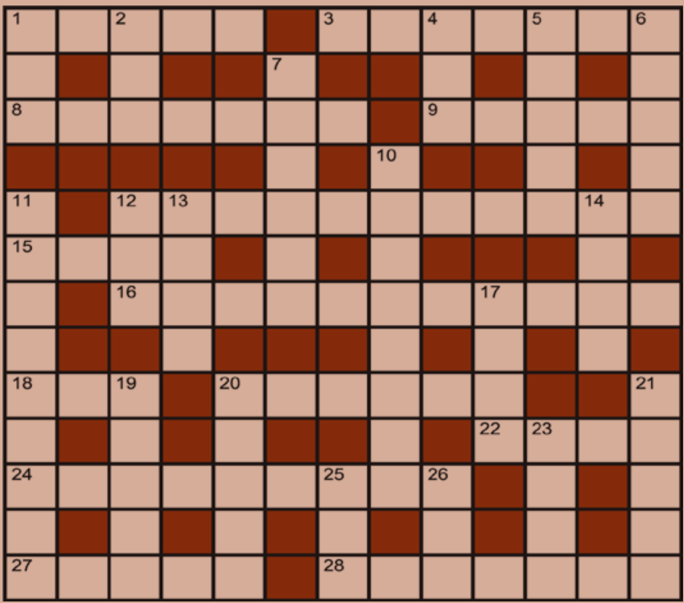
18. **Use private forums for personal plans.** Social media is great for meeting new friends and hooking up with old ones. However, once the "Hey! How are you?" pleasantries have been exchanged, it's time to **graduate the hug fest to a more private venue**.

This is no different than talking to people in different real-life situations. The same commonsense and polite behavior applies and that's what most people feel. Navigating social media is just another chance to form bonds with people by being respectful, helpful, engaging and authentic. Like most other topics discussed here, we've already made so many of the big mistakes that we might feel comfortable speaking from a place of what *not* to do, as well as talking about what might be better to try.

As you set out for 2014 with fresh goals and resolutions, don't overlook your social media profiles and activity. Your online presence can support or damage your professional (and social) image. Start the New Year off by paying closer attention to your social media presence.

– Compiled by CA. Pankaj Jain

CROSSWORD # 11



QUICK CLUES

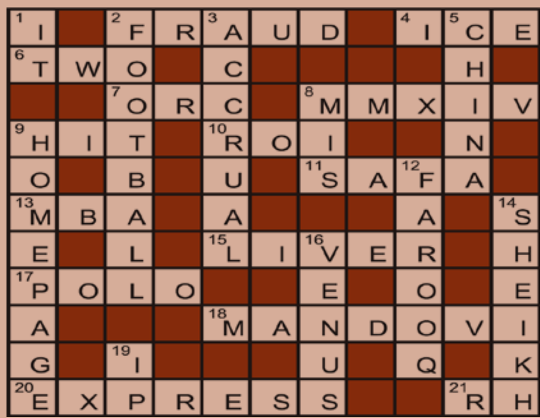
Across:

1 Enamel-covered part of a tooth (5)
3 Most abundant mineral in the human body (7)
8 ICAI Council approved the revised GN on Bank Audit at its meeting held here (7)
9 American musician whose birthday is celebrated by Shillongites with great pomp (5)
12 Naga, Wokha and Pangti which reached South Africa from Nagaland are these (4,7)
15 Killer Whale (4)
16 Google's Balloon Powered Internet-For-Everyone project (7,4)
18 .... Ribbon Project was launched in 1991 to symbolize fight against AIDS (3)
20 Royal Manas National Park is located here (6)
22 Projects aimed at searching extra-terrestrial intelligence (4)
24 ICAI Portal for resolving professional queries (9)
27 SA 300-499 deals with assessment of these (5)
28 "Tata" of South African Nation (7)

Down:

1 www.saiindia.gov.in is the page to visit for empanelment with this authority (3)
2 Generally you can't claim depreciation unless you ...... the asset (3)
4 A semiconductor light source (3)
5 An Inuit dwelling place (5)
6 River bordering India and Bhutan named after the serpent goddess (5)
7 73 year old Tusker which recently died at Kaziranga (6)
10 Gandhiji was here when India achieved freedom (8)
11 Largest Carnivore on land (9)
12 Poor Pradyuman never got promoted beyond this post☺ (3)
13 Planet associated with 18 across (4)
14 Inert gas discovered in 1898 (4)
17 A cataract Operation replaces this part of the Eye (4)
19 Coldest place in India (5)
20 Alloy of Copper and Zinc (rhymes with 19 down) (5)
21 Second largest human bone (5)
23 To render less difficult (4)
25 An amateur radio operator (3)
26 No in French (3)

SOLUTION CROSSWORD # 10



Congratulations to **CA. Mohammed Mandlaywala** for submitting correct solution to crossword # 10

Guwahati Branch Managing Committee for the Session 2013-16 and Office Bearers for the year 2013-14

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Secretary	CA. Rakesh Agarwala	9864020068	rakeshagrl_ca@yahoo.com
Treasurer	CA. Mahabir Agarwala	9435198133	mahabir_agarwala@rediffmail.com
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चलते चलते.....