Background Material on DIRECT TAXES

Covering Various Practical Aspects on Complex topics such as TAX AUDIT, TDS, HUF AND CAPITAL GAINS

CA Agarwal Sanjay
'Voice of CA'
&
Team 'Voice of CA'

BACKGROUND MATERIAL ON DIRECT TAXES

Covering Various Practical Aspects on complex topics such as Tax Audit, TDS, HUF and Capital Gains

CA Agarwal Sanjay 'Voice of CA'

CA Sidharth Jain **CA Adhir Samal**

CA Monika Aggarwal **CA Jyoti Kaur**

CA Apoorva Bhardwaj **CA Shruti Jain**

CA Gaurav Singh **CA Jayant Bothra**

Date of Publication: **1st September, 2012**

**Complimentary copy*

Published by:
Voice of Chartered Accountants (Regd.) (NGO)
303, Prabhat Kiran Building
17, Rajendra Place, New Delhi - 110 008

Printed by:
PRINT-WAYS
info@printwaysdelhi.com

From the Desk of the Founder of 'Voice of CA'

CA Agarwal Sanjay
'Voice of CA'

*On behalf of **'Voice of CA',** I express my immense pleasure to present the book on various complex topics such as Tax Audit, TDS, HUF and Capital Gains. In this book we have given the brief analysis of various complex issues falling under the above mentioned topics duly supported by latest relevant judicial pronouncements and provisions of law. We have made every effort to compile the latest development in these fields and hope that this book will help in better understanding of law and turns out to be a capsule in complex professional situation.*

I wish to place on record my sincere and grateful thanks to co-authors, the 'Team - Voice of CA' and its contributors for the contributions made by them in the preparation and printing of this book.

CA Agarwal Sanjay
'Voice of CA'

1st September, 2012

About the Author

CA Agarwal Sanjay
'Voice of CA'

CA Sanjay 'Voice of CA' Agarwal, officiating Central Council member, holding the position of Chairman, Direct Tax Committee of ICAI since 2011, is also appointed as Vice Chairman Audit Committee since 2012 & Coordinator of Central Grievance Cell of ICAI namely "E-Sahaayataa".

His main area of expertise is Direct Taxation wherein his contribution are in the form of articles & presentations on various topics of direct taxation covering topics of Search and Seizure, Block Assessments, Budget, T.D.S., MAT, HUF, Charitable Trust, Settlement Commission, Penalty, Prosecution, ITAT- Practice & Procedures, Tax Audit, Fringe Benefit Tax, Asst/ Reassessment under Income Tax Act, NGO & Tax Audit, Capital gains, Real Estate taxability, deemed dividend etc. More than 200 Seminars have been attended by him as Speaker in Delhi, Kolkata, Bangalore, Goa, Nagpur, Chandigarh, Amritsar, Jalandhar, Ludhiana, Patiala, Bhatinda, Sonepat, Panipat, Yamunanagar, Hisar, Sirsa, Faridabad, Saharanpur, Gurgaon, Rohtak, Rewari, Bhopal, and Meerut & Muzzafarnagar. He is an eminent personality in the field of Survey Search & seizure and deals at all levels up to Settlement Commission, Mr Agarwal is providing tax consultancy to a number of business organizations, which include multinational and public sector companies.

CA Sanjay 'Voice of CA' Agarwal has also created a platform to interact with Chartered Accountants all over the India, by founding a NGO **"Voice of Chartered Accountants" (Regd.)** to unite the members on single platform. It provides professional updates in the form of latest case laws, news of professional interest, articles, write-ups, presentations etc. to its members.

Co-authors

CA Sidharth Jain

CA Adhir Samal

CA Monika Aggarwal

CA Jyoti Kaur

CA Apoorva Bhardwaj

CA Shruti Jain

CA Gaurav Singh

CA Jayant Bothra

AN INITIATIVE OF
'VOICE OF CA'

We are a registered NGO formally incorporated on 05/03/2009, working with the objective of professional development of members of our esteemed institute "Institute of Chartered Accountants of India". In all spheres of professional, Social & Political exposure, Voice of CA attempted to share thoughts, news and views concerning CA's (after collecting data from our various reliable sources, deep scrutiny and vision) through email from our forum of www.voiceofca.in. Besides this, issues related to our profession are also brought to the notice of members. Around 35000 members come in to its horizon.

Till date over 1000 mails updating members on recent case laws have been sent, more than 4000 queries have been answered and presentation have been circulated covering various aspects of Income Tax such as Penalty, Search & Seizure, Issues on TDS, Charitable Trust, Assessment & Reassessment, Cash Credits, Deemed Dividend, Representation Before Income Tax Appellate Tribunal & CIT(A), Important aspects of Section 14A, Hindu Undivided Family under the Hindu Law & Income Tax Act, 1961, Amendments in Income Tax. Presentation on topics of Service Tax and Excise Duty, other relevant areas such as An Article on Letter of Credit, Foreign Contribution (Regulation) Act, 2010, FEMA - Rules & Procedures, GST Presentation: Compilation of all the updates of GST since July, 2010, article on Haryana VAT and various other topics, Information on relevant tenders daily news is also circulated through Voice of CA.

The main aims and objectives of this NGO are as follows:

a. Enabling members to serve their employers, clients and the nation as a whole in a better manner.

b. To protest the rights of the members against any discrimination and ill recognition.

c. Represent members in front of regulators and legislators, below mentioned are some of the instances where Voice of CA represented for the benefit of its members:

    1. Representation has been made against RBI proposed decision about limiting the coverage of audit of bank branches.

    2. Representation before the Commissioner of Service Tax- New Delhi, against additional requirement for registration under Service Tax.

    3. Voice has been raised against dilution of identity with "Cost Accountants".

4. Representation has been made in respect of an article in Money Market & Business Standard regarding "Banks don't want CA's to appear before DRT".
5. Representation has been made before Central Board of Direct Taxes for delaying the application of new provisions of Rule 30,31,31A, 31AA as brought by Notification no. 31/2009, dated March 25, 2009 along with Circular no. 02/2009, in consequence of which CBDT delayed the applicability of the same for indefinite period vide PRESS RELEASE, New Delhi dated 30th June, 2009.
6. Representation has been made before Hon'ble Union Minister of India, Corporate Affairs, Government of India challenging the Notification no. G.S.R. 888(E) dated 24/12/2008, requiring the same should operate in exception to Form No. 5 as fresh filling of this form involves high financial burden.
7. Representation has been made before various internal authorities such as The President, ICAI, for the benefit of students to remove the infirmities and provide better educational and examination facilities.
8. Representation has been made to ICAI on issues related to:
    - Limit of Tax Audit.
    - Cap on Concurrent Audit.
    - Live Telecast of Council proceedings.
    - Publication of Council decisions.
    - Increase in Fees of CAG audits.
    - Panels for IRDA audits.

d. Creating better infrastructure facilities like improved libraries, shared workstations etc. for members.

e. Reduction in steep hike in fees for members for various courses as well as membership fee.

f. Timely & relevant academic updates is the need of the time & are quite valuable for the members & therefore a strong step need to be taken in this direction so that the same can be made available to the members as per their work requirements.

g. Post qualification courses which are under-promoted, need to be popularized & equipped with better faculties & facilities with assurance of high professional benefits.

h. To formulate a comprehensive roadmap to avoid recurrence of any fraud like Satyam Scam.

i. If a CA in his audit report gives any material qualification regarding financial statements which can have adverse effect on a going concern assumption,

such CA's should not be removed unless & until a clean report is received. Also some Alternate Dispute Resolution Mechanism should be included.

j. Role of independent director will be reviewed and there should be atleast one CA in Board of Directors of every company as an independent director by way of amendment in relevant laws.

k. Distinguish between statutory & tax audit in reference to the responsibility of CA towards stake holders, by advertising in the media and to the public at large, so that our members are not straight away held guilty by the Press/ Media without facing a fair trial from members

l. Promoting dual audit criteria rather than Peer review for better Corporate Governance.

m. Steps for allotting audits of Listed Companies & all those concerns where public money is at stake, to a CA Firm out of a panel maintained by ICAI, RBI etc. on rotational basis.

n. Promotion of Micro, Small & Medium CA. firms.

o. To make the networking more meaningful & having recognition in public sector work.

p. Conduct research in various fields to develop business modules to help members opting to go in business field.

q. To identify members in various organizations working on top positions as business ICONs & to bring back them with honour to help younger generations. Create an environment and a platform for interaction with persons of their own fraternity.

r. To promote quality service and excellence in the profession of Chartered Accountancy and to press members to be proactive to changes and ensures that our members are in pace with the changes.

s. Conduct seminars to enlighten the CAs and CA students about the recent developments and practical aspects of prevailing law. For example, a Mock Search was performed by creating an identical environment of real Search & Seizure conducted under Income Tax Act.

We wish to bring together all the members, so that we know each other better and join hands and to take our profession to greater heights

TEAM – VOICE OF CA

A full stream of professionals are working at the backdrop of Voice of CA, who is continuously extending their support since inception on the one hand and on the other participated with great enthusiasm at every particular event of importance. On behalf of Voice of CA, I personally express my heartiest gratitude to all those contributors and associated members for providing continuously their valuable contribution and support to us.

However it is difficult to mention the name of each and every contributor and associated member due to memory constraint but still a list of contributors and associated members has been prepared.

VOICE OF CA
MEMBERS OF VETTING COMMITTEE

Name	Email-id
CA Anil Jain	anil@asap.net.in
CA Harish Chandra Agrawal	hcaagrawal@yahoo.com
CA Jai Prakash Manjani	jpmanjani@sify.com
CA Sushil Aggarwal	sushil@asap.net.in
CA Davendra Nath Bhardwaj	davender.bhardwaj@gmail.com
CA Umesh Chandra Pandey	umeshpandey@bmchatrath.com
CA Vijay Kumar Gupta	vijayguptaca104@yahoo.com
CA Sidharth	sidhjasso@yahoo.com
CA Mukesh Jain	vmcompany@hotmail.com
CA Mukesh K Bansal	mukbansal80@gmail.com
CA Avinash Gupta	caavinashgupta@gmail.com
CA Naresh Chand Gupta	ncguptaasso@yahoo.co.in
CA Rakesh Gupta	rg@a2zemail.com
CA Chawla Suresh	schawla.in@gmail.com
CA Sandeep Garg	garg.garg@yahoo.com
CA Sandeep Kumar Jain	casandeepjain@gmail.com
CA Rajat Mohan	rajataggarwal008@gmail.com
CA Amarpal	amar.p.ca1@gmail.com
CA Monika Aggarwal	aca.monika@yahoo.in
CA Adhir Kumar Samal	adhir.icai@gmail.com
CA Apoorva Bhardwaj	apoorva.bhardwaj@gmail.com
CA Jyoti Kaur	cajyotikaur@gmail.com
CA Jatin Badlani	jjbadlani@gmail.com
CA Gaurav Kumar Singh	cagauravindia@gmail.com
CA Ajit Kumar Prasad	caajitkumar85@gmail.com
CA Jayant Bothra	ca.jayantbothra@gmail.com
CA Shruti Jain	shru.jain@gmail.com

CONTRIBUTORS LIST
(ALPHABETIC ORDER)

CA Adhir Kumar Samal
CA Aditya Kumar Jha
CA Aditya Swarup Agrawal
CA Ajay Khanna
CA Ajay Kumar Agarwal
CA Ajesh Kumar Aggarwal
CA Ajit Kumar Prasad
CA Ajoy Kumar Goyal
CA Akhil Bansal
CA Akshay Jain
CA Amar Nath
CA Amar Nath Mittal
CA Amarpal
CA Ambay Parshad
CA Amit Goel
CA Amit Gupta
CA Amit Jain
CA Amit Kumar
CA Amit Kumar Aggarwal
CA Anant Jain
CA Anil Gupta
CA Anil Jain
CA Anil Khanna
CA Anil Khatri
CA Anil Kumar Chopra
CA Anil Kumar Goel
CA Anil Kumar Gupta
CA Anil Kumar Jain
CA Anil Kumar Maheshwari
CA Anil Kumar Singal
CA Anil Kumar Srivastava
CA Anil Sagar
CA Anil Sharma
CA Anirudh Singhal
CA Anju
CA Ankur Kapil
CA Anuj Gupta
CA Anupam Kumar Chugh
CA Anupam Mittal
CA Apoorva Bhardwaj
CA Aran Ahuja
CA Archit Batra
CA Arinjay Kumar Jain
CA Arun Ahuja
CA Arun Jain
CA Arun Kumar
CA Arun Kumar Varshney
CA Arvind Kumar Gupta
CA Arvind Mishra
CA Asha Nand Singla
CA Ashhok Kumar Jain
CA Ashish Ghosh
CA Ashish Grover
CA Ashok Kumar
CA Ashok Kumar Garg
CA Ashok Kumar Sood
CA Ashwani Kumar Jindal
CA Ashwani Kumar Randeva
CA Ashwani Kumar Relan
CA Atulya Jain
CA Avinash Gupta
CA Bajrang Lal Agrawal
CA Baldev Raj Madhok
CA Baljit S Sawhney
CA Bharat Bhushan Aneja
CA Bhawana Jain
CA Bhushan Lal Gupta
CA Brij Bhushan Kalia
CA Brij Kishore Kochhar
CA Chander Parkash
CA Chandra Mouly Mishra
CA Charanjeet
CA Charitra Kumar
CA Daleep Kumar Bhatia
CA Dalip Kumar Sachdeva
CA Darpan Gupta

CA Darshan Singh Rawat
CA Davendra Nath Bhardwaj
CA Deepak
CA Deepak Bansal
CA Deepak Bareja
CA Deepak Goel
CA Deepak Gupta
CA Deepak Jain
CA Deepak Kumar
CA Deepshikha Sharma
CA Dev Dhar Nagpal
CA Devendra Nagpal
CA Devendra Singh Adhikari
CA Devinder Kumar Jain
CA Dhan Raj
CA Dhananjay M Paranjape
CA Dharm Chand Bansal
CA Dharmender Pasricha
CA Dharmendra Kumar Garg
CA Dharmendra Madaan
CA Dharmveer
CA Dheeraj Mehta
CA Din Dayal Agrawal
CA Dinesh Kumar Gupta
CA Dinesh Kumar Jain
CA Dinesh Kumar Khandelwal
CA Divya Jain
CA Gagandeep Singh
CA Gaurav Arora
CA Gaurav Gupta
CA Gaurav Jain
CA Gaurav Kumar Singh
CA Girish Aneja
CA Gopal Prasad
CA Hari Gopal Chopra
CA Hari Prasad Joshi
CA Harish Chandra Agrawal
CA Harminder Singh Makkar
CA Hemant Narang
CA Hitesh Sindhwani
CA Hradesh Kumar Varshney
CA Inder Jeet Singh Banwait
CA Inderpal Singh
CA Jagdish Badlani
CA Jai Kumar Mittal
CA Jai Paul
CA Jai Prakash Agarwal
CA Jai Prakash Manjani
CA Jatin Badlani
CA Jatin Bansal
CA Jugal Kishore Agarwal
CA Jyoti Kaur
CA K K Agrawal
CA Kailash Chand Gupta
CA Kailash Chandra Gupta
CA Kamal Ahuja
CA Kamal Garg
CA Kamal Gupta
CA Kamal Kumar
CA Kamal Kumar Jain
CA Kamlesh Kumar
CA Kamlesh Kumar Bhojwani
CA Kapil Gupta
CA Kapil Kumar
CA Kapil Malhotra
CA Kapil Marwah
CA Karan Aggarwal
CA Komal Goel
CA Komal Sadana
CA Krishan Kumar Jamalia
CA Krishan Vrind Jain
CA Krishna Kumar Agarwal
CA Lalit Aggarwal
CA Lalit Allagh
CA Lalit Mittal
CA Lalit Mohan Ahuja
CA Lochan Kundra
CA Madan Mohan Bhasin
CA Mahesh Kumar Agrawal
CA Mahesh Kumar Jain
CA Mahesh Prasad Mehrotra
CA Makhan Lal
CA Man Mohan
CA Manoj Arora
CA Manoj Kumar
CA Manoj Kumar Aggarwal
CA Manoj Kumar Anand
CA Manoj Yadav

CA Mayank Gaur
CA Mohinder Kumar
CA Mohit Bansal Saawariya
CA Monika Aggarwal
CA Monika Jain
CA Mrattunjay
CA Mukesh Chand Dua
CA Mukesh Goyal
CA Mukesh Jain
CA Mukesh Kumar
CA Muni Ram Garg
CA Narender Kumar
CA Narendra Kumar Rustagi
CA Naresh Chand Gupta
CA Naresh Kumar
CA Naresh Kumar Aggarwal
CA Narinder Singh Dalal
CA Naveen Garg
CA Naveen Kumar Goel
CA Naveen Wadhwa
CA Navin Kumar Tulsyan
CA Neel Kant Gargya
CA Neha Khurana
CA Niraj Jain
CA Nitin Malhotra
CA Padam Chand Tulsian
CA Pankaj Agarwal
CA Pankaj Bansal
CA Pankaj Grover
CA Pankaj Gupta
CA Pardumman Kumar
CA Partosh Kumar Jain
CA Parveen Gambhir
CA Pawan Kumar
CA Pawan Kumar Kedia
CA Pawan Singhal
CA Peush Kumar Rastogi
CA Poonam Mehndiratta
CA Prabhat Kumar
CA Prabhjot Singh
CA Pradeep Bodas
CA Pradeep Kumar Gaur
CA Pradeep Kumar Jain
CA Pragya Mansukhani
CA Prakash Chand Agarwal
CA Pramod Goel
CA Pramod Kumar Garg
CA Pramod Kumar Gupta
CA Pramod Kumar Jain
CA Prashant Gupta
CA Prashant Khandelwal
CA Prashant Narang
CA Praveen Kumar Jain
CA Prem Bhushan Kapoor
CA Prem Kumar Arya
CA Puneet Goyal
CA Pushpendra Surana
CA Rahul Bagaria
CA Rai Chand Jain
CA Raj Kumar
CA Rajat Gupta
CA Rajat Mengi
CA Rajat Mohan
CA Rajat Sharma
CA Rajay Kumar Aggarwal
CA Rajeev Aggarwal
CA Rajeev Bhatia
CA Rajeev Kumar Bansal
CA Rajender Kumar Singal
CA Rajesh Aggarwal
CA Rajesh Gupta
CA Rajesh Jhalani
CA Rajesh Kumar
CA Rajesh Kumar Bansal
CA Rajiv Kapahi
CA Rajnish Puri
CA Raju Kumar Sah
CA Rakesh Choudhar
CA Rakesh Gupta
CA Rakesh Kumar Kamiya
CA Rakesh Kumar Singla
CA Rakesh Takyar
CA Ram Niwas Mittal
CA Ram Parkash
CA Raman Khatuwala
CA Raman Kumar Malhotra
CA Ramesh Chand Gupta
CA Ramesh Chand Singhal

CA Ramesh Chandra Agrawal
CA Ramesh Chandra Gupta
CA Ravi Kumar
CA Ravi Kumar Gupta
CA Ravinder Nath Batra
CA Ravinder Pal Sharma
CA Ravinder Singh
CA Ravinder Singh Kalra
CA Rohit Kohli
CA S C Jain
CA Sachin Bhutani
CA Sachin Jain
CA Sachin Nandwani
CA Sandeep Garg
CA Sandeep Kumar Jain
CA Sandeep Puri
CA Sanjay Agarwal
CA Sanjay Arora
CA Sanjay Goyal
CA Sanjay Kumar
CA Sanjay Kumar Bindal
CA Sanjay Kumar Dwivedi
CA Sanjay Kumar Goel
CA Sanjay Kumar Gupta
CA Sanjay Kumar Rasotra
CA Sanjay Verma
CA Sanjeev Jain
CA Sanjeev Kohli
CA Sanjeev Kumar
CA Sanjeev Miglani
CA Sanjeev Prakash Agarwal
CA Santosh Kumar Sarawgi
CA Sarbjit Kumar
CA Sat Paul Sharma
CA Sateesh Jain
CA Satish Chand
CA Satish Kumar
CA Satish Kumar Agarwal
CA Satish Kumar Bansal
CA Satish Kumar Gupta
CA Satish Kumar Manocha
CA Satish Tandon
CA Satvinder Kumar Maini
CA Satya Paul
CA Satyendra Kumar Jain
CA Saurabh Gupta
CA Shailesh Mittal
CA Shanti Prashad Jain
CA Shifa Ul Islam
CA Shilpa Goyal
CA Shishir Kumar Tekriwal
CA Shivani Lohia
CA Shri Kishan Gupta
CA Shyam Sunder Katyal
CA Sidharth
CA Singh Ravinder
CA Sita Ram Bansal
CA Sonali Mahajan
CA Srikanth Chakravarthy
CA Srinivasan S
CA Subhash Chand Gupta
CA Subhash Chander Thakral
CA Sudhir Kumar Gupta
CA Sukhvinder Pal Manhas
CA Sulabh Lohia
CA Sumit Goel
CA Sumit Suri
CA Sumita Kukreja
CA Sunder Kumar Sharma
CA Sunil Dutt
CA Sunil Kansal
CA Sunil Kumar
CA Sunil Kumar Agrawal
CA Sunil Kumar Bhatia
CA Sunil Kumar Gupta
CA Sunil Sayal
CA Surender Kumar Singla
CA Surender Mohan Ahuja
CA Surender Pal Lathar
CA Surendra Kumar
CA Suresh Binani
CA Suresh Chand Agarwal
CA Suresh Chawla
CA Suresh Kumar
CA Sushil Aggarwal
CA Sushil Kumar
CA Sushil Kumar Gulati
CA Sushil Kumar Gupta

CA Sushil Kumar Mittal
CA Sushil Kumar Pandey
CA Sushil Kumar Sharma
CA Sushil Kumar Singhla
CA Swati Jain
CA Taran Jeet Singh
CA Taranjit Singh
CA Tarsem Lal
CA Tarun Makhija
CA Tilak Raj
CA Tirlok Chand
CA Tripti Goel
CA Tushar Arya
CA Umesh Chandra Pandey
CA Umesh Goyal
CA Varun Malik
CA Varun Taneja
CA Varunish Sachdev
CA Vashishta Kumar Gakhar
CA Veni Thapar
CA Venkat Raman Sharma
CA Vijay Kumar
CA Vijay Kumar Dharni
CA Vijay Kumar Gupta
CA Vijay Kumar Sanghi
CA Vikesh Kumar Chetal
CA Vinay Sawhney
CA Vineet Gupta
CA Vinod
CA Vinod Bansal
CA Vinod Kumar
CA Vinod Kumar Jain
CA Vipan Kumar Kalra
CA Virender Bahadur Mathur
CA Virender Kalra
CA Virender Kumar Gauri
CA Virender Kumar Kapur
CA Vishnu Chander Gautam
CA Vishva Deep Sharma
CA Vivek Kumar Bansal
CA Yash Pal Saini
CA Yash Pal Verma

Contents

VOICE OF CA

Part-I

DISCUSSION PAPER ON VARIOUS ISSUES ON CLAUSES OF FORM 3CD

Part - A

DISCUSSION PAPER ON VARIOUS ISSUES ON CLAUSES OF FORM 3CD

Clause 1: Name of Assessee

1. Give name of the assessee whose accounts are being audited under section 44AB.
2. Incase of audit of a branch, the name of the branch should be stated alongwith the name of the assessee.
3. Incase of proprietary concern, Furnish name of the proprietary firm along with the name of the proprietor.
4. Incase of change in name of the company, eg, conversion into public Ltd co or vice versa, state both names and also state the fact of the change by way of a note.
5. In case of any change in the name of the assessee between the last day of the previous year and the date of tax audit report, the name as on the last date of the previous year and also on the tax audit report date be stated.

Clause 2: Address

1. As far as possible the address should correspond to the address which the assessee is using while making communication with the Income Tax Department for assessment purposes (i.e the address where any communication/notice etc send by the department may be taken as effective service), address as appearing on Tax Challans, PAN, etc.

2. Incase of audit of a branch, the address of the branch should be stated.

3. Incase of change in address after the end of the financial year and before the date of tax audit, the fact may be brought on form 3CD.

4. Incase of a company, the address of the registered office be stated alongwith the principle place of business, if any.

Clause 3: Permanent Account Number

1. State here the PAN of the assessee.

2. In case of a new Tax Audit, it is advisable to procure copy of the pan card of the assessee.

3. In case the pan number is not allotted as on the date of signing of audit report, the fact should be stated.

4. If the PAN has been applied and the same has not been allotted for, it is advisable to seek copy of pan application acknowledgment .

Clause 4: Status

1. The status does not refers to the residential status.

2. It means status of the person who is defined as per section 2(31) [i.e Individual, HUF, Company, Firm, etc.].

3. In case there is any dispute with respect to status of the assessee, full facts relating to the same should be mentioned.(dispute may arise for e.g. w.r.t treatment of a partnership firm 'As Such' or as 'AOP')

Co-operative societies and co-operative banks are artificial juridical persons-**M.V Rajendra vs. ITO 260 ITR 422 (Ker)**

Joint venture set up by two registered firms is not a joint venture by AOP or BOI and is not a person within meaning of clause (v) of Section 2(31)-**Gouranga Lal Chatterjee vs. ITO 247 ITR 737 (Cal).** The income was held to be assessable in the hands of individual partners.

Person in section 2(31) includes institutions-**CIT vs. Gujarat Maritime Board 289 ITR 0139 (Guj) Affirmed in 295 ITR 561 (SC)**

Distinction between AOP and BOI

Meera and Company vs. Commissioner of Income-tax 224 ITR 635 [SC]

Sub-clause (v) of clause (31) of section 2 of the Income-tax Act, 1961, speaks of "an association of persons or a body of individuals". This implies that an "association of persons" is not something distinct and separate from a "body of individuals". The latter expression has been added to obviate any controversy as to whether only combinations of human beings are to be treated as a unit of assessment. When several individuals are found to have joined together for the purpose of making profit, the group of individuals may be conveniently described as a "body of individuals". "An association of persons or a body of individuals, whether incorporated or not", has been brought within the net of taxation with the intention clearly to hit combinations of individuals or other persons who were engaged together in some joint enterprise. The combinations may or may not be incorporated. A profit-yielding joint venture has to be taxed as a single unit.

G.N Sunanda vs. CIT 174 ITR 0664 (KAR)

In order to constitute an association of persons, there must be joining together in a common venture the object of which is to produce income, profits or gains. Though a body of individuals is not identical with an association of persons, they have similarities; an association of persons may consist of non-individuals, but a body of individuals consists of only human beings. "Body" in "body of individuals" would mean association for some common purpose or object and there must be unity under some common tie or occupation. A mere collection of individuals without a common tie or aim will not constitute a body of individuals under section 2(31) of the Income-tax Act, 1961, and under section 47(ii) of the Act. A "body of individuals" must be capable of holding income producing assets or assets that produce income.

Clause 5: Previous year ended

Here the date of which the previous year ended has to be stated. Since presently the previous year u/s 3 of The Income Tax Act are uniform and ends on 31st march, being a financial year, the relevant previous year should be mentioned.

Clause 6: Assessment year ended

Here the assessment year relevant to the previous year whose accounts are being audited should be stated.

Clause 7: Particulars of Partners/members of firm or AOP, their P.S.R and changes

(a) If firm or Association of Persons, indicate names of partners/members and their profit sharing ratios.

(b) If there is any change in the partners or members or in their profit sharing ratio since the last date of the preceding year, the particulars of such change.

1. This clause is applicable only to partnership firm & associations of persons. Firm Includes a LLP. However, LLP's registered outside India are not Firms or AOP.
2. If a partner of a firm/AOP acts in a representative capacity, the name of beneficial partner/member should be stated along with such fact.
3. If the loss sharing ratio is different of PSR, it should also be stated.
4. The tax auditor should obtained relevant partnership deeds/ documents duly certified and get the changes verified.
5. Detail of all changes in partners/members & also there profit sharing ratio during the previous year should be stated.
6. There is no need to state the change in remuneration (partner's salary) and interest to partners or members generally. However, the Apex court in case of **CIT vs. R.M Chidambram Pillay [106 ITR 292]** has held that salary to partner is not a charge to profit but only an appropriation of profit. Accordingly change in salary during the year should be construed as change in PSR and thus be indicated.

Clause 8: Nature of business & profession & changes and its particular

(a) Nature of business or profession.

(b) If there is any change in the nature of business or profession, the particulars of such change.

a. The expression Business & Profession should be given their meaning as per the Income Tax Act.
b. Whether a particular activity can be classified as business or profession will depend upon facts of each case.

1. The principal to find out whether or not the transaction in question is an adventure in the nature of trade may be referred at **284 ITR 453 (BOM)- Deepak Tanna vs. CIT**

2. Trade means a business which a person has learnt or carries on for procuring subsistence or profit, occupation or employment- **224 ITR 318 (GAU)- CIT vs. Assam Hard Board Ltd.**

3. The Income Tax Act defines the term business only inclusively. The two essential requirements for an activity to be considered as business are (i) it must be a continuous course of activity, and (ii) it must be carried on with a profit motive. **221 ITR 018 (MAD)-CIT vs. Venkata Subbiah Reddiar (K.S)**

4. Difference between business and profession explained in **212 ITR 133 (RAJ)- CIT v/s Bhavgan Broker Agency**

   The word "business" has been defined under clause (13) of section 2 of the Income-tax Act, 1961, to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The word "profession" has been defined in section 2(36) to include vocation, which refers to a way of living and not necessarily a course of activity indulged in, for earning one's livelihood or making any income. "Business" is a term with a wider import than "profession". All professions are businesses but all businesses are not professions. There should be some special qualification of a person apart from skill and ability, which is required in carrying on any activity which could be considered as profession. This could be by having education in a particular system either in a college or university or it may be even by experience.

Accordingly, the following have been held as business:-

(i) Commission agent **(224 ITR 318 (Gau))**

(ii) Stock Brokers **(204 ITR 093 (Bom)**

(iii) C&F agents **(206 ITR 548 (Bom)**

(iv) Travel Agents

(v) Courier Agents etc.

c. The expression profession has been specifically defined under the income tax act the specified profession have been referred u/s 44AA

of the Act. These include legal, medical, engineering, accountancy, technical consultancy, authorized representative, film artists, company secretaries, information technology and until recently cricketers and umpires, etc.

d. The nature of business or profession should correspond to the relevant classification as per form ITR-4 (Heading nature of business).

e. In case any existing line of business is discontinued or a new line or facility is added due to business restructuring, amalgamation, demerger or any other reason, the fact relating to the same may be stated.

f. Any temporary suspension of business or cessation of the business may not amount to change and thus need not be reported.

An ongoing controversy is subsisting as to whether certain transactions in shares and securities would be business or investment. The CBDT has sought to clarify the issue by way of circular No. 4/2007, dated 15-6-2007and had laid out certain parameters. The same may also been kept in mind by the Tax auditor while commenting upon nature of business or profession.

Clause 9: Books of account prescribed, maintained and examined

(a) Whether books of account are prescribed under section 44AA, if yes, list of books so prescribed.

(b) Books of account maintained. In case books of account are maintained in a computer system, mention the books of account generated by such computer system.

(c) List of books of account examined.

1. The limits as to mandatory maintenance of account books in case of specified profession are as stated in section 44AA (1) read with rule 6F. Thus under 9(a) the tax auditor is merely to comment whether any books of account are prescribed for assesse's line of business or not.

2. In case of specified professions, the tax auditor is to verify whether the books of account as prescribed are maintained or not & has to state the books of account maintained. i.e Cash book, ledger, journal (if mercantile system is being followed), Bills issued, etc.

3. In case the books are maintained in computer system, the auditor's is to state the books of account maintained by the system, which he may do after obtaining a complete list of books & records and other documents (financial & non Financial) maintained by the assessee.

4. In case of assessee engaged in manufacturing/trading activities, the tax auditor should ensure that the inventory records are being kept which would facilitate him in procuring quantitative details of stores, raw material & finished goods

5. There might be cases where objectivity behind enactment of all three sub clauses of clause 9 comes into place for e.g. where the books of accounts have been prescribed but all have not been maintained or where books of accounts are maintained but all of them have not been referred to the tax auditor for examination. Under these circumstances the tax auditor is to ascertain as to how he would conclude whether such a situation warrants any disclosure or qualification.

Clause 10: Presumptive income and relevant section

Whether the profit and loss account includes any profits and gains assessable on presumptive basis, if yes, indicate the amount and the relevant sections (44AD, 44AE, 44AF, 44B, 44BB, 44BBA, 44BBB or any other relevant section).

1. The amount of any presumptive profit which is credited to/included in the profit and Loss A/c need be stated alongwith the relevant section.

2. The Section covered here are 44AD, 44AE, 44AF, 44B, 44BB, 44BBA, 44BBB or any other relevant section. The expression 'any other relevant section' means any section which deals with presumptive income and may be enacted in future by principle of ejusdem generis.

3. Incase of composite books of account for presumptive income business and other business, expenses to be apportioned as per some reasonable basis on basis of some evidence in possession of the assessee. In case of separate books and non presumptive business turnover being less then specified limit, tax auditor should specify that the report is in respect of the business whose income is assessable on presumptive basis and that the report does not relates to the business assessable under the normal provisions of the Act.

Clause 11: Method of Accounting

a) Method of accounting employed in the previous year.

b) Whether there has been any change in the method of accounting employed vis-a-vis the method employed in the immediately preceding previous year.

c) If answer to (b) above is in the affirmative, give details of such change, and the effect thereof on the profit or loss.

d) Details of deviation, if any, in the method of accounting employed in the previous year from accounting standards prescribed under section 145 and the effect thereof on the profit or loss.

1. The method of accounting employed in the previous year is to be stated. This varies upon the nature of business and profession and also the business organization of the assessee.

2. All companies are required as per section 209[3] of The Companies Act to follow mercantile system of accounting.

3. The hybrid system of accounting has been discontinued wef A/y 1997-98.

4. An assessee having different businesses may choose different method of accounting for them i.e cash system for some and mercantile for others. As long as he is following the said different methods consistently and regularly and they results in proper determination of profits of the business, there is no need to change them.

5. The tax auditor is merely to state if there is any change in the method of accounting employed vis-a-vis the same method employed in the immediately preceding previous year or not.

6. Incase there is any change in accounting policy, the tax auditor has to determine its materiality. Here also incase it is material, the fact relating to the change in accounting policy and also its effect on the profit and loss is to be stated in financial statements.

7. For the purposes of section 145, vis a vis method of accounting followed by the assessee, the department has notified **IT(AS)-I** relating to **Disclosure of accounting policies** : and **IT(AS)-II** relating to **Disclosure of prior period and extraordinary items and changes in accounting policies.** Accordingly, fundamental accounting

assumptions of materiality, going concern, accrual, and substance over form, prudence etc are to be examined. If a fundamental accounting assumption is not followed, such fact shall be disclosed.

149 ITR 759[MAD] Commissioner of Income-tax Vs. Carborandum Universal Ltd.

That the adoption of the direct cost method was bona fide and was a permanent arrangement with the intention to follow the same method year after year, the change would have to be accepted notwithstanding the fact that during the assessment year in question, which was the first year when the change of method was brought about, a prejudice or detriment might be caused to the revenue. As the method of valuation adopted by the assessee had obtained recognition from practicing accountants and the commercial world for valuation of stock-in-trade, the adoption of that method could not be questioned by the Revenue unless the adoption of that method was found to be not bona fide or restricted to a particular year.

202 ITR 789 (BOM) Melmould Corporation v. Commissioner of Income-tax

Whenever there is a change in the method of valuation, there is bound to be some distortion in the calculation of profits in the year in which the change takes place. But, if the change is brought about bona fide and is in accordance with the normally accepted accounting practice, there is no reason why such a change should not be permitted.

Commissioner of Income-tax v. George Oakes Ltd.303 ITR 357 [MAD.]

When the change of accounting method is bona fide and is recognised in accounting principles, the resultant variation in income cannot be forced to be taxed upon the assessee.

Clause 12: Closing Stock

(a) Method of valuation of closing stock employed in the previous year.

(b) Details of deviation, if any, from the method of valuation prescribed under section 145A, and the effect thereof on the profit or loss.

1. Here the method employed for valuation of closing stock having regard to the articles or goods dealt in or manufactured by the assessee is to be stated.

2. For ascertainment of the same, reference may be made to the annual financial statements (significant accounting policies) or a management representation may be obtained after duly satisfying himself regarding the method of valuation of closing stock.

3. For Example, it may be stated, wrt method of valuation of closing stock, as under: -

   3.1 Raw material, at cost or net realizable value whichever is lower

   3.2 Finished goods at cost or net realizable value whichever is lower

4. The term closing stock is to be construed having regard to section 145A and AS-2. Accordingly, closing stock would include raw material, work in progress, spares, loose tools, maintenance supplies, consumables, finished goods etc.

5. Section 145A provides for inclusive method of valuation. At the same time AS-2 relating to inventory valuation does not permits inclusive method. Thus all assessees are to follow AS-2 and make the adjustment here for the purpose of section 145A. Accordingly, there is no need to change the amount of sales, purchases, stock etc in books of accounts. However the adjustments required by section 145A are to be made while computing income for the purpose of return of income.

6. It may be noted that section 145A is tax neutral as long as the assessee makes payment of the duty inaccordance with the provisions of section 43B.

7. The Supreme Court held in **ALA firm's case (189 ITR 285)** that when business is discontinued on dissolution, the stock should be valued at market price and the tax auditor may keep the same in mind in suitable cases.

Clause 12A: Conversion of Capital asset into stock in trade

Give the following particulars of the capital asset converted into stock-in-trade:

(a) Description of capital asset

(b) Date of acquisition

(c) Cost of acquisition

(d) Amount at which the asset is converted into stock-in- trade

The particulars to be stated under new clause 12A should be furnished with respect to the previous year in which capital asset has been converted into stock-in-trade. *The clause does not require details regarding the taxability of capital gains or business income arising from such deemed transfer.*

Under clause (a) description of the capital asset is required to be mentioned for example shares, security, land, building, plant, machinery etc.

Under Clause (b) the date of acquisition is to be reported. For ascertaining the correct date the tax auditor will have to refer the accounts of the financial year in which such capital asset is acquired. The date assumes importance for the purpose of determining whether the asset is long-term or short-term in nature.

Under clause (c) the cost of acquisition is required to be reported. Here the cost of acquisition as per the books of account is to be mentioned. In case of depreciable assets, the carrying cost appearing in the books will be the written down value. *But the value to be reported will be the original cost of acquisition and not WDV [incase of depreciable assets]*. Even in case of an asset acquired prior to the 1st day of April, 1981 the value to be reported will be the original cost of acquisition. The assessee may exercise the option of considering the fair market value of the asset as on 1st April, 1981 for assets acquired prior to that date for the purpose of computation of capital gains as provided under section 55(2)(b)(i).

Under clause (d) the amount at which the asset converted into stock-in-trade should be stated. Such an amount may not be the fair market value on the date of conversion or treatment as stock-in-trade. If a value other than carrying cost is recorded then the auditor has to examine the basis of arriving such a value. The valuation of stock-in-trade is to be examined with reference to AS-2 – Valuation of Inventories. Non-compliance of AS-2 is to be properly qualified in the main audit report.

However, the date of transfer of conversion is not to be stated.

It is pertinent to mention that the Act and Form 3CD are both silent as to conversion of stock in trade into capital assets, qua taxability and qua reporting. However the said issue has been examined in ITA 6374/ MUM/2004, ACIT v Bright Star Inv P Ltd by Mumbai ITAT.

Clause 13: Amounts not credited to the profit and loss account

(a) the items falling within the scope of section 28;

(b) the Proforma credits, drawbacks, refund of duty of customs or excise or service tax, or refunds of sales tax, where such credits, drawbacks or refunds are admitted as due by the authorities concerned;

(c) escalation claims accepted during the previous year;

(d) any other item of income;

(e) capital receipt, if any.

1. The list contained u/s 28 is inclusive and not exhaustive.

2. Amounts not credited to P n L but nevertheless credited to general reserve are to be reported as information is required to be given with reference to the entries in the books of account produced before the tax auditor.

3. The value of any benefit or perquisite derived by a partner or a proprietor whether convertible into money or not, but which has arisen due to the business should be disclosed under this clause. Here the monetary value of free trade trips, gifts, etc received from the companies in capacity as dealers and big traders need be stated. Here the tax auditor may also wish to refer to the latest CBDT circular wrt pharmaceutical companies and the freebies provided by them to medical practitioners.

4. In order to verify the refunds of excise, sale tax, service tax, customs, VAT, the tax auditor may refer to the relevant returns where such claims have been raised and/or orders of authorities permitting the said claims.

5. The expression admitted as due by the authorities concerned would mean admitted as due within the relevant previous year. However, unilateral claims not admitted by the relevant authorities should not be stated here.

6. Since this clause is exhaustive, particulars of income tax refund need not be stated here.

7. The escalation claims received is based on method of accounting of the assessee. Generally the claims are made in pursuance to a

contract, if so permitted. Thus when a claim is made unilaterally or is sub-judice, then they are not to be stated here.

8. Any other item of income would include those receipts which are entered in books of account but are not credited to profit and loss account, and the tax auditor, due to judicial pronouncements, or his professional expertise, is of an opinion that this is to be credited to profit and loss account.

9. While examining all credit items, the tax auditor should give due regard to **AS-9- Revenue Recognition**.

10. The expression Capital receipts may include, Capital Subsidy, Government grants in respect of fixed assets, Profit on sale of fixed assets not passed through profit and loss account, etc. One may refer the following supreme court judgments to understand the fundamental principles distinguishing capital and revenue subsidy, while also referring to AS-12, relating to Accounting for Government Grants: -

    228 ITR 253 [SC] Sahney Steel and Press Works Ltd. Vs. Commissioner of Income-tax

    251 ITR 427 [SC] Commissioner of Income-tax v. Rajaram Maize Products

    306 ITR 392 [SC] Commissioner of Income-tax v. Ponni Sugars and Chemicals Ltd.

11. "Capital receipts" for this clause does not cover share capital or item of gift etc.

Clause 14: Depreciation and WDV

Particulars of depreciation allowable as per the Income-tax Act, 1961 in respect of each asset or block of assets, as the case may be, in the following form: -

(a) Description of asset/block of assets.

(b) Rate of depreciation.

(c) Actual cost or written down value, as the case may be.

(d) Additions/Deductions during the year with dates; in case of any addition of an asset, date of put to use, including adjustment on account of:

(i) Modified Value Added Tax credit claimed and allowed under the Central Excise Rules 1944, in respect of assets acquired on or after 1st March, 1994,

(ii) Change in rate of exchange of currency and

(iii) Subsidy or grant or reimbursement by whatever name called.

(e) Depreciation allowable.

(f) Written down value at the end of the year.

1. Description/classification should be based on purpose & functions to the assessee & also past assessment history & judicial pronouncements are to be examined. If required seek suitable certificate from technical experts.

2. Determine Rate of depreciation as per Appendix I of Income Tax Rules

3. In case of any dispute between the department & the assessee relating to the ownership, classification, rate of depreciation of the asset, etc the same should be suitably disclosed. The intangible asset should be separately classified and their carrying cost/acquisition cost should be verified.

4. For date on which asset has been put to used, the tax auditor can call for basic records like production, installation details, excise records, power connection, etc. along with management representation. Also due care should be taken for apportionment of deprecation in case of succession, amalgamation & demerger.

    a. CENVAT credit on capital goods should be reduced from actual cost. The auditor should verify that the amount of CENVAT credited deducted from cost of capital goods tallies with CENVAT credit account

    b. Change in rate of exchange in currency due to fluctuation, incremental liability is to be added/deducted as the case may be (section 43A read with AS-11 amended). **Refer 312 ITR 254 (SC) CIT vs.Woodward Governors India Pvt. Ltd.**

c. Capital subsidy & grant is generally received by way of reimbursement and the same, incase is not received in the first year, be deducted in the subsequent year of receipt.

d. The claim of depreciation has now been made mandatory by Finance Act 2001 by **over-ruling 243 ITR 056 (SC) CIT Vs. Mahendra Mills Ltd,** which laid that depreciation claim is optional.

5. **Assessee need not be the registered owner:**

The following decisions highlight the fact that the assessee need not be the registered owner of the asset for claiming depreciation.

Mysore Minerals Ltd Vs CIT 239 ITR 775 (SC)

Dalmia Cement (Bharath) Ltd Vs CIT (2001) 247 ITR 267 (SC)

6. **Active User Vs Passive User:**

It is to be noted that under certain circumstances, depreciation is allowable even if the asset is actually not put to use during the year. Reference in this regard can be made to the following decisions:-

Whittle Anderson Ltd Vs CIT (1971) 79 ITR 613 (Bom)

Capital Bus Service (P) Ltd Vs CIT (1980) 123 ITR 404 (Del)

CIT Vs Refrigerators & Allied Industries 163 ITR 498 (Del)

7. Hotel Building is not a plant **CIT Vs Anand Theatres (2000) 244 ITR (SC)**. However the operation theatre of the hospital is a plant **CIT Vs Dr.B.V.Rao 243 ITR (SC)**. Now it is very clear that building etc., will not constitute as plant

8. Depreciation is admissible for trial run of machinery

It was held in the case **ACIT Vs Ashima Syntex Ltd., (251 ITR 133 Guj HC)** that when there is commencement of business by way of production of articles it can be said that the assessee is entitled to depreciation.

9. The Punjab & Haryana High Court held that there is a normal depreciation of value even when a machine or equipment is merely kept in storeroom. Thus actual use of the asset may not be the relevant test in all cases. **CIT Vs Pepsu Road Transport Corpn. [2002] 121 Taxman 232**.

10. The Air Conditioner fitted in the bus forms part of integral part and eligible for higher depreciation available for buses **CIT Vs Delhi Airport Service (2002) 255 ITR 91 (Del)**

11. Incase the business premises of the assessee, purchased by it are situated in commercial buildings/malls, etc, the tax auditor should ensure that the depreciation claimed by the assessee wrt building does not include the amortization on the cost of land, included in the value of building (since in such cases, the assessee also happens to have a proportionate share in the land, underneath).

Clause 15: Amounts admissible under sections 33AB, 33ABA, 33AC, 35, 35ABB, 35AC, 35CCA, 35CCB, 35D, 35DD, 35DDA, 35E:

(a) debited to the profit and loss account (showing the amount debited and deduction allowable under each section separately);

(b) not debited to the profit and loss account.

33 AB	Tea Development Account
33 ABA	Site Restoration
33 AC	Reserves for Shipping Business
35	Expenditure on Scientific Research
35 ABB	Expenditure for obtaining Telecom License
35AC	Expenditure on Eligible Project or Schemes
35CCA	Payments to organizations carrying out rural development programme.
35CCB	Payments to organizations carrying out program of conservation of natural resources
35D	Amortisation of certain preliminary expenses.
35DD	Amortisation of expenses in case of amalgamation and demerger
35 DDA	Amortisation of expenditure incurred under voluntary retirement scheme
35 E	Deduction for expenditure on prospecting, etc., for certain minerals

1. Also section 35AD should come within the ambit of this section (as introduced wef 01/04/2010).

2. In case the assessee has obtained a separate audit report for claiming deduction under any of these sections, he must make a reference to that report while giving the details under this clause.

3. The tax auditor should indicate the amount debited to profit & loss a/c & amount admissible as per applicable provisions.

4. The amount not debited to profit & loss a/c but admissible under any of the section mentioned have to be stated.

5. If the assessee is eligible for deduction under one or more of the above section, the tax auditor has to state deduction allowable under each section separately.

Clause 16: Bonus, commission and employees contributions to welfare dues

(a) Any sum paid to an employee as bonus or commission for services rendered, where such sum was otherwise payable to him as profits or dividend. [Section 36(1)(ii)].

(b) Any sum received from employees towards contributions to any provident fund or superannuation fund or any other fund mentioned in section 2(24)(x); and due date for payment and the actual date of payment to the concerned authorities under section 36(1)(va).

1. If an employer would have given dividend or profit share to his employee then it would not have been allowed as an expense, since it is appropriation of profits. Therefore under this clause the auditor is required to ensure that the assessee is not showing dividend/ share in profits paid as bonus or commission which are otherwise deductible. The reporting under Clause 16(a) is applicable in case of companies and partnership firms. For better understanding of this clause, one may wish to refer to the ratio of the following judicial pronouncements: -

   a. **Dalal Broacha Stock Broking P. Ltd. v. Addl CIT 010 ITR Trib. 0357 (ITAT Mumbai-Spl Bench)**

   b. **AMD Metplast P. Ltd. v. DCIT 341 ITR 563 (DEL).**

2. By virtue of omission of first proviso to section 36(1)(ii) w.e.f 01-04-1989 which Provided that the deduction in respect of bonus paid to an employee employed in a factory or other establishment to which the provisions of the Payment of Bonus Act, 1965 (21 of 1965), apply shall not exceed the amount of bonus payable under that Act:, **presently the bonus paid in excess of amount determined/payable under Payment of Bonus Act is also allowable**.

3. The **amount only is to be quantified**. There is **no need to an expression of opinion as to admissibility** or otherwise of the said payment.

4. Under Clause (b) the tax auditor is to state relevant month, the employee contribution to the said welfare funds, the due date of payment under respective statute and the actual date of payment.

5. The date of **clearing of the cheque** should be taken as **date of payment**.

6. The tax auditor need not report as to whether the professional tax deducted by employer from the salary paid to employee has been paid to the credit of the concerned authorities.

7. However, the amount paid under the Welfare fund may be stated under this clause.

307 ITR 363 [DEL] Shriram Pistons and Rings Ltd. Vs. CIT

That the "good work reward" that was given by the assessee to some employees on the recommendation of senior officers of the assessee did not fall in any of the categories of bonus specified under the industrial law. There was nothing to suggest that the good work reward given by the assessee to its employees had any relation to the profits that the assessee may or may not make. The reward had relation to the good work done by the employee during the course of his employment and at the end of the financial year on the recommendation of a senior officer of the assessee, the reward was given to the employee. Consequently, the "good work reward" could not fall within the ambit of section 36(1)(ii) of the Income-tax Act, 1961. The "good work" reward was allowable as business expenditure under section 37(1) of the Act.

Clause 17: Amounts debited to Profit and loss Account

17. (a) Expenditure of Capital Nature

- **Discount on Debenture is Revenue Expenditure Madras Industrial Investment Corporation vs. CIT- 225 ITR 802 (SC)** (Deferred deduction possible)

- Expenses by way of **stamp duty & registration for issue of bonus share** are revenue expense **CIT vs. General Insurance Corp. 286 ITR 232 (SC)**

- Expenses on **issue of shares is capital** expense **Brooke Bond India Ltd. vs. CIT 225 ITR 795 (SC)**

- **Professional charges towards** services rendered in connection with **amalgamation** were in course of carrying on of assesse's business and thus revenue expense. **Bombay Dying & Manufacturing Co. Ltd. vs. CIT 219 ITR 521 (SC)**

17.(b) Expenditure of Personal Nature

In case of a Company, no partial disallowances for use of vehicles, telephone etc. by the directors can be made. **Sayaji Iron & Engg. Co. vs. CIT 253 ITR 749 (Guj) also 254 ITR 673, 268 ITR 502, Haryana Oxygen Ltd. vs. CIT 76 ITD 038 (Del), B.S Agricultural Industries India vs. ITO 50 TTJ 295 (Del).**

Also Required as statutory auditor to state any personal expenses debited to profit and loss account—section 227 of The Companies Act.

Obtain specific management representation that no personal expenses have been debited to profit and loss account.

17.(C) ADVERTISEMENT IN PUBLICATION OF POLITICAL PARTIES

Expenditure on advertisement in souvenirs, brouchers etc. published by political parties are specifically disallowed under section 37(2B)

17.(d) Expenditure incurred at Clubs

- Payment to clubs would not include organization such as Rotary, Lions, Jaycees, and Giants etc., they being service organization.
- Payments made through credit card are to be examined so as to ascertain whether any expense incurred could be treated as perquisite in the hands of the person concerned.
- Information may be given separately in respect of entrance fees, subscription & cost of club services.

17.(e) Penalty

- Where a statutory impost is levied, it is to be studied to find whether impost is compensatory or pnal or composite and deduction is to be allowed wholly or partly to the extent the impost is wholly or partly compensated **Swadeshi Cotton Company Ltd. vs. CIT 233 ITR 199 (SC). Also Prakash Cotton Mills Pvt. Ltd. vs. CIT 201 ITR 684 (SC), Malwa Vanaspati & Chemical Co. vs. CIT 225 ITR 383 (SC).**

- Amount paid at option of assessee under law or statutory scheme is not penalty **CIT vs. Mihir Textile Ltd. 205 ITR 163 (SC).**
- Expense incurred in transaction carried out in violation of provisions of FERA (now FEMA) **Maddi Venkta Raman & Co. Ltd. vs. CIT 229 ITR 534 (SC).**
- SEBI Regularisation Scheme providing one-time opportunity to defaulters for regularising default is Incidental to carrying on business. The same is not penalty or akin to penalty. **Kaira Can Co. Ltd. V DCIT 002 ITR [TRIB.] 020 [Mum]**
- **Master Capital Services Ltd. v. DCIT [ITA No. 364/Chandi/2006; A.Y. 2002-03] (26-02-2007**), it was held that the fines paid by share brokers for violation of BSE/NSE (Stock Exchange) rules (e.g. for trading volume crossing fixed exposure limit, for late submission of margin certificates or for late deliveries of shares due to non-matching of signatures etc.) are not fines paid for infraction of any statute/law and are allowable under section 37(1).

17.(f) Amount inadmissible under section 40(a)

- While quantifying the amount inadmissible under section 40(a)(ia), the tax auditor is to examined the TDS compliance made by assessee through proper returns, challans, records etc. Also the particulars stated here must correspond to Clause 27 also.
- In case of large assessee, TDS compliance may be checked on test check basis also.
- Where TDS has been deposited belatedly it is to be seen that the same is being deposited with interest as stated u/s 201(1A), else the same would be amount to non deposition of TDS wholly and liable for disallowance.
- FBT, income tax, wealth tax, tax on behalf of employee referred under section 10(10CC) are not allowable.
- Also STT is now an eligible deduction upon omission of section 40(a) (ib). However, only state that STT which is in respect of sale and purchase of securities as a dealer and not as an investor.
- **Interest on OD for payment of income tax** is not allowable expense under section 40, **East India Pharmaceutical Works Ltd. vs. CIT 224 ITR 627 (SC)** also **Bharat Commerce & Industries vs. CIT 230 ITR 733 (SC)**.

17.(g) Interest, salary, remuneration, etc inadmissible u/s 40(b) and its calculations

- The tax auditor may refer to the instrument of partnership or AOP to ascertain whether the same authorizes the payment of interest, remuneration, etc to the partners/members.
- Workings may be done keeping in mind new slab rates brought in by Finance Act, 2009 effective 1-4-2010.

17.(h) Payments for expenditure not made through account payee cheque or drafts

- Constructive payments made through banking channels by way of any RTGS, NEFT, E-payment etc. are to be taken as not voilative of section 40A(3) as they are in pare materia to the object behind the enactment of the said section .
- The expression expenditure must be understood in its plain meaning to include expenditure for stock in trade & raw material **(Attar Singh Gurmukh Singh vs. ITO 191 ITR 667 (SC))**
- Amendment by Finance Act 2009 entire payment or aggregate payments, to a single person in a day, if not made through a/c payee cheques or draft, and exceeding Rs. 20000/-, shall be disallowed. For payment for hiring or leasing goods carriages, the limit is made Rs. 35000/-
- Case of Aloo Supply company of Orissa HC now of academic interest as provision changes to aggregate of all payments made in single day.
- If payment have been in contravention of section 40A(3) but are covered by rule 6DD, the particulars of the same should be stated by the tax auditor.
- The certificate relating to compliance with the provisions of section 40A(3) may be obtained from the management through management representation.

17.(k) Liability of Contingent nature

The present value of contingent liability, like warranty expense, if properly ascertained & discounted on accrual basis is allowable **CIT vs. Wipro GE Medical Systems Ltd. 314 ITR 062 (SC)**.

17.(l) Deduction inadmissible u/s 14A

The Supreme Court decision in **Rajasthan state warehousing corporation (242 ITR 450**) after which section 14A was brought on books to the effect that in case of indivisible business having tax free and taxable income, no disallowance can be made on proportionate basis and entire expense is allowable. –-- **Dhanlakshmi Bank Ltd. 12 SOT 625 (Cochin).**

What is the Logic behind enactment of section 14A(2), (3)? Extracted from Clause 11 of circular no.14/2006 dated 28-12-2006

"In the existing provisions of section 14A, no method of computing the expenditure incurred in relation to income which does not form part of the total income has been provided for. Consequently, there is considerable dispute between the taxpayers and the Department on the method of determining such expenditure."

Is disallowance u/s 14A to be made even if no exempt income?

Disallowances under section 14A is to be made even in a year in which the assessee has no tax free income. **Cheminvest Ltd. vs. ITO (Delhi ITAT Special Bench** unreported till date). This is in consonance with Rule 8D(2)(iii). Rule 8D is also invited under those cases, where the assessee claims that no expenditure has been incurred by it for the purpose of any income which does not form part of the total income [section 14A(3)].

However a **Contradictory view has been taken by Chennai Bench of ITAT**, in **M/s. Siva Industries & Holdings Ltd. vs. ACIT, ITA. No. 2148/MDS/2010,** Vide order dated 20.05.2011 and has observed that "For the applicability of s. 14A there must be (a) taxable income and (b) tax-free income. If either one is absent, s. 14A has no applicability. If it is assumed that s. 14A would apply even when the assessee does not have tax-free income, the expenditure would get disallowed year after year so long as the assessee held the shares and if he sold them and made a capital gain that would be taxed as well. This is not contemplated by s. 14A. If there is no claim for tax-free income, there cannot be any disallowance u/s 14A."

Furthermore, recently **Delite Enterprises** case, the Bombay High court have taken a view that incase where there was no exempt income, the disallowance u/s 14A is not warranted.

Whether there is any bar on reopening completed assessments by CIT(A) and ITAT?

ITAT cannot remand back the matter to AO for making disallowance under section 14A- **Top Star Mercantile vs. ACIT (Bombay High Court)**. ITAT Delhi Special bench judgement in the case of Aquarius Travels Pvt. Ltd. (111 ITD 053) on interpretation of proviso to section 14A, and laying that CIT (A) and ITAT can suo motto or upon a specific ground being raised by any party in case of a pending appeal, in r/o A/y 2001-02 and earlier years, consider applicability of Section 14A, impliedly overruled

What is the extent and scope of Subsection (2) & (3) of section 14A?

Explained by **ITAT Mumbai Special Bench in the case of ITO vs. Daga Capital Management Private Ltd. (117 ITD 169 Mumbai)**

1. Section 14A(2) & 14A(3) being procedural are retrospective. The intention behind given expression in relation to in section 14A is to encompass not only direct expenses but also indirect expenses which has any relation to exempt income.

2. Section 14A would be applicable where shares are held as stock in trade.

3. Expenditure relating to incidental exempt income is also not immune from operation of section 14A

(The BHC vide its judgement dated 12-Aug-10 in **Godrej and Boyce Mfg. Co. Ltd. v/s DCIT 328 ITR 081** laid out following principles on interpretation of SECTION 14A and Rule 8D

(a) the mandate of section 14A is to prevent claims for deduction of expenditure in relation to income which does not form part of the total income of the assessee ;

(b) section 14A(1) is enacted to ensure that only expenses incurred in respect of earning taxable income are allowed ;

(c) the principle of apportionment of expenses is widened by section 14A to include even the apportionment of expenditure between taxable and non-taxable income of an indivisible business ;

(d) the basic principle of taxation is to tax net income. This principle applies even for the purposes of section 14A and expenses towards non-taxable income must be excluded ;

(e) once a proximate cause for disallowance is established-which is the relationship of the expenditure with income which does not form part of the total income-a disallowance has to be effected.

The SLP filed against the above judgement of the Bombay High Court is pending before the Apex Court S.L.P. (C) No.36516 of 2010 wherein on 10/01/2011, a constitution bench comprising of Three Judges (incl The CJI) have Ordered to Issue notice but refused to grant and ad-interim stay.

Under amended section 14A read with Rule 8D, burden of proof of earning of exempt income/incurrence of expenditure in relation thereto on whom?

It is for the AO to demonstrate that expenditure was incurred by assessee in relation to income not includible in total income. Section 14A(2) (if AO is not satisfied....) (also refer to the Judgement of Delhi High Court in case of Maxopp Investments to bring home the ratio of the expression 'satisfaction/ recording of reasons by the AO"

Normally the disallowance under section 14A read with rule 8D would be **determined only upon assessment** that is much after tax audit is completed and return filed. Therefore the tax auditor, at the time of tax audit, will have to **verify the amount of inadmissible expenditure determined by the assessee**.

The **primary responsibility** to furnish the detail of expenses incurred in respect of exempt income is on the **assessee**.

The method for computation of disallowance under **Rule 8D is mandatory for the AO only**. Accordingly the assessee may or may not adopt the same.

Interest which is directly attributable to non taxable income and also such interest which is attributable to taxable income must both be deducted out of the total interest paid while arriving at Variable A as referred in Rule 8D(2)

An interesting judgement on the issue whether disallowance u/s 14A is exigible incase the assessee is claiming deduction under chapter VI-A or not, could be referred in case of **Punjab State Co-operative Milk Producers Federation Ltd. v. CIT (No. 1) [2011] 336 ITR 495 (P&H),** wherein the answer has been given in favour of the revenue.

17.(m) Amount inadmissible under proviso to section 36(1)(iii)

Commitment charges paid in respect of loan taken for establishing new project are in nature of interest and allowable as business expenses **DCIT vs. Gujarat Alkalis and Chemicals Ltd. 295 ITR 085 (SC)**

If the assessee can show that interest free advance to relative or sister concern has been commercial expediency and is for the purpose of business, no disallowance can be made under section 36(1)(iii) **S.A. Builders vs. CIT 288 ITR 001 (SC).** Also **Dalmia Cement Bharat Ltd. 254 ITR 377 (Del)** stating that no businessman need be compelled to maximize his profit.

Burden of Proof on Whom

Munjal Sales Corporation v. CIT 298 ITR 298 [SC]

Under the Income-tax Act, 1961, after amendment of the Act by the Finance Act, 1992, in order that interest paid on borrowings can be allowed as a deduction in computing the business profits, *every assessee, including a firm, has to establish, in the first instance, that it was allowable under section 36(1)(iii)* ;

Clause 17A: Amount of Interest Inadmissible u/s 23 of the MSMED Act, 2009

Detailed discussions are appearing as per ICAI Guidance Note on the same. The Tax auditor is required to obtain a specific management representation from the assessee on this aspect.

Clause 18: Particulars of payments made to persons specified under section 40A(2)(b).

1. The object behind this section is to ensure that the related parties do not get unreasonably or excessively paid by virtue of being related to the assessee is one way or the other on account of purchases/supplies made or services rendered.

2. List of related party is to be procured from the assessee by way of management representation or last year form 3CD.

3. Only payments made to related parties are covered & not sales/services rendered made to them.

4. The auditor is merely to state particulars of related parties, amount paid to them & their relation. He is not required to quantify whether the payment is reasonable or otherwise

5. Inapplicable to income - goods sold to associates at lower than the market price-section 40A(2) not applicable-123 ITR 592(Mad),139 ITR 827(MP)

6. Ultimate Burden to prove upon revenue-Circular 6P DT 06-07-1968. However, assessee to discharge onus at first instance.

261 ITR 258 (MUM) Commissioner of Income-tax Vs. Shatrunjay Diamonds

Under Section 40A(2)(b) the Burden of proof is on assessee to prove that price is reasonable.

M.L.B.D. Books International vs. ACIT (ITA 374/2009) order dated 31.03.2009

The fair market value had to be discerned by keeping in mind a similarly circumstanced person.

Clause 19: Amounts deemed to be profits and gains under section 33AB or 33ABA or 33AC.

1. The items are similar to those stated in clause 15 except to the effect that whereas under clause 15, the admissible deduction is to be computed, *under this clause, the notional profit attributable to withdrawal of amount from the specified reserve is stated*.

2. So far as section 33AC relating to shipping business is concerned, as per amendment by Finance Act 2004, no further deduction shall be available.

Clause 20: Any amount of profit chargeable to tax under section 41 and computation thereof.

1) Assesse previously claimed deduction of any expenditure, loss or trading liability and during the year any benefit derived by way of remission and cessation (write off) of such trading liability.

2) If assets are sold during the year , consideration of such assets is more than the WDV , amount above WDV up to the extent of Depreciation allowed (Acquisition Cost – WDV) will be treat as business income.

3) Assets used as scientific research and subsequently sale out without using in business for some other purpose. Net proceeds of such assets up to the depreciation allowed will treat as business income.

4) Withdrawal of amount from specified reserve created under 36(1)(vii)

Clause 21: Tax, cess, fees, duty, interest

(i) In respect of any sum referred to in clause (a), (b), (c), (d), (e) or (f) of section 43B, the liability for which:

(A) pre-existed on the first day of the previous year but was not allowed in the assessment of any preceding previous year and was:

(a) paid during the previous year;

(b) not paid during the previous year.

(B) was incurred in the previous year and was:

(a) paid on or before the due date for furnishing the return of income of the previous year under section 139(1);

(b) not paid on or before the aforesaid date.

Under clause 21(i)(A), the liability towards sums stated u/s 43B which existed on the first day of the previous year need be stated.

The date of payment under the PF Act shall be the date of clearing.

If amounts are unpaid uptil the date of tax audit report and are paid subsequently, the same may be claimed through a separate CA certificate.

[2009] 313 ITR 0161- Commissioner of Income-tax vs. P. M. Electronics Ltd. (Delhi High Court)

Provident fund contributions made before filing return--allowable--income-tax act, 1961, s. 43b.

CIT v. Dharmendra Sharma [2008] 297 ITR 320 (Delhi)

CIT v. Vinay Cement Ltd. [2009] 313 ITR (St.) 1

CIT v. Nexus Computer P. Ltd. [2009] 313 ITR 144 (Mad)

Important : - please note that following the decision of the Delhi HC in case of P.M. Electronics, the Delhi ITAT bench in case of ACIT v/s Consulting Engg. Services Pvt. Ltd. ITA No.3823/Delhi /2008 held that even the employees contribution to welfare funds are covered by amendment to section 43B wef 1-4-2004, which is an incorrect appreciation of the law.

Payment made before the grace days allowed under the Provident Fund Act and Rules should also be considered as payment made within the due date under Section 43B(b) of the Income Tax Act,1961.

M/s Hunsur Plywood Works Ltd Vs CIT (1996) 54 TTJ 260 (Bang.)

CIT Vs Shri Ganapathy Mills Company Ltd. (1999) 243 ITR 879 (Mad.)

Commissioner of Income-tax Vs. Salem Co-operative Spinning Mills Ltd. 258 ITR 360(Mad.)

Hitech (India) Pvt. Ltd. Vs CIT 227 ITR 446. (AP)

Such matters should not arise after the liberalisation in respect of such payments by amendment to section 43B by the Finance Act, 2003 with effect from April 1, 2004.and are merely of academic interest now.

[2009] 118 ITD 535 (HYD.) Assistant Commissioner of Income-tax, Circle 3(4) v. GMR Holdings (P.) Ltd.

Turnover fee to SEBI is covered by to 43B. Adjustment of amount against security deposit by the assessee is not payment

[2009] 118 ITD 401 (MUM.) Air India Ltd. v. Deputy Commissioner of Income-tax,

Foreign travel tax is covered by 43B

[2009] 116 ITD 186 (PUNE) Alfa Laval India Ltd. v. Deputy Commissioner of Income-tax

Based on enquiry report, ESI authorities issued demand notices dated 16-6-2000 and 29-5-2000 to assessee for liabilities of assessment years 1996-97 and 1997-98. Assessee paid amount on 29-6-2000. Whether since liability-in-question did not accrue in financial year relevant to assessment year-in-question, assessee was not entitled to deduct said amount while computing its income for assessment year.

[2008] 306 ITR (A.T.) 0106- Assistant Commissioner of Income-tax vs. Real Image Media Technologies P. Ltd. (Income-tax Appellate Tribunal--Chennai)

Deduction of business expenditure is allowed on actual payment. Assessee is liable to make payment only on received payment and not entitled to claim

deduciton on account of service tax. Held that section 43 B is not applicable in case of assessee, no addition shall be made.

[2007] 107 ITD 343 (chd.) (SB) Deputy Commissioner of Income-tax Circle 4(1) v. Glaxo Smithkline Consumer Healthcare Ltd.

For claiming deduction under section 43B, in respect of payment of excise duty, it is not necessary that liability to pay duty must be incurred first and only thereafter, payment of such duty is made. Therefore, deduction for tax, excise duty, etc., is allowable under section 43B on payment basis before incurring liability to pay such amounts. However, unexpired Modvat Credit available to an assessee is in nature of a future entitlement which cannot be considered equivalent to actual payment of central excise duty. ***Accordingly, unexpired Modvat Credit available to an assessee on last day of previous year would not be eligible for deduction under section 43B.***

[2007] 289 ITR 0154- Shree Pipes vs. Deputy Commissioner of Income-tax (Assessment) (Rajasthan High Court)

Deduction of Business Expenditure is allowed only on actual payment. Interest on arrears of sales tax is a part of sales tax for section 43B. Therefore, interest not deductable unless actually paid

Mewar Motors v. CIT [2003] 260 ITR 218 (Raj)

[2009] 308 ITR 0234- Commissioner of Income-tax vs. Official Liquidator of Essab Computer P. Ltd. (Gujarat High Court)

Circular No. 496, dated September 25, 1987, the Board made it clear that if the sales tax due to the Government was converted into a loan which may be repaid by the assessee subsequently in instalments, the Department shall treat the sales tax dues as actually paid for all purposes.

Sales tax liability converted as loan under deferred payment scheme–disallowance under section 43b by assessing officer while processing return under section 143(1)(a)–cbdt circular that sales tax liability converted into loan may be allowed as deduction in year in which conversion permitted by government order–additional tax cannot be levied–income-tax act, 1961, ss. 43b, 143(1)(a), (1a)–cbdt circular no. 674 dated 29-12-1993.*

Whether the conversion of interest due into term loan can be considered as payment u/s 43B?

Madras High Court in Kalpana Lamp and Components Ltd., (2002) ITR 491 (MAD) can not be allowed as payment. It is also not part with the sales tax loan allowed by the state Government. Also refer to **Explanation 3C**.–For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (d) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or borrowing shall not be deemed to have been actually paid.

Clause 22: Treatment of MODVAT claim and Prior Period Income/ Expenditure

(a) Amount of modified value added tax credits availed of or utilized during the previous year and its treatment in the profit and loss account and treatment of outstanding modified value added tax credits in the accounts.

(b) Particulars of income or expenditure of prior period credited or debited to the profit and loss account.

1. It requires factual reporting of CENVAT credit & is to be read along with clause 12(b) of form 3CD. The auditor should check relevant statutory records i.e. RG 23 (both parts), Account Current & records maintained under CENVAT Credit Rules.

2. Since CENVAT credit availed & utilized are to be reported, it is advisable to report the opening & closing balance of CENVAT also to avoid any misleading conclusion and inferences.The treatment of CENVAT Credit in profit & loss and outstanding CENVAT credit in account has to be reported. (this may be referred through section 145A)

3. Separate disclosures may be reported for CENVAT credit on capital goods and other than capital goods.

4. In sub-clause (b), the particulars of prior period income or expense as debited or credited to profit & loss a/c are to be stated.

5. This clause becomes inapplicable in case of an assessee following cash system of accounting as per point no. 11(a). Where however the method of accounting is accrual & accounts are audited under any other Act, then reference may be made to disclosures/ Notes to accounts attached with financial statements.

6. The AS (IT)-II relating to prior period items & extra-ordinary items has been notified by government under section 145.

280 ITR (A.T.) 0194 (DEL.) Deputy Commissioner of Income-tax Vs. Indag Rubber Ltd.

That in a case where any liability or receipt had accrued but was not quantified, the assessment is to be made on the basis of the date of accrual in a case where the mercantile system of accounting is applicable. The accrual of liability or income is not postponed for want of quantification. In such cases, if at the time of assessment or appellate proceedings, the quantified amount becomes known, the same should be made part of the relevant assessment. The assessee was disputing the liability itself and not merely the quantum thereof. The doctrine of hindsight cannot affect the date of accrual of liability or, as the case may be, income. Thus, the doctrine of hindsight had no application.

243 ITR 35 (Mad) CIT Vs Anna Transport Corporation Ltd

When an assessee is following the mercantile system of account, it cannot possibly make a provision in its accounts, unless the liability had accrued. When the assessee is not in a position to determine the existence of liability, let alone the quantification thereof, the assessee cannot be penalised for not making a provision in the earlier years.

Clause 23. Details of any amount borrowed on hundi or any amount due thereon (including interest on the amount borrowed) repaid, otherwise than through an account payee cheque [Section 69D].

1. Where any amount is borrowed on a hundi from a person, or any amount due thereon is repaid to any person, otherwise than through an account payee cheque drawn on a bank, the amount so borrowed or repaid shall be deemed to be the income of the person borrowing or repaying the amount aforesaid in the P.Y. in which the amount was borrowed or repaid, as the case may be. However, in case the amount borrowed under this section has been deemed as income of the borrower, then the borrower shall not be liable to be assessed again in respect of such amount under this section on repayment of such amount.

2. It is advised to get a copy of complete list of hundi loans obtained by a mode other than account payee cheque and verify the same with books of account. Where it is not able to get all the relevant details, proper reporting should be there.

Clause 24 Particulars of each loan and deposit accepted/repaid in an amounting exceeding limits as per section 269SS/269T

Difference between Loan and Deposit

In A. M. Shamsudeen v. Union of India [2000] 244 ITR 266 (Mad), that in a loan, it is the duty of the debtor to seek the creditor and repay the money to him, while in the case of deposit, it is generally the duty of the depositor to go to the depositee to make a demand for repayment.

Baidya Nath Plastic Industries (P.) Ltd. v. K.L. Anand, ITO [1998] 230 ITR 522 (Delhi)

There is a distinction between a loan and a deposit. In the case of a loan, it is the duty of the debtor to seek the creditor and repay the money to him or to repay the money according to the agreement. But in the case of a deposit, it is generally the duty of the depositor to go to the banker or the person with whom the money is deposited, and make a demand for the repayment of the same.

Loans and deposits by means of transfer entries otherwise than by an account payee cheque/draft have to be reported under this clause.

Transfer Entry and their scope

CIT Vs Noida Toll Bridge Co. Ltd 262 ITR 260 (Del)

Where the transaction was by an account payee cheque and the transaction was made by the assessee through ILFS, by journal entry in the books of account of the assessee by crediting the account of ILFS, held no violation u/s 269SS

[2001] 78 ITD378 (Jp.) Assistant Commissioner of Income-tax v. Jag Vijay Auto Finance (P.) Ltd.

Where deposits were accepted by assessee-company through transfer vouchers from depositors who had bank accounts in same bank in which assessee-company had its accounts - and the amounts in question were credited in company's bank account through proper banking channel, Held that there was no violation of provisions of section 269SS in any manner.

[2004] 3 SOT 811 (Ahd.) Assistant Commissioner of Income-tax v. Gujarat Ambuja Proteins Ltd.

Where there was no actual receipt of money by assessee-company and amounts were credited by journal entries on account of payments made by its sister concern for and on behalf of assessee-company, held that the AO was not justified in holding that assessee had taken those deposits in violation of section 269SS. Thus, penalty under section 271D was rightly deleted.

[1996] 56 TTJ 580 (AHD) BOMBAY CONDUCTORS & ELECTRICALS LTD. v. DEPUTY COMMISSIONER OF INCOME-TAX

Assessee had purchased goods from its holding company and while it paid part purchase price by account-payee cheque, for rest of purchase price it made adjustment in its books of account by transferring equivalent amount from 'goods purchase account' to 'Sarafi account' standing in holding company's name. Held that, such adjustment could not be held to be 'deposit' or 'loan' within meaning of section 269SS and penalty u/s 271B was not exigible.

[2004] 3 SOT 162 (Ahd.) Premier Art Silk Processors (P.) Ltd. v. Deputy Commissioner of Income-tax

Where the assessee had made repayments to several depositors in cash due to low creditworthiness and credibility of company which was not favourable to creditors. On account of such situation creditors were insisting upon payments being made in cash only and they were not accepting cheque or draft. Held that such repayment of loan or deposit in cash with a view to meet urgent business necessities and such payments made under bona fide belief is a valid excuse and constitutes a reasonable cause within meaning of section 273B and in such a case no penalty is leviable.

RTGS, NEFT, High Value, A/c Tranfer, etc. are constructive payments made through bank accounts and are to be viewed liberally in view of the object behind enactment of section 269SS/269T. Also finds support from the ICAI guidance note.

Interest free loans are also loans.

For violation of Sec 269SS and Sec 269T, Sec 271D and 271E provides penalty, respectively, for an amount equivalent to loan accepted or repaid. However, if there is a reasonable cause then penalty may not be levied.

Clause 25 Brought forward losses and change in shareholding of Companies

(a) Details of brought forward loss or depreciation allowance, in the following manner, to the extent available:

Sl No.	Assessment Year (s)	Nature of Loss/ Allowance	Amount as Returned	Amount Assessed Give ref to relevant orders	Remarks

(b) whether a change in shareholding of the company has taken place in the previous year due to which the losses incurred prior to the previous year cannot be allowed to be carried forward in terms of Sec 79;

1. The amount to be tabulated is required to be quantified as per return and assessment/appellate orders.

2. The format is for standardization & can be amended to incorporate relevant information.

3. Separate statements in prescribed format can be prepared if more than one type of loss/allowances is carried forward for same assessment year.

4. In the remark column information about the pending assessment or appellate proceedings or delay in filing loss returns (section 139(3)) may be given.

5. In case where the assessments are in various stages of litigation, details may be given unto the stage till which orders have been passed and the factual position relating to pending litigation may be given by way of remark.

6. In case of corporate assessee, where CARO is applicable, details of pendency before various may be cross verified.

7. Clause (b) relates to carry forward & set off of losses in case of companies and is not applicable to companies in which public is substantially interested.

8. Section 79 is non obstante chapter VI and dilution of shareholding from 51% will not effect the provisions of section 32(2) relating to set

off & carry forward of unabsorbed depreciation and **CIT vs. Concord Industries Ltd. 119 ITR 458 (Mad).**

9. The comparison of the composition of the shareholding is to be done with reference to the last day of the current previous year and the last day of every previous year in which the loss was incurred. The carry forward of the loss incurred in respect of different previous years is to be determined with respect to the individual previous year.

10. The above comparison of the shareholding can be done by referring to the register of members.

11. Section 79 is inapplicable in case of change in voting power takes place either due inheritance or on account transfer of shares by way of gift to any relative of the shareholder.

Clause 26: Section-wise details of deductions, if any, admissible under Chapter VI-A.

The deduction available under chapter VIA may be categorized as follows

A. Deduction in respect of certain payments.

B. Deduction in respect of certain incomes

C. Other Deductions

1) Only those deductions are required to be stated for which either the expense of the income is recorded in books of accounts. In case, LIC is paid outside the books of accounts, the same is not to be stated.

2) The deduction available to the assessee is subject to his GTI, which the tax auditor may not be aware. In such cases the tax auditor should put a note that the deduction is subject to determination of GTI of the assessee.

3) If the deduction computed by assessee and the tax auditor are different due to judicial pronouncement or interpretation, the fact is to be stated

4) In case of deduction in respect of payments/incomes, the tax auditor should ascertain whether there is corresponding expenditure/income covered by the relevant section recorded in the books audited by him.

Clause 27. Compliance with TDS

(a) Whether the assessee has complied with the provisions of Chapter XVII-B regarding deduction of tax at source and regarding the payment thereof to the credit of the Central Government. [Yes/No]

(b) If the provisions of Chapter XVII-B have not been complied with, please give the following details, namely:

(i) Tax Deductible and not deducted at all

(ii) Shortfall on account of lesser deduction than required to be deducted

(iii) Tax deducted late

(iv) Tax deducted but not paid to the credit of the Central Government

(Please give the details of cases covered in (i) to (iv) above)

1. The new clause 27 is different from the earlier clause. In the earlier clause the requirement was with reference to the tax deducted at source but not paid to the credit of the Central Government in accordance with the provisions of chapter XVIII-B. The new clause requires reporting on the compliance with the provisions of chapter XVIII-B regarding deduction of tax at source and payment thereof to the credit of the Central Government. Thus, the scope of reporting under the new clause is much wider. This reporting requirement is to be read with the specific non-compliances stated under clause (b).

2. Since the old as well amended section relates to chapter XVII-B, details of any non compliance relating to TCS (covered by chapter XVII-BB) are not to be stated.

3. This clause may be read with clause 17(f) and corresponds to 40(a) (ia)

4. In case where the assessee submits that tax is not required to be deducted on any payment the tax auditor may exercise his judgement in light of applicable law/judicial pronouncement and in case of difference of opinion both the view points should be stated. Whereas the primary reporting responsibility relating to compliance with provisions of chapter XVII-B, the primary responsibility to prepare the information in such manner so that tax auditor can verify the compliance is on the assessee

5. In case of large organization it is in their interest to get separate and independent audit conducted in respect to TDS.

Clause 28: Quantitative details of principle items in case of trading and manufacturing concerns

1. Quantitative details are to be given only of principal of goods. What would constitute principal item would depend upon facts of each case however items which constitute more than 10% in value of the aggregate purchase consumption or turnover may be classified as principal items.

2. Petty items need not be stated. In case of non corporate assessee the tax auditor should management representation certified documents for principal items of raw materials, finished goods and by-products:

3. Certificate from the assessee certifying the balance of the opening stock, purchases, sales and closing stock.

4. Certificate to the extent of shortage/excess/damage and the reasons thereof.

5. In the case of an assessee engaged in the manufacture of goods where the input of raw materials and the output of finished goods are recorded in different units of measurement, unless an alternative method is available for conversion of the end product into the same unit of measure, the yield and shortage cannot be ascertained. In some cases where the end product is standard item and can be converted back and related to the input of the raw material in the same unit of measurement, the same should be done to ascertain the shortage, yield etc. In case it is not possible, the fact should be so stated under this clause.

Clause 29: In the case of a domestic company, details of tax on distributed profits under section 115-O in the following form:

(a) total amount of distributed profits;

(b) total tax paid thereon;

(c) dates of payment with amounts.

1. Dividend means dividend as defined under section 2(22) excluding deemed dividend under section 2(22)(e).

2. The amount of divided declared, paid or distributed whether out of current profits or accumulated profits shall be subject to dividend distribution tax @ 15% plus education cess and secondary Hidher Education Cess

3. The auditor is not to see the determination of the distributed profits but is to state the amount of profits which he may refer from minutes books.

4. Under clause (b) the tax payable on distributed profit is to be determined and reduced in case any dividend is received by a domestic company from its subsidiary which has paid DDT and recipient company is not a subsidiary company of any other company(section 115O(1A))

5. Under clause (c) the particulars of the DDT deposited are to be stated that is date of payment and amount of DDT deposited.

Clause 30: Whether any cost audit was carried out? if yes, enclose a copy of the report of such audit [see section 139(9)].

1. The tax auditor has to state if cost audit was carried out and if the answer is in affirmative, he has to attach the copy of the same.

2. The tax auditor is not required to make detailed study of the cost audit report however he has to take note of any material observation having relevance to tax audit.

3. Where the cost audit has been ordered but is not completed by the time of tax audit report, the fact relating to same is to be stated.

4. Information is required to be given only in respect of such cost audit whose time period corresponds to the previous year under tax audit.

5. Even though cost audit report is required to be filed along with income tax return (section 139(9)(e)) which failure would rendered the return as defective, the annexure less return forms bars any document to be accompanied with the return. Under these circumstances it is advisable that the cost audit report may be furnished before the AO by way of letter.

Clause 31: Whether any audit was conducted under the Central Excise Act, 1944, if yes, enclose a copy of the report of such audit.

a. The tax auditor has to state if any audit was conducted under the Central Excise Act. 1944 and if the answer is in affirmative, he has to attach the copy of the same.

b. The tax auditor is not required to make detailed study of such audit report however he has to take note of any material observation having relevance to tax audit.

c. Where the audit has been ordered under central excise but is not completed by the time of tax audit report, the fact relating to same is to be stated.

d. Information is required to be given only in respect of such excise audit whose time period corresponds to the previous year under tax audit.

Clause 32: Accounting ratios with calculations as follows:

(a) Gross profit/Turnover;

(b) Net profit/Turnover;

(c) Stock-in-trade/Turnover;

(d) Material consumed/Finished goods produced.

1. The ratios are to be given for assessees engaged in manufacturing or trading activities and not to professionals.
2. Computation of various components based upon which ratios have been worked out is required to be stated under this clause
3. There should be consistency between the numerator and denominator while calculating the ratios
4. The ratios have to be given for the business as a whole and not product wise
5. While calculating the ratios, the tax auditor should assigned meaning to terms used in the above ratios having regard to GAAP
6. The net profit to be shown is NPBT
7. In case of partnership firm the NP ratio has to be calculated after charging interest and remuneration to partners.
8. The stock turnover ratio is to be computed while taking only finished goods.

ANNEXURE -I

PART A

Clauses 1 to 6 – These are just the same as of part A of form 3CD and have already been deliberated upon in earlier part of the discussion paper.

PART B

Nature of Business

The nature of business or profession must be same as in form 3CD [refer cl. 8(a)]. The code must correspond to the relevant code as per the list. In case the code is not specific one, the residual code pertaining to the main activity may be stated.

1. Paid-up share capital/ Capital of Partner/Proprietor

The Paid up capital as per the balance sheet is to be stated in case of Corporates.

There is no need to state the Authorised Capital.

In case of non corporates, the expression may be construed to mean capital contribution made by the sole proprietor or the partner as the case may be.

2. Share Application Money/ Current account of Partner/ Proprietor

This clause is applicable only for corporates. The amount received as share application must be stated hereunder.

3. Reserves and Surplus/ Profit and Loss Account

Means portion of earnings appropriated by the management for General or for specific purpose other than provisions for depreciation or diminution in the value of asset or for known liability

The Tax Auditor may also refer to part III of Schedule VI of The Companies Act, in this regard too.

Incase of non corporate assessees, besides the reserves, un-appropriated balances of the profit and loss account of the partner/proprietor should also be disclosed.

4&5. SECURED LOANS & UNSECURED LOANS

There is no requirement to give individual bifurcation of each secured/ unsecured loan.

Only the aggregate quantum of the same is to be disclosed.

Secured Loans are those, which are secured wholly or partially against an asset. Whereas, an unsecured loan is a one, which is not a secured loan.

The details of assets/guarantees given for secured loans need not be stated.

7. Total of Balance Sheet

Incase of corporate assessee's and those whose accounts are required to be audited under any other act, requiring the audit report in form 3CA, the tax auditor must ensure that the total of the balance sheet annexed with his tax audit report must be stated here.

Incase of Audit report in Form 3CB, the total of balance sheet, on which the tax auditor is giving his opinion, is to be stated.

9. Gross profit

The gross profit computed for working out the GP ratio as per cl 32[a] of form 3CD must be stated here.

10&11. Commission received & Commission paid

The Gross amount of commission received and gross commission paid must be stated here. The intention of the legislature seems to be verification of the amount claimed/compliance with provisions of section 194H of the Act.

12&13. Interest received & Interest paid

The Gross amount of interest received and gross interest paid must be stated here. The intention of the legislature seems to be verification of the amount claimed/compliance with provisions of section 194A of the Act. Where the assessee has received and paid interest to a same party, during the year, instead of net interest gross amount is to be stated.

14. Depreciation as per books of account

The amount of depreciation debited in the books of accounts is to be stated. The Tax auditor is not required to comment here as to whether the same has been correctly or aptly determined.

15. Net Profit (or loss) before tax as per Profit and Loss Account

The net profit computed for working out the NP ratio as per cl 32[b] of form 3CD must be stated here.

16. Taxes on income paid/provided for in the books

The requirement relates to stating the income tax provided for in the books of accounts, which, incase of corporate assessees, should match with the provision for taxation in profit and loss account.

Incase, no provision of taxation has been provided for in the books of the assessee, the tax auditor should state the amount of tax [es] paid as per books of account which are subject to his audit.

FORM OF TAX AUDIT PARTICULARS TO BE FURNISHED BY MEMBERS/FIRM

Record of Tax Audit Assignments

1. Name of the member accepting the assignment
2. Membership No.
3. Financial year of audit acceptance
4. Name and Registration No. of the firm/firms of which the member is proprietor or partner.

SI. No.	Name of the auditee	Assessment year of the auditee	Date of appointment	Date of acceptance	Name of the firm on whose behalf the member has accepted the assignment	Date of communication with the previous auditor (applicable)
1	2	3	4	5	6	7

VOICE OF CA

Part-II

TAX DEDUCTED AT SOURCE UNDER THE INCOME TAX ACT, 1961

(As Ammended By Finance Act, 2012)

Chapter -I

AMENDMENTS BROUGHT IN "TDS PROVISIONS VIDE FINANCE ACT 2012"

A. Threshold for TDS on payment of interest on debentures - Amendment to Clause (v) of proviso of section 193 [w.e.f. 1st July, 2012]

"any interest payable to an individual or a Hindu undivided family, who is resident in India, on any debenture issued by a company in which the public are substantially interested, if—

(a) the amount of interest or, as the case may be, the aggregate amount of such interest paid or likely to be paid on such debenture during the financial year by the company to such individual or Hindu undivided family does not exceed five thousand rupees; and

(b) such interest is paid by the company by an account payee cheque."

Brief of Amendment

The present limit of Rs. 2500 has been announced to Rs. 5000 and this limit is also applied to the unlisted debentures. Provided the interest should be paid by Account payee cheque. The new provisions are also makes eligible HUF beside individuals.

B. Taxation of a non-resident entertainer, sports person etc by amending provision of Section 115BBA, and consequent change made to 194E.- [w.e.f. 1st July, 2012]

"Where any income referred to in section 115BBA is payable to a non-resident sportsman (including an athlete) or an entertainer who is not a citizen of India or a non-resident sports association or institution, the

person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of twenty per cent."

Brief of Amendment

Consequential amendment is proposed in section 194E to provide for withholding of tax at the rate of 20% from income payable to non-resident, non-citizen, entertainer, or sportsmen or sports association or institution.

C. Amendment brought u/s 194J vide Finance Act 2012 - Section 194J (1)(ba) - [Newly Inserted w.e.f. 1st July, 2012]

"(ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company; or

Brief of Amendment - *Deduction of tax at source @ 10% by a company in respect of remuneration or fees or commission by whatever name called, paid to a director which is not in the nature of salary and it will be considered as fees for professional or technical services.*

D. Threshold for TDS on compensation or consideration for compulsory acquisition increased by amending provisio of Section 194LA - w.e.f. 1st July, 2012]

Provided that no deduction shall be made under this section where the amount of such payment or, as the case may be, the aggregate amount of such payments to a resident during the financial year does not exceed **two hundred thousand rupees.**

Brief of Amendment

The limit raised to Rs. 2,00,000/- from Rs. 1,00,000 for non deduction of tax u/s 194LA.

E. SECTION 194LC - INCOME BY WAY OF INTEREST FROM INDIAN COMPANY. [NEWLY INSERTED, W.E.F. 1ST JULY, 2012]

*"**(1) Where any income by way of interest referred to in sub-section (2) is payable to a non-resident, not being a company or to a foreign company***

by a specified company, the person responsible for making the payment, shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct the income-tax thereon at the rate of five per cent.

(2) The interest referred to in sub-section (1) shall be the income by way of interest payable by the specified company,—

(i) in respect of monies borrowed by it at any time on or after the 1st day of July, 2012 but before the 1st day of July, 2015 in foreign currency, from a source outside India,—

(a) under a loan agreement; or

(b) by way of issue of long-term infrastructure bonds, as approved by the Central Government in this behalf; and

(ii) to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan or the bond and its repayment.

Explanation.—For the purpose of this section—

(a) "foreign currency" shall have the meaning assigned to it in clause (m) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999);

(b) "specified company" means an Indian company.'

Brief of Amendment

- If specified company raises a loan in foreign currency from abroad, which is approved by central Government, the interest paid by specified company to non-resident is chargeable to 5% on interest paid and accordingly new section 194LC inserted which provides TDS is deducted at 5% plus surcharge and cess on such amount paid.

- The interest payable to a non resident by an Indian company engaged in certain specified business relating to generation or distribution of power, operation of aircraft, manufacture or production of fertilizer, construction of road, toll road, bridge, port, inland port, shipyard, ship or dam shall be subjected to withholding tax @ 5% at the time of payment or accrual whichever is earlier.

- Long-term low cost funds from abroad- the benefit of lower rate of withholding tax i.e. 5% shall also extend to all businesses. This lower rate of tax would also be available for funds raised through long term infrastructure bonds in addition to borrowing under a loan agreement. Thus interest paid between 1/07/12 and 1/07/15, under an agreement, (including rate of the interest payable), approved by the Central Government, shall be taxable @ of 5% (plus applicable surcharge and cess).

F. Amendment in section 197A (1C) [Amended w.e.f. 1st July, 2012]

"Notwithstanding anything contained in section 193 or section 194 or section 194A or section 194EE or section 194K or sub-section (1B) of this section, no deduction of tax shall be made in the case of an individual resident in India, who is of the age of ***sixty years*** *or more at any time during the previous year, if such individual furnishes to the person responsible for paying any income of the nature referred to in section 193 or section 194 or section 194A or section 194EE or section 194K, as the case may be, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the tax on his estimated total income of the previous year in which such income is to be included in computing his total income will be nil."*

Brief of Amendment

The age of Senior Citizen is specified in section 197A is reduced to 60 years in place of 65 years.

G. Amendment to sub-section (1) of Section 201

Section201(1) - Before the Proviso to sub–section (1) of Section 201 following proviso is newly inserted.[w.e.f. 1st July, 2012]

"Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—-

i. has furnished his return of income under section 139;

ii has taken into account such sum for computing income in such return of income; and

iii. has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

H. Amendment to Proviso to sub-section (1) of section 201 [w.e.f. 1st July, 2012]

Provided further ***that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.***

I. A proviso after sub-section (1A) of Section 201 is newly inserted. [w.e.f. 1st July, 2012]

"Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso of sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident."

J. Amendment to Clause (ii) sub-section (3) of Section 201. [w.e.f. 1st April, 2010]

Six years ***from the end of the financial year in which payment is made or credit is given, in any other case***

K. Explanation after sub-section (4) of section 201 shall be inserted. [w.e.f. 1st July, 2012]

Explanation.—For the purposes of this section, the expression "accountant" shall have the meaning assigned to it in the Explanation to sub-section (2) of section 288

L. Clause (iv) of Section 204. [Newly Inserted, w.e.f. 1st July, 2012]

"In the case of credit, or as the case may be, payment of any sum chargeable under the provisions of this Act made by or on behalf of the Central Government or the Government of a State, the drawing and disbursing officer or any other person, by whatever name called, responsible for crediting, or as the case may be, paying such sum."

Chapter-II

TDS FROM SALARY

192. (1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the [rates in force] for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year.

[(1A) Without prejudice to the provisions contained in sub-section (1), the person responsible for paying any income in the nature of a perquisite which is not provided for by way of monetary payment, referred to in clause (*2*) of section 17, may pay, at his option, tax on the whole or part of such income without making any deduction there from at the time when such tax was otherwise deductible under the provisions of sub-section (1).

(1B) For the purpose of paying tax under sub-section (1A), tax shall be determined at the average of income-tax computed on the basis of the rates in force for the financial year, on the income chargeable under the head "Salaries" including the income referred to in sub-section (1A), and the tax so payable shall be construed as if it were, a tax deductible at source, from the income under the head "Salaries" as per the provisions of sub-section (1), and shall be subject to the provisions of this Chapter.]

[(2) Where, during the financial year, an assessee is employed simultaneously under more than one employer, or where he has held successively employment under more than one employer, he may furnish to the person responsible for making the payment referred to in sub-section (1) (being one of the said employers as the assessee may, having regard to the circumstances of his case, choose), such details of the income under the head "Salaries" due

or received by him from the other employer or employers, the tax deducted at source therefrom and such other particulars, in such form and verified in such manner as may be prescribed, and thereupon the person responsible for making the payment referred to above shall take into account the details so furnished for the purposes of making the deduction under sub-section (1).]

[(2A) Where the assessee, being a Government servant or an employee in a [company, co-operative society, local authority, university, institution, association or body] is entitled to the relief under sub-section (1) of section 89, he may furnish to the person responsible for making the payment referred to in sub-section (1), such particulars, in such form and verified in such manner as may be prescribed, and thereupon the person responsible as aforesaid shall compute the relief on the basis of such particulars and take it into account in making the deduction under sub-section (1).]

[*Explanation*.—For the purposes of this sub-section, "University" means a University established or incorporated by or under a Central, State or Provincial Act, and includes an institution declared under section 3 of the University Grants Commission Act, 1956 (3 of 1956), to be a University for the purposes of that Act.]

[(2B) Where an assessee who receives any income chargeable under the head "Salaries" has, in addition, any income chargeable under any other head of income (not being a loss under any such head other than the loss under the head "Income from house property") for the same financial year, he may send to the person responsible for making the payment referred to in sub-section (1) the particulars of—

(*a*) such other income and of any tax deducted thereon under any other provision of this Chapter;

(*b*) the loss, if any, under the head "Income from house property",

in such form and verified in such manner as may be prescribed, and thereupon the person responsible as aforesaid shall take—

(*i*) such other income and tax, if any, deducted thereon; and

(*ii*) the loss, if any, under the head "Income from house property",

also into account for the purposes of making the deduction under sub-section (1) :

Provided that this sub-section shall not in any case have the effect of reducing the tax deductible except where the loss under the head "Income from

house property" has been taken into account, from income under the head "Salaries" below the amount that would be so deductible if the other income and the tax deducted thereon had not been taken into account.]

[(2C) A person responsible for paying any income chargeable under the head "Salaries" shall furnish to the person to whom such payment is made a statement giving correct and complete particulars of perquisites or profits in lieu of salary provided to him and the value thereof in such form and manner as may be prescribed.]

(3) The person responsible for making the payment referred to in sub-section (1) [or sub-section (1A)] [or sub-section (2) or sub-section (2A) or sub-section (2B)] may, at the time of making any deduction, increase or reduce the amount to be deducted under this section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct during the financial year.

(4) The trustees of a recognised provident fund, or any person authorised by the regulations of the fund to make payment of accumulated balances due to employees, shall, in cases where sub-rule (1) of rule 9 of Part A of the Fourth Schedule applies, at the time an accumulated balance due to an employee is paid, make therefrom the deduction provided in rule 10 of Part A of the Fourth Schedule.

(5) Where any contribution made by an employer, including interest on such contributions, if any, in an approved superannuation fund is paid to the employee, [tax] on the amount so paid shall be deducted by the trustees of the fund to the extent provided in rule 6 of Part B of the Fourth Schedule.

(6) For the purposes of deduction of tax on salary payable in foreign currency, the value in rupees of such salary shall be calculated at the prescribed rate of exchange.

Questions and Answers on Section 192

Q.1. Who is responsible to deduct tax on Salary?

A.1. All persons paying salary are responsible to deduct TDS on income chargeable under the head "Salary". In other words none of the payer of Salary is excluded; Individual, HUF, Partnership firms, companies, cooperative societies, Trust and other artificial judicial persons have to deduct TDS on Salary.

Q.2. Who is the payee?

A.2. Any employee having taxable income under the head "Salary" shall be treated as payee for TDS u/s 192. For application of S. 192, there must exist employer employee relationship between payer and payee. For eg. Director of company is not employee and as such no TDS u/s 192 on any amount paid to director, visiting professors are not employees and therefore no TDS u/s 192 on the amount paid by the institutions to the visiting faculty.

Q.3. Application of TDS on Non resident Employees?

A.3. Yes, TDS to be deducted by employers on payments made to non resident employee u/s 192.

Q.4. When does the liability to deduct tax at source shall arise u/s 192?

A.4. Liability to deduct tax at source shall arise at the time of actual payment of salary and not at the time of accrual.

Q.5. At what amount tax has to be deducted u/s 192?

A.5. TDS u/s 192 has to be deducted on estimated income of the employee under the head "Salaries" for that Financial Year. No tax will however be required to be deducted at source for financial year 2012-2013 in any case unless the estimated salary income including the value of perquisites, exceeds –

S.No.	*Amount*	*Particulars*
1.	Rs. 250000	For an individual resident in India of the age of 60 years and above but less than 80 years.
2.	Rs. 500000	For an individual resident in India of the age of 80 years of more.
3.	Rs.200000	Any other individual.

Q.6. At which rate TDS has to be deducted u/s 192?

A.6. TDS U/s 192 has to be deducted at the average of income tax computed on the basis of rates in force during the financial year. The total tax to be deducted on the estimated income of the employee for the relevant financial year is divided the number of months of his employment. The amount so arrived is the monthly deduction of tax at source.

However, if the employee does not have PAN No., TDS shall be deducted 20% without including Education Cess & SHEC, if the normal tax rate in this case is less than 20%. **(Please refer section 206AA and Circular No.8 dated 13.12.2010).**

Q.7 Whether employer is also liable to deduct tax on non monitory perquisites?

A.7. Section 192 (1)(A) provides an option to employer to pay tax on behalf of employee on non monitory perquisites however it is not mandatory. For the purpose of paying tax by employer u/s 1(a) tax shall be determined at the average rate of income tax of tax in force on the income chargeable under the head salaries including the value of non monitory perquisites.

Q.8 How to compute TDS on Salary in case of simultaneous employment? What are relevant Forms and Rules?

A.8. Situation1: In case where change of employment made during the year–Where the employee was employed some other person before joining the present employer during the financial year, tax will be deducted by the present employer by taking into account the salary received from the TDS employer, tax deducted at source etc. for this purpose the employee has to submit in writing the full particulars regarding salary received.

Situation 2: Where employee is simultaneously working under more than one employer. In this case tax will be deducted by the employer, the concerned employee so chooses. The employee shall submit the details of salaries due or received by him from other employer(s) the tds there from and such other particulars as may be prescribed in Form No.12B.

The relevant judicial pronouncements:

1. Employer not liable to deduct tax, if employee not intimate his earning from other employer, it was so held in **CIT V/s Marubeni India Pvt. Ltd. (2007) 294 ITR 157 (Del).**

2. The assessee is not liable to deduct tax at source on payments received by its employee from any other employer. **CIT v/s Woodward Governor India Pvt. Ltd. 295 ITR 1 Del) (See also Kinetics Technology (India) Ltd. v/s Jt. CIT (2006) 94 ITD 63 (Del)**

Q.9. <u>What are the provisions of section 192[3] of the Act? Can an employer increase or decrease the amount of monthly TDS on Salary</u>?

A.9. Yes, the employer is authorized to adjust such excess/deficit in the subsequent months. However the same is permissible in case of same employee. **[Please refer CIT v/s Enron Expat Services Inc (2010) 45 DTR 154: 194 Taxman 70 (Uttarakhand)] [See also Commissioner of Income-tax v. Delhi Public School (2012) 247 CTR 317 (Del)].**

The relevant judicial pronouncements:

1. Interest u/s 201(1A) is not applicable if the exact amount of TDS is not deducted in each month. **ITO V/ Asia Hotels Ltd. (1991) 41 TTJ (Del) 28.**

2. No interest u/s 201(1A) for non deduction in initial months on grant of ex gratia, increments and DA since there was no default in terms of section 192(3).**{Executive Engineer, T.L.C. Division, A.P. State Electricity Board v. ITO (1987) 20 ITD 318 (Hyd)].**

3. In correct estimate of salary cannot inevitably lead to inference that estimation is not honest and fair. **[Lintas Indi Ltd. v. Asst. CIT (206)5 SOT 310 (Mum) ; Gwalior Rayon Silk Co. Ltd. V. CIT (1983) 140 ITR 832 (MP) and Nishith M. Desai v. ITO (206) 9 sot 42 (Mum)] ; CIT v ONGC Ltd. (2002) 254 ITR 121, 124 (Guj).**

4. The adjustment either of increasing or decreasing the tax deduction at source is to be made with reference to the estimated income of "the assessee" i.e. an employee and not all of them taken together deducting from some and refunding to others. **(Shriram Pistons & Rings Ltd. v. ITO (2000) 16 DTC 331(Del-Trib) (2000) 73 ITD 30 (Del-Trib)].**

Q.10. Can the person, responsible for any deduction of tax at source, adjust the excess tax deducted and deposited against the subsequent tax to be deducted in respect of payment to any other person?

A.10. No. In this case the employee, whose tax has been deducted in excess than required, shall be allowed to take back the refund after filing return of income.

Q.11. What are the provision for deduction of tax at source on accumulated balance of recognized provident fund?

A.11. Section 192(4) states that the trustees of a recognized provident fund, or any other person, authorized by the regulation of the fund to make payment of accumulated balances due to employees shall deduct tax at the time when such accumulated balance due to the employee is paid, where such payment from recognized provident fund is taxable.

Q.12. Whether benefit of lower deduction or no deduction of TDS is available u/s 192?

A.12. Yes. However assessee to whom the salary is payable may make an application in Form No.13 to the Assessing Officer and if the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income tax at any lower rate or no deduction of income-tax, he my given such certificate as may be appropriate.

W.E.F. 1-4-2010, as per section 206AA(4), no certificate under section 197 shall be granted unless the application made in Form No.13 under that section contains the Permanent Account Number of the applicant.

Q.13. What the provisions of TDS on salary in case where employer undertakes to pay tax free salary?

A.13. Where an employer undertakes to pay tax free income to an employee, what he undertakes to pay is an agreed sum of money plus the tax payable for that amount. Therefore, at the time of making the estimate of salary income for the purpose of making deduction under section 192(1), the employer is under an obligation to take into consideration not only the actual amount that has been paid to the employee but also the tax payable on the salary income . **[British Airways v. CIT (1992) 193 ITR 439 (Cal)].**

Q.14. Whether the employer is liable to deduct tax at source on amount paid as compensation to employee upon settlement on termination of employment?

A.14. No. **please refer Mahindra Singh Dharwal v. Hindustan Motors Ltd. (1985) 152 ITR 68 (SC)], All India Reporter Ltd. v. Ramachandra D. Datar (1961) 41 ITR 446 (SC)].,**

Q.15. How the tax to be deducted at source shall be calculated in case employee is earning income, which is taxable under other heads?

A.15. where an employee also has any income (not being a loss other than a loss under the head house property) for the same financial year, chargeable under any other head, he may furnish the statement of such other income and any tax deducted thereon to his employer to take them into consideration while deducting tax from his salary. However the resultant tax deductible u/s 192 cannot be less than the amounts that would have been deductible if such other income and tax deducted there on would not have been taken in to account.

However, any loss incurred under the head "Income from house property" can be taken in to account while determining TDS u/s 192.

Q.16. Whether private arrangement for making tax – free payments can discharge obligation to deduct tax at source?

A.16. No, Whatever the private arrangements between the payor and payee may be, the payer's liability under the statute is clear. **Please refer John Patterson & Co. (India) Ltd. V. ITO (1959) 36 ITR 449 (Cal.)**

Q.17. Whether employer should rely upon employees assurance about making of savings by him while determining TDS u/s 192. ?

A.17. No**.** On mere assurance of petitioner that he will make saving of particular amount without any documentary proof, it is not justifiable to reduce the TDS from salary proportionately. **Please refer Major General, Vinay Kumar Singh v. UOI (2000) 18 DTC 19 (MP – HC) see also Koti Enterprises Pvt. Ltd. v. ITO (2000) 74 ITD 437 (Cal.) (SMC).**

Q.18. Whether provisions of S. 192 shall also apply to any remuneration in addition to 'Salary'?

A.18. Yes Remuneration in addition to salary received by employee for work done is chargeable as ' Salary Income', therefore the same is liable for tax deduction at source. **Please refer CIT v. V.R. Chaphekar (1977) 107 ITR 49 (Bom.) also refer American Express Bank Ltd V ITO (2002) 74 TTJ (Del – Trib) 599.**

Q.19. Whether transport facility given to employees from their residence to office and vice versa is a perquisite to attract TDS u/s 192?

A.19. **Please refer Transworks information services Ltd. V ITO (2009) 29 SOT 543 (Mum).**

Q.20. Whether the employee is liable to once again pay tax where employer duly deducted Tax u/s 192 but not had issued TDS certificate?

A.20. once an employer has deducted tax at source employee assessee cannot be held responsible for payment once again. **Please refer Pranab Kumar Chakraborty V DCIT (2008) 115 ITD 113 (Mum), see also J.G. Joseph v JCIT (2008) 303 ITR (AT) 395 (Mum).**

Q.21. Whether provisions of s. 192 shall also apply to salary paid by non resident employer to a non resident employee for services rendered in India?

A.21. Yes, Provisions of S. 192 shall apply if the salary was paid for services rendered in India even though the employers as well as employee were nonresident and the payment is made outside India. **Please refer Bobcock Power (Overseas Projects) Ltd. v. ACIT (2002) 81 ITD 29 (Del).**

Q.22. When nonresident employer is deducting tax, whether the resident employer is also liable to deduct tax at source u/s 192 to whom the services of the employee have been made available?

A.22. No, Please refer Cholamandalam MS General Insurance Co. Ltd., In re (2009) 309 ITR 356 (AAR) (Del).

Q.23. Whether the home salary payment made to expatriated employees by the foreign company in foreign currency abroad can be held to be 'deemed to accrue or arise in India', consequently whether tax u/s 192 shall be deductible thereon?

A.23. Whether the home salary payment made to expatriated employees by the foreign company in foreign currency abroad can be held to be 'deemed to accrue or arise in India' would depend upon the in-depth examination of the facts in each case. If the home salary/ special allowance payment made by the foreign company abroad is for rendition of services in India and if no work is found to have been performed for foreign company, then such payment would certainly come under section 192 (1), read with section 9(1)(ii). **Please refer CIT v Eli Lilly & Co. (India) (P.) Ltd.*[2009] 312 ITR 225 (SC).**

Q. 24 Whether fees paid to consultant doctor are covered by S. 192?

A.24. Fees paid to consultant doctors by assessee-hospital under a contract (FGC) are covered by section 194J and not section 192**. ITO v. Apollo Hospitals International Ltd.[2011] 9 taxmann.com 95 (AHD. - ITAT)**

However where there is a employer-employee relationship between assessee and consultant doctors and, consequently, remuneration paid to them was chargeable to tax under head 'Salaries' and payments in question were subject to deduction of tax as per provisions of section 192 and not section 194J**. St. Stephen's Hospital v. Dy. CIT, [2006] 6 SOT 60 (Delhi)**

Q.25. Whether the provision of S. 40(a)(iii) shall attract, where deduction of Salary claimed being due but TDS not deducted since the same is not actually paid?

A.25. Where assessee claimed deduction of salary payable to its employee outside India on accrual basis and deducted tax at source under section 192, at time of payment or remittance of salary, assessee's claim would not be hit by provisions of section 40(a)(iii). **Please refer Citigroup Global Markets India (P.) Ltd.* v Dy. CIT [2009] 29 SOT 326 (MUM.)**

Q.26. whether shares and stock option plan offered at concessional rate will be treated as perquisite for the purpose of deduction u/s 192?

A.26. No. payer is not liable to deduct TDS under section 192 in respect of issue of its shares under stock option plan to its employees at a concessional rate as it could not be treated as a perquisite (salary). **Please refer CIT v Wipro Ltd. [2009] 319 ITR 289 (KAR.)**

Q.27. Whether employer responsible for deducting TDS in case of misuse of meal coupons by employee?

A.27. No. where employer had distributed free food/meal coupons to its employees for purchase of meals only at specified eating points; such coupons were not transferable; and value of each coupon did not exceed monetary limit provided by rule 3(7)(iii), merely because some of employees had misused said facility by using coupons for other purposes, employer could not be treated to be in default for non-compliance with requirement of deducting tax at source under section 192, **Please refer CIT(TDS) v. Reliance Industries Ltd. [2009] 308 ITR 82 (GUJ.)**

Q.28. Whether reimbursement of expenses to parent company on account of expenses of globol manager shall attract TDS u/s 192?

A.28. No, Amount paid by assessee-company to its parent company on account of reimbursement of expenditure incurred in respect of global accounts manager, could not be treated as payment of salary, so as to attract deduction of tax at source. **Please refer Expeditors International (India) (P.) Ltd v. ACIT [2008] 118 TTJ 652(Delhi).**

However Salaries paid overseas to managing director for services rendered by him in India would fall under head 'salaries' as income earned in India and chargeable to tax and, consequently, section 192 would apply. **Kinetic Technology (India) Ltd. v. ITO, [2005] 96 ITD 441 (Delhi)**

Q.29. Whether tips paid by customers to employees working in a restaurant can be considered as part of their salary liable for deduction of tax at source?

A.29. No, **please refer Nehru Place Hotels Ltd. v. ITO [2008] 173 Taxman 88.**

Q.30. Whether foreign employer is liable to deduct tax at source on salary paid to expatriate technicians, account of remuneration for services rendered by them in India, irrespective of their residential status.?

A.30. Yes, Payment made to expatriate technicians by foreign employer, having permanent establishment in India, on account of remuneration for services rendered by them in India, is liable to tax in India irrespective of their stay in India. Therefore, foreign employer is liable to deduct tax at source U/s 192 while making such payments to expatriates. **Please refer Pride Foramer S.A. v. ACIT, [2005] 97 ITD 86 (Delhi).**

Q.31. Where director of a company is receiving commission in addition to Salary, whether TDS will be deducted upon actual payment.?

A.31. No, commission shall become taxable on due basis. **Please refer Sanjib Kumar Agarwal V CIT (2009) 310 ITR 295 (Cal).**

Q.32. Whether honorarium to part time teacher shall attract deduction u/s 192.?

A.32. Honorarium to part time teacher held as salary, if the employee is under the control of the employer, **please refer Max Mueller Bhavan, In re (2004) 268 ITR 31, 32, 35 – 36 (AAR).**

Q33. Whether salary paid to MP, MLA. Ministers & Chief Ministers shall attract TDS u/s 192?

A33. MP and MLA are not employed by any body, rather they are elected by the public, their remuneration cannot be said to be salary within the meaning of section 15, such income shall be taxable under the head income from other sources as consequent to election they acquire constitutional position and discharge functions and obligations **[CIT v Shiv Charan Mathur (2008) 306 ITR 126 (Raj)]**

However pay and allowances received by the Chief Minister of State or a minister is salary. It cannot be taxed under the head income from other source **(Please refer Lalu Prasad v CIT (2009) 316 ITR 186 (Patna).**

Article 125 & 221 of the constitution deals with the salaries of Supreme Court and High Court Judges respectively and expressly state that what the judges receive are salaries. **[Justice Deoki Nandan Agarwala v. Union of India (1999) 237 ITR 872 (SC).**

IMPORTANT CIRCULARS

1. **Circular: No. 707, dated 11/07/1995 -** Where non-residents are deputed to work in India and taxes are borne by employers, in certain cases if an employee to whom refunds are due has already left India and has no bank account here by the time assessment orders are passed, refund can be issued to employer as tax has been borne by it.

2. **Circular : No. 761, dated 13-1-1998.-** Banks has been advised that as per section 17(1)(ii) of the Income-tax Act, 1961, the term 'salary' includes pension, once tax has been deducted under section 192 of the Income-tax Act, 1961, the tax-deductor is bound by section 203 to issue the certificate of tax deducted in Form 16. No employee-employer relationship is necessary for this purpose the certificate in Form No. 16 cannot be denied on the ground that the tax deductor is unaware of the payees' other income.

3. **Circular: No. 285 [F. No. 275/77/79-IT(B)], dated 21-10-1980-** Where the tax is deducted at source and paid by the branch office of the assessee and the quarterly statement/annual return (in case of salaries) of tax deduction at source is filed by the branch, such branch office would be treated as a separate unit independent of the head office. After meeting any existing tax liability of such a branch, which would normally be in relation to the deduction of tax at source, the balance amount may be refunded to the said branch office. The Income-tax Officer, who will refund the amount, would be the one who receives the quarterly statement/annual return (in case of salaries) of tax deduction at source from that branch office and keeps record of the payments of tax deduction at source made by that branch.

Chapter -III

TDS FROM PAYMENTS TO CONTRACTORS

194C. (1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to—

(*i*) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(*ii*) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,

of such sum as income-tax on income comprised therein.

(2) Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

(3) Where any sum is paid or credited for carrying out any work mentioned in sub-clause (e) of clause (*iv*) of the *Explanation,* tax shall be deducted at source—

(*i*) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or

(*ii*) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.

(4) No individual or Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

(5) No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor, if such sum does not exceed [thirty] thousand rupees :

Provided that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds [seventy-five] thousand rupees, the person responsible for paying such sums referred to in sub-section (1) shall be liable to deduct income-tax under this section.

(6) No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his Permanent Account Number, to the person paying or crediting such sum.

(7) The person responsible for paying or crediting any sum to the person referred to in sub-section (6) shall furnish, to the prescribed income-tax authority or the person authorised by it, such particulars, in such form and within such time as may be prescribed.

Explanation.—For the purposes of this section,—

(*i*) "specified person" shall mean,—

(*a*) the Central Government or any State Government; or

(*b*) any local authority; or

(*c*) any corporation established by or under a Central, State or Provincial Act; or

(*d*) any company; or

(*e*) any co-operative society; or

(*f*) any authority, constituted in India by or under any law, engaged either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both; or

(*g*) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India; or

(*h*) any trust; or(*i*) any university established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a university under section 3 of the University Grants Commission Act, 1956 (3 of 1956); or

(*j*) any Government of a foreign State or a foreign enterprise or any association or body established outside India; or

(*k*) any firm; or

(*l*) any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, if such person,—

(A) does not fall under any of the preceding sub-clauses; and

(B) is liable to audit of accounts under clause (*a*) or clause (*b*) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor;

(*ii*) "goods carriage" shall have the meaning assigned to it in the *Explanation* to sub-section (7) of section 44AE;

(*iii*) "contract" shall include sub-contract;

(*iv*) "work" shall include—

(*a*) advertising;

(*b*) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(*c*) carriage of goods or passengers by any mode of transport other than by railways;

(*d*) catering;

(*e*) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer,

but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer.]

QUESTIONS AND ANSWERS ON SECTION 194C

Q.1 Who is responsible to deduct tax u/s 194C?

A.1. Any person responsible for paying any sum to any resident contractor for carrying out any work (including supply of labour for carrying out any work) under a contract in pursuance of a contract between contractor and person specified, shall deduct in context at the time of such payment thereof in cash of by issue of a cheque or draft or by any other mode or its credit to contractor's account or any other account, by whatever name called, whichever happens earlier. Specified person are referred in explanation to section 194C, as under:-

(a) the Central or State Government; or

(b) any local authority; or

(c) any corporation established by or under a Central, State or Provisional Act; or

(d) any company; or

(e) any co-operative society; or

(f) any authority constituted in India by or under any law, engaged either for the purpose of dealing with the satisfying the needs for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages or for both (e.g. CIDCO, HUDCO, etc.] ; or

(g) any society registered under the Societies Registration Act, 1860 or under any such corresponding law; or

(h) any trust; or

(i) any university or deemed university; or

(j) any government of a foreign state or foreign enterprise or any association or body established outside India; or

(k) any firm;

(l) any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, whether incorporated or not other than those falling under any of the preceding clauses, whose total sales, gross receipts or turnover

from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor.

W.e.f. 1-10-2009 as per newly inserted section 194C(6), no deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his Permanent Account Number, to the person paying or crediting such sum.

Q.2. At what rate TDS has to be deducted u/s 194C ?

A.2 (a) 1% where the payment is being made or credit is given to an individual or a HUF.

(b) 2% where the payment is being made or credit is to be given to any other entity.

W.e.f. 1-10-209, the nil rate will be applicable if the transporter quotes his PAN. The rate of TDS will be 20% in all the above cases, if PAN is not quoted by the deductee on or after 1-4-2010.

No surcharge, education cess and SHEC shall be added. Hence, TDS shall be deductible at basic rates.

Q.3. What is the meaning of work for the purpose of section 194C?

A.3. Meaning of work for the purpose of section is contained in clause (iv) of Exoplanation (iv) to section 194C(7) "Work" shall include-

(a) Advertising;

(b) Broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods or passengers by any mode of transport other than by railways;

(d) catering;

(e) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer,

but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer.

Q.4. Whether contract for Sale shall also be covered by TDS u/s 194C?

A.4. No, the provisions of S. 194C shall not apply to contract for sale, it has been provided that "work" shall not include manufacturing or supply a product according to the requirement or specification of a customer by using raw material purchased from a person other than such customer as such a contract is a contract for `sale', **please refer Circular : No. 681, dated 8-3-1994.**

Purchase of advertisement material from a person without supplying any material used in preparation of said material shall be a contract for sale. **Please refer Dy. CIT v. Eastern Medikit Ltd.* [2012] 135 ITD 461 (ITAT-Delhi)**

Q.5. Whether Individuals and HUF are laible to deduct tax if the payment made to a contractor is for personal use?

A.5. Section 194C(4) provides that no individual or a Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

Q.6. Under what circumstances TDS u/s 194C is not deductible?

A.6. (i) Where single payment does not exceed Rs.30000/-

(ii) Where the aggregate payment does not exceed Rs.75000/-

(iii) In case of transporter TDS u/s 194C is not deductible if the transporter provides its PAN No.

(iv) In case, where payee applied in form 13 to AO for non deduction, being his taxable income including rent below taxable limit, and has obtained certificate thereof.

Q.7. Are Individuals and HUF also covered by the provisions of section 194C for deduction of tax on payments to contractors?

A.7. As per proviso to section 194C(2) individuals and HUF whose total sales/turnover/receipts from the business/profession carried on by him

in the immediately preceding financial year exceeded the monetary limit specified under section 44AB(a) or (b) (i.e. it exceed Rs.6,00,000 / 15,00,000, as the case may be), are also required to deduct tax at source.

Q.8. Whether provision of S. 194C shall also apply to hiring or renting of equipment?

A.8. The provisions of section 194C would not apply in relation to payments made for hiring or renting of equipments, etc. Hiring of an assets does not amount to a contract to carrying out any work. **Please refer CIT v. Poompuhar Shipping Corporation Ltd. (2006) 282 ITR 3 (Mad). See also Roy Mitra Enterprise v. ACIT [2012] 20 taxmann.com 86 (ITAT-Kol.), Jaiprakash Enterprises Ltd. v. ACIT [2012] 49 SOT 1 (ITAT-Luck.)**

Q.9. Whether supply of out sources, manufactured goods under contract will be treated as a works contract u/s 194C.?

A.9. It was held that the supply of outsourced manufactured goods by the contract manufacturer constituted an outright sale and could not be treated as a works contract within the scope of section 194C. Consequently, the assessee was not liable to deduct tax at source from the purchase price of the goods paid by it to the contract manufacturer or the supplier. **[Tuareg Marketing (P) Ltd. v. ACIT (2009) 28 SOT 1 (Del); Novartis Healthcare (P) Ltd. v. ITO, TDS (Mum). See also CIT v. Nova Nordisk Pharma India Ltd. [2012] 341 ITR 451 (Kar.), CIT v. Glenmark Pharmaceuticals Ltd. (2010) 324 ITR 199 (Bom), Dy CIT v. Reebok India Co. (2006) 10 TTJ 976 (Del). Also see Whirlpool of India Ltd. v. Jt. CIT (2007) 16 SOT 435 (Del)].**

Q.10. Whether Service contract covered by S. 194C?

A.10. Yes, **Circular :** *No. 681, dated 8-3-1994*

Q.11. Whether provisions of section 194C shall apply in respect of all contracts?

A.11. Before a person can be called a contractor his status must have nexus in its characteristics as carrying out work for another person as a contractor in the ordinary sense and not merely carrying on activities of his own business or profession in the ordinary course by charging fees or remuneration. **[All Gujarat Federation of Tax Consultants v CBDT (1995) 214 ITR 276 (Guj)].**

Q.12. Is there any circular that may help in differentiating between works contract and any other contract?

A.12. Yes, Circular No.681, dated 8-3-1994 issued by CBDT elaborates upon various kinds of contracts that may fall within the definition of works contract and also specifies the nature of contract that shall fall out of the preview of section 194C.

Q.13. Whether the provisions of section 194C are also applicable to non resident?

A.13. No, the payments made to non resident contractor would come within the preview of section 195.

Q.14. Whether provisions of section 194C shall apply to franchise agreements?

A.14. No, the provisions of section 194C shall not apply to franchise agreement as under the franchise arrangement, their consist mutual obligations and rights. **Please refer CIT v. Career Launcher India Ltd. (2012) 250 CTR 240 (Del)].**

Q.15. Where the assessee entered into contract with transporter for transporting goods from plant to various destination, whether such contract shall attract TDS u/s 194C or 194I?

A.15. (i) That to decide whether a contract is one for "transportation" or for "hiring", the crucial thing is to see who is doing the transportation work. If the assessee takes the trucks and does the work of transportation himself, it would amount to hiring. However, if the services of the carrier were used and the payment was for actual transportation work, the contract is for transportation of goods and not an arrangement for hiring of vehicles, and as such provisions of section 194C shall apply. **Please refer ITO v. Indian Oil Corporation (Del) (Trib).www. itatonline.org], see also CIT (TDS) v. Swayam Shipping Services P. Ltd. (2011) 339 ITK 647 (Guj)].**

(ii) Payments made by assessee to transporters providing vehicles and driver to pick and drop employees is liable to TDS under section 194C and not section 194-I. **Bharat Electronics Ltd. v. Dy. CIT (TDS), [2012] 50 SOT 172 (ITAT-Delhi)**

However in case of payments made by transport contractor for hiring tankers to use them in transport contract business is not liable to

TDS under section 194C, in such case S. 194I shall apply. **Bhail Bulk Carriers v. ITO [2012] 50 SOT 622 (ITAT-Mum.)**

Q.16. Whether provisions of S. 194C shall apply to subcontracting?

A.16. Yes, where assessee contractor got work done through another party under his supervision and control, there existed relationship of 'contractor' and 'sub-contractor' requiring assessee to deduct tax at source under section 194C. **Ratan J Batliboi v. ACIT [2012] 24 taxmann.com 96 (ITAT-Mum.)**

Q.17. Whether, having a contract is a primary requirement for deduction of tax u/s 194C?

A.17. Yes, In absence of any contract between assessee-contractor and sub-contractor, assessee was not liable to deduct TDS under section 194C on payments made to them. **Ratnakar Sawant, Dinesh N. Shah & Co. v. ITO, [2012] 22 taxmann.com 218 (ITAT-Mum.)**

Q.18. Whether the provisions of Section 194C shall also apply in a situation when assessee entered in to a separate contract for supply of goods and erection work?

A.18. In a case where three separate agreements were entered into : one for supply of goods, second for erection works and third for civil engineering work, section 194C cannot be pressed into service to deduct tax at source on payment for supply of material merely because said agreement is a part of composite transaction. **CIT v. Karnataka Power Transmission Corporation Ltd. [2012] 21 taxmann.com 473 (Kar.)**

Q.19. Whether TDS u/s 194C deductible on erection and commissioning of plan even in case of composite contract?

A.19. In case of common purchase order for supply of plant and for erection and commissioning of plant, the pre dominant object of the contract is the purchase of the plant and the erection and commissioning is only incidental. However in the cases where two contracts are separable contracts TDS shall be deductible on the amount attributable to the erection and commissioning and not on the gross sum paid by the assessee. **Please refer Senior Accounts Officer (O & M), Haryana Power Generation Corpn. Ltd. v. ITO (2006) 103 TTJ 584 (Del).**

Q.20. Whether Contract for carrying goods and passengers by trailer, utility vans, water tanker, sumos, etc., is covered by section 194C or by section 194-I?

A.20. Contract for carrying goods and passengers by trailer, utility vans, water tanker, sumos, etc., is covered by section 194C and not by section 194-I. **CIT (TDS) v. Reliance Engineering Associates (P.) Ltd. [2012] 21 taxmann.com 539 (Guj.)**

Q.21. Whether Production of motion films or cinematographic films would fall within meaning of expression 'work' as contemplated under section 194C?

A.21. Yes, production of motion films or cinematographic films would fall within meaning of expression 'work' as contemplated under section 194C. **Nitin M. Panchamiya v. ACIT*[2012] 50 SOT 468 (ITAT- Mum.)**

Q.22. Whether contract for supply of labour shall attract TDS u/s 194C?

A.22. Yes, payment made to Calcutta Dock Labour Board for supply of labor for assessee's business, attracted TDS provisions of section 194C **Dy. CIT v. Kamal Mukherjee & Co. (Shipping) (P.) Ltd.* [2012] 51 SOT 73 (ITAT- Kol.), see also Associated Cement Co. Ltd. v. CIT (1979) 120 ITR 444 (Pat).**

Q.23. Whether sponsorship money paid shall attract TDS u/s 194C?

A.23. Where assessee-management consultant was organizing conferences and sponsorship money was paid to it after conceptualization of conferences, it could not be said that assessee had undertaken to organize said conference at instance of sponsors and, hence, provisions of section 194C (2) could not be invoked. Dr**. Raju L Bhatia v. JCIT* [2012] 134 ITD 615 (ITAT-Mum.)**, however **Circular: No. 715, dated 8-8-1995**, provides for TDS u/s 194C on sponsorship.

Q.24. Whether payments made to finance companies in consideration of providing access to their customer database shall attract TDS u/s 194C?

A.24. Where assessee entered into agreements with finance companies to provide access to their customer database, it was not a contract for service and, thus, assessee was not required to deduct tax at source while making payments to finance companies. **Dy. CIT v. Armour Consultants (P.) Ltd.* [2012] 50 SOT 140 (ITAT-Chennai)**

Q.25. Whether provisions of section 194C shall apply to payment made to Security Guard?

A.25. Yes, please refer **Glaxo Smith Kline Pharmaceuticals Ltd. v. ITO (TDS) (2011) 48 SOT 643 (Pune)(Trib).**

Q.26. Whether payment made to daily wager shall attract TDS u/s 194C?

A.26. No, please refer **CIT v. DewanChand (2009) 17 DTR 337 (Del)**.

Q.27. Whether the provision of section 194C shall also apply to the collections made by contractor?

A.27. Tax u/s 194C has to be deducted from the payments made to a contractor at the time of such payment to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or any other more and therefore no tax deductible on the amount collected by contractor on behalf of municipal committee. **{S.S. and Co. Octroi Contractors v. State of Punjab and Others (204) 268 ITR 398 (P&H)].**

Q.28. What is the criteria to distinguish between works contract and contract for sale of goods?

A.28. The question whether a particular contract is a contract for sale or works contract shall depend upon the facts and circumstances of each case. **Please refer State of Gujarat v Variety Body Builders 38 STC 176 (SC) and Anamolu Seshagiri Rao & Co. v. State of Andhra Pradesh (1973) 32 STC 51 (AP), P.S.& Company v. State of Andhra Pradesh 56 STC 283, Sentinel Rolling Shutters & Engineering Co. (P) Ltd. v. CST (1978) 42 STC 409 (SC).**

Q.29. Whether a contract to improve customers goods will amount to works contract?

A.29. Yes, please refer **Shankar Vittal Motor Co. v. State of Mysore (1964) 15 STC 771 (Mys).**

Q.30. Whether provisions of section 194C shall apply to bottling contracts ?

A.30. yes, please refer **United Exercise v. CST 28 STC 16.**

Q.31. Whether provisions of section 194C shall apply to periodic repairing?

A.31. yes, please refer **Eastern Typewriter Service v. State of Andhra Pradesh (1978) 42 STC 18 (AP), also refer Circular: No. 715, dated 8-8-1995.**

Q.32. Whether provisions of section 194C shall apply on supply of packing material?

A.32. Where assessee-company purchased printed cartons with its own specifications from different suppliers for packing plastic containers in which rolls films were packed, payment for said purchases was not contractual payment requiring deduction of tax under section 194C. Please refer **Jindal Photo Films Ltd. v. ITO [2006] 5 SOT 272 (Delhi), see also Wadilal Dairy International Ltd. v. Asssitant CIT (2001) 70 TTJ (Pune-Trib) 77. Also see Balsara Home Products Ltd. v. ITO (2005) 94 TTJ (Ahd.) 970. See also ITO v. Dr.Willmar Schwabe India Pvgt. Ltd. (205) 3 SOT 71 (Del).**

Q.33 Whether provision of section 194C shall apply on supply of printed labels by printer to assessee?

A.33. The supply of printed labels by the printer to the assessee amounted to sale and not a works contract and that the provisions of S. 194C were not attracted. **Please refer CIT v. Dabur India Ltd. (2005) 198 CTR (Del) 375. BDA Ltd. v. ITO, (TDS)(2006) 281 ITR 999 (BOM), CIT v. Dabur India Ltd. (2006) 283 ITR 197 (Del) also refer Circular: No. 715, dated 8-8-1995.**

Q.34. Whether provisions of section 194C shall apply to clearing and forwarding agent?

A.34. Payment made to clearing and forwarding agent is of the nature of payment made for carrying out any work. **Please refer National Panasonic India Pvt. Ltd. v. DCIT (TDS) (205) 3 SOT 16 (Del). See also Glaxo Smith Kline Consumer Healthcare Ltd. v. ITO (2007) 12 sot 221 (Del Trib).**

Q.35. What would be the scope of an advertising contract for the purpose of section 194C of the Act?

A.35. The term 'advertising' has not been defined in the Act. During the course of the consideration of the Finance Bill, 1995, the Finance Minister clarified on the Floor of the House that the amended provisions of tax deduction at source would apply when a client makes payment to an advertising agency and not when advertising agency makes payment to the media, which includes both print and electronic media. The deduction is required to be made at the rate of 1 per cent. It was further clarified that when an advertising agency makes payments

to their models, artists, photographers, etc., the tax shall be deducted at the rate of 5 per cent as applicable to fees for professional and technical services under section 194J of the Act. **Circular: No. 715, dated 8-8-1995.**

Q.36. At what rate is tax to be deducted if the advertising agencies give a consolidated bill including charges for art work and other related jobs as well as payments made by them to media?

A.36. The deduction will have to be made under section 194C at the rate of 1 per cent. The advertising agencies shall have to deduct tax at source at the rate of 5 per cent under section 194J while making payments to artists, actors, models, etc. If payments are made for production of programmes for the purpose of broadcasting and telecasting, these payments will be subjected to TDS @ 2 per cent. Even if the production of such programmes is for the purpose of preparing advertisement material, not for immediate advertising, the payment will be subject to TDS at the rate of 2 per cent. **Circular: No. 715, dated 8-8-1995.**

Q.37 Where the tax is required to be deducted at source on payments made directly to the print media/Doordarshan for release of advertisements?

A.37. The payments made directly to print and electronic media would be covered under section 194C as these are in the nature of payments for purposes of advertising. Deduction will have to be made at the rate of 1 per cent. It may, however, be clarified that the payments made directly to Doordarshan may not be subjected to TDS as Doordarshan, being a Government agency, is not liable to income-tax. **Circular: No. 715, dated 8-8-1995.**

Q.38. Whether a contract for putting up a hoarding would be covered under section 194C or 194-I of the Act?

A.38. The contract for putting up a hoarding is in the nature of advertising contract and provisions of section 194C would be applicable. It may, however, be clarified that if a person has taken a particular space on rent and thereafter sub lets the same fully or in part for putting up a hoarding, he would be liable to TDS under section 194-I and not under section 194C of the Act. **Circular: No. 715, dated 8-8-1995.**

Q.39. Whether payment under a contract for carriage of goods or passengers by any mode of transport would include payment made to a travel agent for purchase of a ticket or payment made to a clearing and forwarding agent for carriage of goods?

A.39. The payments made to a travel agent or an airline for purchase of a ticket for travel would not be subjected to tax deduction at source as the privity of the contract is between the individual passenger and the airline/travel agent, notwithstanding the fact that the payment is made by an entity mentioned in section 194C(1). The provision of section 194C shall, however, apply when a plane or a bus or any other mode of transport is chartered by one of the entities mentioned in section 194C of the Act. As regards payments made to clearing and forwarding agent for carriage of goods, the same shall be subjected to tax deduction at source under section 194C of the Act. **Circular: No. 715, dated 8-8-1995.**

Q.40. Whether a travel agent/clearing and forwarding agent would be required to deduct tax at source from the sum payable by the agent to an airline or other carrier of goods or passengers?

A.40. The travel agent, issuing tickets on behalf of the airlines for travel of individual passengers, would not be required to deduct tax at source as he acts on behalf of the airlines. The position of clearing and forwarding agents is different. They act as independent contractors. Any payment made to them would, hence, be liable for deduction of tax at source. They would also be liable to deduct tax at source while making payments to a carrier of goods, **Please refer CIT v Cargo Linkers (2008) 218 CTR 695 (Del), ACIT v Grandprix Fab.(P) Ltd. (2010) 34 DTR 248 (Del – Trib). Circular: No. 715, dated 8-8-1995.**

Q.41. Whether section 194C would be attracted in respect of payments made to couriers for carrying documents, letters, etc.?

A.41. The carriage of documents, letters, etc., is in the nature of carriage of goods and, therefore, provisions of section 194C would be attracted in respect of payments made to the couriers. **Circular: No. 715, dated 8-8-1995.**

Q.42. In case of payments to transporters, can each GR be said to be a separate contract, even though payments for several GRs are made under one bill?

A.42. Normally, each GR can be said to be a separate contract, if the goods are transported at one time. But if the goods are transported continuously in pursuance of a contract for a specific period or quantity, each GR will not be a separate contract and all GRs relating to that period or quantity will be aggregated for the purpose of the TDS. **Circular: No. 715, dated 8-8-1995.**

Q.43. Whether there is any obligation to deduct tax at source out of payment of freight when the goods are received on "freight to pay" basis?

A.43. Yes. The provisions of tax deduction at source are applicable irrespective of the actual payment. **Circular: No. 715, dated 8-8-1995.**

Q.44. Whether a contract for catering would include serving food in a restaurant/sale of eatables?

A.44. TDS is not required to be made when payment is made for serving food in a restaurant in the normal course of running of the restaurant/cafe. **Circular: No. 715, dated 8-8-1995.**

Q.45. Whether payment to a recruitment agency can be covered by section 194C?

A.45. Provisions of section 194C apply to a contract for carrying out any work including supply of labour for carrying out any work. Payments to recruitment agencies are in the nature of payments for services rendered. Accordingly, provisions of section 194C shall not apply. The payment will, however, be subject to TDS under section 194J of the Act. **Circular: No. 715, dated 8-8-1995.**

Q.46. Whether section 194C would cover payments made by a company to a share registrar ?

A.46. In view of answer to the earlier question, such payments will not be liable for tax deduction at source under section 194C. But these will be liable to tax deduction at source under section 194J. **Circular: No. 715, dated 8-8-1995.**

Q.47. Whether FD commission and brokerage can be covered under section 194C?

A47. No **Circular: No. 715, dated 8-8-1995.**

Q.48. Whether section 194C would apply in respect of supply of printed material as per prescribed specifications?

A.48. Yes. **Circular: No. 715, dated 8-8-1995.**

Q.49. Whether tax is required to be deducted at source under section 194C or 194J on payment of commission to external parties for procuring orders for the company's product?

A.49. Rendering of services for procurement of orders is not covered under the provisions of section 194C. However, rendering of such services may involve payment of fees for professional or technical services, in which case tax may be deductible under the provisions of section 194J. **Circular: No. 715, dated 8-8-1995.**

Q.50. Whether advertisement contracts are covered under section 194C only to the extent of payment of commission to the person who arranges release of advertisement, etc., or whether deduction is to be made on the gross amount including bill of media?

A.50. Tax is to be deducted at the rate of 1 per cent of the gross amount of the bill. **Circular: No. 715, dated 8-8-1995.**

Q.51. Whether deduction of tax is required to be made under section 194C for sponsorship of debates, seminars and other functions held in colleges, schools and associations with a view to earn publicity through display of banners, etc., put up by the organisers?

A.51. The agreement of sponsorship is, in essence, an agreement for carrying out a work of advertisement. Therefore, provisions of section 194C shall apply. **Circular: No. 715, dated 8-8-1995.**

Q.52. Whether deduction of tax is required to be made on payments for cost of advertisement issued in the souvenirs brought out by various organisations?

A.52. Yes. **Circular: No. 715, dated 8-8-1995.**

Q.53. Whether a maintenance contract including supply of spares would be covered under section 194C or 194J of the Act?

A.53. Routine, normal maintenance contracts which includes supply of spares will be covered under section 194C. However, where technical services are rendered, the provision of section 194J will apply in regard to tax deduction at source. **Circular: No. 715, dated 8-8-1995.**

Q.54. Whether the deduction of tax at source under sections 194C and 194J has to be made out of the gross amount of the bill including reimbursements or excluding reimbursement for actual expenses ?

A.54. Sections 194C and 194J refer to any sum paid. Obviously, reimbursements cannot be deducted out of the bill amount for the purpose of tax deduction at source. **Circular: No. 715, dated 8-8-1995.**

Q.55 Whether provisions of S. 194C shall apply to cooling charges paid to cold storage owners?

A.55 Yes, the arrangement between the customer and cold storage owners are basically contractual in nature and hence the provisions of section 194C (instead of section 194-I) will be applicable to the amount paid as cooling charges by the customers of the cold storage. **[Circular No. 1/2008, dated 10/01/2008].**

Q.56 Whether provisions of S. 194C shall also apply to banks in relation to services rendered by it?

A.56 The provisions of section 194C would not apply in relation to payments made to banks for discounting bills, collecting/receiving payments through cheques/drafts, opening and negotiating Letters of Credit and transactions in negotiable instruments. **Circular : No. 681, dated 8-3-1994**

Chapter –IV

TDS FROM COMMISSION AND BROKERAGE

194H. Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of [ten] per cent :

Provided that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed [five thousand rupees] :

[**Provided further** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (*a*) or clause (*b*) of section 44AB during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income-tax under this section:]

[**Provided also** that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public call office franchisees.]

Explanation.—For the purposes of this section,—

(*i*) "commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities;

(*ii*) the expression "professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA;

(*iii*) the expression "securities" shall have the meaning assigned to it in clause (*h*) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956)[83] ;

(*iv*) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

QUESTIONS AND ANSWERS ON S. 194H

Q.1 who is responsible to deduct tax u/s 194H?

Ans. Any person, (other than individual or a Hindu undivided family) who is responsible for paying, to a resident, any income by way of commission (not being insurance commission referred to in section 194D) or brokerage, shall, deduct income-tax thereon.

However, individuals and HUF who were covered under section 44AB(a) and (b) in the preceding previous year i.e. whose gross turnover/receipts of the business/profession in the immediately preceding financial year exceeded business/profession in the immediately preceding financial year exceed ` 60,00,000 / 15,00,000, as the case may be, are also required to deduct tax at source.

Q.2 What is the point of deduction of TDS u/s 194H?

Ans. It will be deducted at the time of credit of such income to the account of the payee or to any account, whether called suspense account or by

any other name or at the time of payment, of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier.

Q.3. At what rate TDS has to be deducted u/s 194H ?

Ans. The rate of TDS shall be 10%.

Notes:

1. No surcharge, education cess or SHEC shall be added to the above rates. Hence, tax will be deducted at source at the basic rate.
2. The rate of TDS will be 20% in all cases, if PAN is not quoted by the deductee on or after 1-4-2010.

Q.4. Under what circumstances TDS u/s 194H is not deductible?

Ans. **(1)** No deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to the payee, does not exceed ₹ 5,000 (₹ 2,500 upto 30.06.2010)

(2) No tax shall be deducted on any commission or brokerage payable by Bharat Sanchar Nigam Ltd. or Mahanagar Telephone Nigam Ltd. to their public call office franchises (Third proviso to section 194H inserted w.e.f. 1-6-2007)

Q5. What is the meaning of words "Commission or brokerage" for the purpose of section 194H?

Ans. Commission or brokerage includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person:

(a) for services rendered (not being professional services), or

(b) for any services in the course of buying or selling of goods, or

(c) in relation to any transaction relating to any asset, valuable article or thing, not being securities.

Q.6. Whether having Principal-agent relationship is a sine qua non for invoking provisions of section 194H?

Ans. Principal-agent relationship is a sine qua non for invoking provisions of section 194H. When bank issues bank guarantee on behalf of assessee,

there is no principal-agent relationship between bank and assessee and, therefore, assessee is not required to deduct tax at source under section 194H from payment of bank guarantee commission made to bank. ***Kotak Securities Ltd. v. Dy. CIT [2012] 18 taxmann.com 48 (Mum.) see also Jagran Prakashan Ltd.v. Dy. CIT (TDS)* [2012] 21 taxmann. com 489 (All.), ACIT v. Pearl Bottling (P.) Ltd.* [2011] 10 taxmann. com47.(Visakhapatnam.), Ajmer Zila Dngh Utpadaicsang Ltd. V ITO (2009)30 DTR 418 (JP)(Trib)]***

Q.7. Whether TDS u/s 194H is deductible on commission paid by Mother dairies to concessionaires?

Ans. Commission paid by Mother Dairy to concessionaires who sell milk of assessee from booths owned by assessee not liable to TDS under section 194H as principle-agent relationship is missing. ***CIT v. Mother Dairy India Ltd.* [2012] 18 taxmann.com 49 (Delhi), Delhi Milk Scheme v. ITO [2006] 8 SOT 344 (Delhi), Government Milk Scheme V ACIT (2006) 98 ITD 306 (Pune).***

***Q.8.* Whether Provisions of section 194H applicable on discounts offered by laboratories rendering testing facility to collection centers/ franchisees?**

Ans. Where assessee laboratory was rendering services of testing samples to collection centres/franchisees, TDS under section 194H not required in respect of discount offered by assessee to said collection centres/ franchisees. ***SRL Ranbaxy Ltd. v. ACIT[2011] 16 taxmann.com 343 (Delhi).***

Q.9. Whether Provisions of section 194H applicable on discounts offered by Mobile companies to retailers of rechargeable coupons and starter packs?

Ans. Such starter packs/rechargeable coupons were sold by distributors to retailers at rate stipulated by assessee which was less than MRP on Sim cards - After selling all Sim cards and pre-paid coupons to retailers, franchisees were to make payment of sale proceeds to assessee after deducting a discount . Since there was principal-agent relationship between assessee and franchisees and, therefore, receipt of discount by franchisee was, in real sense, commission paid to franchisees and same would attract provisions of section 194H. Please refer ***Bharti Cellular Ltd. v. ACIT, . [2011] 12 taxmann.com 30 (Cal.) see also Vodafone Essar Cellular Ltd. v. ACIT*[2010] 194 Taxman 518 (KER.), however***

contrary decision given by the Hyderabad tribunal in ACIT v Idea Cellular Ltd. (2009) 29 DTR 237 (Hyd)

Q.10. Whether deduction of TDS u/s 194H permissible, in case agreement between payer and payee is on principal to principal basis?

Ans. Assessee-company, engaged in business of manufacture and sale of soft drinks, had appointed a C&F-cum-distributor for purpose of distribution and sale of its products vide an agreement - Assessing Officer held that payments made by assessee to distributor would constitute commission under section 194H and assessee was liable to deduct tax at source on such payments. Since agreement between assessee and distributor was clearly stipulated to be an agreement on principal-to-principal basis, payments made by assessee to distributor were as incentives and discounts and not commission liable for deduction of tax at source under section 194H. Please refer ***CIT v. Jai Drinks (P.) Ltd.* 2011] 198 Taxman 271 (Delhi)***

Q.11. Whether TDS u/s 194H applicable to tickets issued by airlines to its travel agents at a concessional price?

Ans. Assessee-airlines issued tickets to its travel agents at a concessional price, transaction between assessee and travel agents was that of principal-to-principal and difference in price was discount and therefore, such transaction would not fall with ambit of section 194H. ***CIT v. Singapore Airlines Ltd.* [2009] 180 Taxman 128 (Delhi).***

Q.12. Whether Provisions of section 194H applicable to trade incentive to dealers?

Ans. Where assessee, a manufacturer of bicycles, was giving trade incentive to dealers, Tribunal was justified in holding that if dealers were selling goods at price for which they were purchasing from company, such trade incentive would amount to commission for purpose of section 194H. ***Please refer Tube Investments of India Ltd. v. ACIT[2009] 223 CTR 99 (MAD.)***

Q.13 Whether Provisions of section 194H applicable on Discount granted to licensed stamp vendors on sale of stamp paper?

Ans. Discount granted to licensed stamp vendors on sale of stamp paper, by treasury cannot be termed as `commission or brokerage' to attract TDS under section 194H. ***Please refer Kerela State Stamp Vendors Association v. Office of the Accountant General [2006] 150 Taxman 30/282 ITR 7/200 CTR 658 (Ker)***

Q.14 Whether Provisions of section 194H applicable on payments made by news channel to advertising agencies?

Ans. Where assessee, a unit of Prasar Bharati, was paying certain amount at the rate of 15 per cent to the advertising agencies, since there was no relationship of principal and agent between assessee and advertising agency, aforesaid amount deducted by the advertising agency out of gross payment received by agency from advertiser could not be treated to be payment of commission by assessee to agency so as to attract deduction of tax at source under section 194H on payment received by agency. Please refer ***All India Radio Commercial Broadcasting Service / Prasar Bharati Broadcasting Corpn. of India v. ITO [2006] 8 SOT 513 (Delhi)***

Q.15. Whether consigner is liable to deposit TDS u/s 194H to the credit of Central Government where consignee retained its commission out of sale proceeds of goods?

Ans. Where commission or brokerage is retained by the consignee/agent and not remitted to the consignor/principal while remitting the sale consideration. It may be clarified that since the retention of commission by the consignee/agent amounts to constructive payment of the same to him by the consignor/principal, deduction of tax at source is required to be made from the amount of commission. Therefore, the consignor/ principal will have to deposit the tax deductible on the amount of commission income to the credit of the Central Government, within the prescribed time***. Please refer Circular: No. 619, dated 4-12-1991.***

Q.16. Whether provisions of S. 194H shall apply to free issue of goods under trade scheme?

Ans. Free issue of goods under trade scheme and free gift on sponsorship and promotions and early payment discount given to distributors do not constitute commission as the distributor works on principal to principal basis and not on principal agent relation. ***[Foster's India (P) Ltd. v ITO (2009) 29 SOT 32 (Pune)(URO).]***

Q.17. Whether TDS u/s 194H deductible on turnover commission payable by RBI to Agency Banks?

Ans. Tax deduction at source under section 194H should not be applicable in respect of Turnover Commission payable by the Reserve Bank of India to the Agency Banks (Banks authorized for conducting

Government business) for performing the general banking business of the Central and State Governments on behalf of RBI. ***Circular: No. 6/2003, dated 3-9-2003.***

Chapter -V

TDS ON RENT

194-I. Any person, not being an individual or a Hindu undivided family, who is responsible for paying to [a resident] any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, [deduct income-tax thereon at the rate of—

[(*a*) two per cent for the use of any machinery or plant or equipment; and

(*b*) ten per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:]]

Provided that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed [one hundred and eighty thousand rupees] :

[Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (*a*) or clause (*b*) of section 44AB during the financial year immediately preceding the financial year in which such income by way of rent is credited or paid, shall be liable to deduct income-tax under this section.]

Explanation.—For the purposes of this section,—

[(*i*) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,—

(*a*) land; or

(*b*) building (including factory building); or

(*c*) land appurtenant to a building (including factory building); or

(*d*) machinery; or

(*e*) plant; or

(*f*) equipment; or

(*g*) furniture; or

(*h*) fittings,

whether or not any or all of the above are owned by the payee;]

(*ii*) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

QUESTION AND ANSWERS ON S. 194I

Q.1. who is liable to deduct TDS on Rent?

A.1. Any person, other than an individual or a HUF, is responsible for paying to resident in India, any income by way of the rent, amounting in aggregate to more than Rs. 180000 in a financial year. However w.e.f. 01/06/2002, individuals and HUF who were covered under section 44AB (a) and (b) in the preceding previous year, are also required to deduct tax at source.

Q.2. What is the point of deduction of TDS u/s 194I?

A.2. Tax should be deducted either at the time of actual payment of rent or at the time of its credit to the account of the payee whichever is earlier.

Q.3. What is the meaning of Rent?

A.3. Clause (c.)of Explanation to section 194I specifies the meaning of "Rent" means any payment, by whatever name called, under any lease, sub lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any, -

(a) Land; or

(b) Building (including factory building); or

(c.) land appurtenant to a building (including factory building); or

(d) Machinery; or

(e) Plant; or

(f) Equipment; or

(g) Furniture; or

(h) Fittings,

Whether or not any or all of the above are owned by the payee.

Q.4. At what rate tax to be deducted u/s 194I?

A.4. The rates of TDS in case of rent shall be as under:

Nature of payment – Rent (194I)		
(a)	Rent of Plant Machinery or equipment	2%
(b)	Rent of Land, Building or furniture to an individual and Hindu undivided family.	10%
(c)	Rent of land, Building or furniture to a person other than an individual or Hindu Undivided Family.	10%

Q.5. Under what circumstances there is no need to deduct TDS u/s 194I?

A.5. There is no need to deduct TDS u/s 194I under below mentioned circumstances:

(i) Where aggregate amount of rent does not exceed Rs. 180000/-

(ii) In case, where rent paid to Government and Certain entities.

(iii) Entities whose income is unconditionally exempt u/s 10. (Refer

circular no. 4/2002, dated 10/07/2002 also refer circular No. 12/2002, dated 22/11/2002, circular no. 735, dated 30.01.1996].

(iv) In case, where payee applied in Form 13 to AO for non deduction, being his taxable income including rent below taxable limit, and has obtained certificate thereof.

Q.6. Whether a contract for putting up a hoarding would be covered under section 194C or 194-I of the Act?

A.6. The contract for putting up a hoarding is in the nature of advertising contract and provisions of section 194C would be applicable. It may, however, be clarified that if a person has taken a particular space on rent and thereafter sub lets the same fully or in part for putting up a hoarding, he would be liable to TDS under section 194-I and not under section 194C of the Act. **Circular : No. 715, dated 8-8-1995. See also ITO v Roshan Publicity Pvt. Ltd. (2005) 4 SOT 105 (Mum).**

Q.7. Whether payments made to a hotel for rooms hired during the year would be of the nature of rent?

A.7. Payments made by persons, other individuals and HUFs for hotel accommodation taken on regular basis will be in the nature of rent subject to TDS under section 194-I. **Circular : No. 715, dated 8-8-1995.**

Q.8. Whether the rent paid should be enhanced for notional income in respect of deposit given to the landlord?

A.8. The tax is to be deducted from actual payment and there is no need of computing notional income in respect of a deposit given to the landlord. If the deposit is adjustable against future rent, the deposit is in the nature of advance rent subject to TDS. **Circular: No. 715, dated 8-8-1995.**

Q.9. Whether payments made by company taking premises on rent but styling the agreement as a business centre agreement would attract the provisions of section 194-I?

A.9. The tax is to be deducted from rent paid, by whatever name called, for hire of a property. The incidence of deduction of tax at source does not depend upon the nomenclature, but on the content of the agreement as mentioned in clause (*i*) of *Explanation* to section 194-I. **Circular: No. 715, dated 8-8-1995.**

Q.10. Whether in a case of a composite arrangement for user of premises and provision of manpower for which consideration is paid as a specified percentage of turnover, section 194-I of the Act would be attracted?

A.10. If the composite arrangement is in essence the agreement for taking premises on rent, the tax will be deducted under section 194-I from payments thereof. **Circular: No. 715, dated 8-8-1995.**

Q.11. Whether tax is required to be deducted at source where a non-refundable deposit has been made by the tenant?

A.11. In cases where the tenant makes a non-refundable deposit tax would have to be deducted at source as such deposit represents the consideration for the use of the land or the building, etc., and, therefore, partakes of the nature of rent as defined in section 194-I. If, however, the deposit is refundable, no tax would be deductible at source. It is further clarified that if the deposit carries interest, the tax to be deducted on the amount of interest will be governed by section 194A of the Income-tax Act. **Circular: No. 718, dated 22-8-1995**

Q.12. Whether the tax is to be deducted at source from warehousing charges?

A.12. The term 'rent' as defined in *Explanation* (*i*) below section 194-I means any payment by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any building or land. Therefore, the warehousing charges will be subject to deduction of tax under section 194-I. **Circular: No. 718, dated 22-8-1995**

Q.13. On what amount the tax is to be deducted at source if the rentals include municipal tax, ground rent, etc.?

A.13. The basis of tax deduction at source under section 194-I is "income by way of rent". Rent has been defined, in the *Explanation* (*i*) of section 194-I, to mean any payment under any lease, tenancy, agreement, etc., for the use of any land or building. Thus, if the municipal taxes, ground rent, etc., are borne by the tenant, no tax will be deducted on such sum. **Circular: No. 718, dated 22-8-1995**

Q.14. Whether section 194-I is applicable to rent paid for the use of only a part or a portion of any land or building?

A.14. Yes, the definition of the term "any land" or "any building" would include a part or a portion of such land or building. **Circular: No. 718, dated 22-8-1995**

Q.15. Where accommodation in hotel rooms taken on regular basis whether tax is deductible u/s 194C or 194I?

A.15. Where earmarked rooms are let out for a specified rate and specified period, they would be construed to be accommodation made available on 'regular bases. Similar would be the case, where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement. However, where an agreement is merely in the nature of a rate contract, it cannot be said to be accommodation 'taken on regular basis', as there is no obligation on the part of the hotel to provide a room or specified set of rooms. The occupancy in such cases would be occasional or casual. In other words, a rate-contract is different for this reason from other agreements, where rooms are taken on regular basis. Consequently, the provisions of section 194-I while applying to hotel accommodation taken on regular basis would not apply to rate contract agreements. **Please refer Circular: No. 5/2002, dated 30-7-2002.**

Q.16. How he can take credit of TDS deducted on advance rent?

A.16. Where advance rent is spread over more than one financial year and tax is deducted thereon, credit shall be allowed in the same proportion in which such income is offered for taxation for different assessment years. However where rent agreement gets terminated/cancelled resulting into refund of balance amount of advance rent to the tenant. Or the rented property is transferred, credit for the entire balance of tax deducted at source, which has not been given credit so far, shall be allowed in the assessment year relevant to the financial year during which the rent agreement gets terminated/cancelled or rented property is transferred and balance of advance rent is refunded to the transferee or the tenant, as the case may be. **Please refer Circular : No. 5/2001, dated 2-3-2001.**

Q.17. Whether provisions of S. 194I shall apply in a situation where payment is made for hotel accommodation by an employee or an individual representing a company?

A.17. Where an employee or an individual representing a company (like a consultant, auditor, etc.) makes a payment for hotel accommodation directly to the hotel as and when he stays there, the question of tax deduction at source would not normally arise (except where he is covered under section 44AB as mentioned above) since it is the employee or such individual who makes the payment and the company merely reimburses the expenditure. **Circular: No. 5/2002, dated 30-7-2002.**

Q.18. Whether provisions of S. 194 I shall apply to proceeds of film exhibition?

A.18. Provisions of section 194-I are not attracted to proceeds of film exhibition, since :

(i) The exhibitor does not let out the cinema hall to the distributor;

(ii) Generally, the share of the exhibitor is on account of composite services; and

(iii) The distributor does not take cinema building on lease or sub-lease or tenancy or under any agreement of similar nature.

Please refer - **Circular : No. 736, dated 13-2-1996.**

Q.19. Whether TDS u/s 194 I deductible on gross amount inclusive of service tax?

A.19. Service tax paid by the tenant doesn't partake the nature of "income" of the landlord. The landlord only acts as a collecting agency for Government for collection of service tax. Therefore it has been decided that tax deduction at source (TDS) under sections 194-I of Income-tax Act would be required to be made on the amount of rent paid/payable without including the service tax. Please refer **CIRCULAR NO. 4/2008, DATED 28-4-2008**

Q.20. Whether holding company is liable to deduct TDS on rent in respect of premises shared with its subsidiary?

A.20. Where holding company of assessee took a premise on rent and allowed assessee to use a part of it, and there was no relationship of lessor and lessee between them, assessee had no TDS obligation under section 194-I while reimbursing a part of rent to holding company. **Please refer ACIT *v.* Result Services (P.) Ltd. [2012] 23 taxmann.com 93 (Delhi)**

Q.21. Whether TDS u/s 194 I on payments in respect of entitlement rights of assured supply of railway rakes?

A.21. Seconding entitlement rights of assured supply of railway rakes and receiving charges for same is not rent as defined in section 194-I and, therefore, there would be no TDS obligation. **Bonai Industrial Co. Ltd. v. Dy.CIT, [2012] 24 taxmann.com 158 (Cuttack - Trib.)**

Q.22. Where there are several co – owners whether threshold limit of Rs. 180000/- shall be taken in to consideration in respect of each co-owner separately?

A.22. Where property in question leased out to a bank was owned by various co-owners and each owner was having a definite and ascertainable share in property, threshold limit for purpose of deduction of tax at source under section 194-I would apply to each of co-owners separately. **CIT v. Senior Manager, SBI*[2012] 20 taxmann.com 40 (All.) see also CIT v. Manager, State Bank of India[2009] 226 CTR 310 (RAJ.), Amalendu Sahoo V ITO (2003) 264 ITR 16 (Cal), Orient Bank of Commerce V TDS / TRO (2006) 99 TTJ 1235 (Chd).**

Q.23. Whether the tenant / assessee can be held as assessee in default, where the landlord duly paid the short deduction of TDS along with interest?

A.23. Once landlord paid amount of short deduction of TDS with interest on amount of rent, tenant/assessee could not be construed as an assessee-in-default. **CIT v. Sony India (P.) Ltd.* [2012] 17 taxmann.com 126 (Kar.)**

Q.24. Whether TDS on Landing and parking charges is deductible u/s 194C or 194I?

A.24. Landing and parking charges paid by assessee-airlines to Airport Authority of India were 'rent' within meaning of provisions of section 194-I as those were payments made for use of land of airport. **CIT v. Japan Airlines Co. Ltd. [2010] 325 ITR 298 (Delhi) see also CIT v Asiana Airlines (2008) 175 Taxman 177 (Del, United Airlines V CIT (2006) 287 ITR 281 (Del), however Chennai high court has given an adverse opinion in Singapore Airlines Ltd. V ITO (2006) 7 SOT 84 (Chennai).**

Q.25. Whether provisions of S. 194I shall apply to non refundable security deposit?

A.25. Amount paid as security deposit under terms of lease agreement which was not refundable at the time of termination of lease. It could be said that said amount was in fact advance rent and as such, assessee was required to deduct tax at source from payment of such advance rent under section 194-I. **Please refer CIT* v. Reebok India Co. [2007] 291 ITR 455 (Delhi)**

Q.26. Where only land and warehouse are used and no other ser-vices are provided – Whether tax deductible u/s 194C or 194I?

A.26. Where only land and warehouse are used and no other ser-vices are provided, payment made is rent subject to deduction of tax at source under section 194-I of IT Act. **Hindustan Coca-Cola Bev. (P.) Ltd. v. CIT [2004] 141 Taxman 60 (Delhi)**

Q.27. Whether TDS u/s 194I is deductible on upfront fee?

A.27. Where the lessee paid an upfront fee against license fee for a lease covering a period of 30 years, tax is deductible at source even on such upfront fee as rent under section 194I. **Please refer TRO v Bharat Hotels Ltd. (2009) 318 ITR (AT) 244(Bom)].**

Q.28. Whether fee for infrastructure partakes the character of Rent for the purpose of deduction of tax u/s 194I?

A.28. where fees collected from students were shared by assessee and it franchisees and the assessee for the purpose of its convenience, had categorized said fees shared as marketing claim and infrastructure claim. No tax is deductible on infrastructure claim u/s 194I. **Please refer [CIT v NIIT Ltd. (2009) 184 Taxman 472 (Del) see also ACIT v Nib Ltd. (2008) SOT 44 (Del) (URO).**

Q.29. Where rent paid to Co - owners separately will partake the character of rent paid to AOP?

A.29. No, **please refer [CIT v Lally Motors (2009) 311 ITR 29 (P&H)].**

Q.30. Whether TDS u/s 194I applies to premium payable for lease?

A.30. The definition of rent includes any payment by whatever name called **[(CIT v Panbari Tea Co. Ltd. (1965) 57 ITR 422 (SC)]**

Q.31. Whether hiring of storage tanks qualified either as land and building or hire charges?

A.31. The storage tanks in question did not qualify either as land or as building within the meaning of section 194I, what is attached to the land belongs to the land is a principle not applicable to India. Therefore, the structure though erected on land, could not be regarded as part of the land. **Please refer [Gulf Oil India Ltd. V ITO (2000) 75 ITD 172 (Mum)].**

Q.32. Whether provision of S. 194I shall attract where C&F agent provides other services in addition to storage?

A.32. Where the terms & conditions of the agreement are such that, to reveal that the agent not only stored the goods but also rendered certain other professional services like inventory management, packing, follow up, collection, maintaining banks account of the sale proceeds, under these circumstances it could not be said that the payment made by the assessee to them was in the nature of rent. **Please refer [Eli Lilly & Co. (India) (P) Ltd. V DCIT (2006) 99 TTJ 461 (Del)]**.

Chapter -VI

TDS ON FEES FOR PROFESSIONAL OR TECHNICAL SERVICES

194J. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—

(*a*) fees for professional services, or

(*b*) fees for technical services, [or]

[*(*ba*) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company; or***]**

[(*c*) royalty, or

(*d*) any sum referred to in clause (*va*) of section 28,]

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to [ten] per cent of such sum as income-tax on income comprised therein :

Provided that no deduction shall be made under this section—

(*A*) from any sums as aforesaid credited or paid before the 1st day of July, 1995; or

(*B*) where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or

paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed—

(*i*) [thirty thousand rupees], in the case of fees for professional services referred to in clause (*a*), or

(*ii*) [thirty thousand rupees], in the case of fees for technical services referred to in [clause (*b*), or]

(*iii*) [thirty thousand rupees], in the case of royalty referred to in clause (*c*), or

(*iv*) [thirty thousand rupees], in the case of sum referred to in clause (*d*) :]

[Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (*b*) of section 44AB during the financial year immediately preceding the financial year in which such sum by way of fees for professional services or technical services is credited or paid, shall be liable to deduct income-tax under this section :]

[Provided also that no individual or a Hindu undivided family referred to in the second proviso shall be liable to deduct income-tax on the sum by way of fees for professional services in case such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.]

Explanation.—For the purposes of this section,—

(*a*) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;

(*b*) "fees for technical services" shall have the same meaning as in *Explanation 2* to clause (*vii*) of sub-section (1) of section 9;

[(*ba*) "royalty" shall have the same meaning as in *Explanation 2* to clause (*vi*) of sub-section (1) of section 9;]

(*c*) where any sum referred to in sub-section (1) is credited to any account, whether called "suspense account" or by any other name, in the books

of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly.

Note in respect of Amendment brought u/s 194J vide Finance Act 2012 - Section 194J (1)(ba) - [Newly Inserted w.e.f. 1st July, 2012]

"any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company; or

Notes to clause:

The existing provisions in sub-section (1) of the aforesaid section 194J provide that a person, not being a individual or a HUF, who is responsible for paying to a resident any sum by way of fees for professional services, fees for technical services royalty or sums referred to in clause (va) of section 28 shall deduct an amount equal to 10% of such sum as income tax. It is proposed to amend the aforesaid sub-section (1) to insert a new clause (ba) so as to provide that the person referred to in sub-section (1) of the aforesaid section who is responsible for paying to a director of a company any sum by way of any remuneration or fees or commission, by whatever name called (other than those on which tax is deductible under section 192), shall deduct an amount equal to 10% in accordance with the provisions of the aforesaid section.

Memorandum Enplaning Finance Bill 2012

Under the existing provisions of the Income-tax Act, a company, being an employer, is required to deduct tax at the time of payment of salary to its employees including Managing director/whole time director. However, there is no specific provision for deduction of tax on the remuneration paid to a director which is not in the nature of salary.

It is proposed to amend section 194J to provide that tax is required to be deducted on the remuneration paid to a director, which is not in the nature of salary, at the rate of 10% of such remuneration.

Brief of Amendment

The amendment is proposed to provide for deduction of tax at source @ 10% by a company in respect of remuneration or fees or commission by whatever

name called, paid to a director which is not in the nature of salary and it will be considered as fees for professional or technical services.

Q.1. Who is liable to deduct TDS u/s 194J?

A.1. Any person, other than in individual or a HUF, who is responsible for paying to a resident any sum by way of:-

i. Fees for professional services,

ii. Fees for technical services,

iii. Any remuneration or fee or commission by whatever name called paid to a director, which is not in the nature of salary (w.e.f. 1.7.2012)

iv. Royalty,

v. Any sum referred to in clause (va) of section 28 which relates to non-complete payment, or

vi. Shall deduct income tax on income comprised therein.

vii. However, an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or professional carried on by him exceed the monetary limits specified under clause (a) or clause(b) of section 44AB during the financial year immediately preceding the financial year in which such sum by way of fees for professional services or technical services is credited or paid, shall also be liable to deduct income-tax under this section. [Proviso 2 to section 194J(1)].

Q.2. What is the point of deduction of TDS u/s 194J?

A.2. Tax is to be deducted either at the time of actual payment of such fees or its credit to the account of the payee whichever is earlier.

Q.3. At what rate tax to be deducted u/s 194J?

A.3. 10% on such income.

Notes:

i. No surcharge, education cess or SHEC shall be added to the above rates. Hence, tax will be deducted at source at the basic rate.

ii. The rate of TDS will be 20% in all cases, if PAN is not quoted by the deductee on or after 1-4-2010.

Q.4. Under what circumstances there is no need to deduct TDS u/s 194J?

A.4. There is no need to deduct TDS u/s 194J where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed-

(i) Rs. 30,000 in the case of fees for professional services referred to above.

(ii) Rs. 30,000 in the case of fees for technical services referred to above.

(iii) Rs. 30,000 in the case of royalty referred to above.

(iv) Rs. 30,000 in the case of non-complete fee referred to above.

Q.5. What is the meaning of professional Services in reference to S. 194J?

A.5. Explanation (a) to Section194J provides that 'Professional Services' means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section.

Q.6. What is the meaning of Expression "fees for technical services" in reference to section 194J?

A.6. Explanation (b) to Section194J provides that "fees for technical services" shall have the same meaning as in *Explanation 2* to clause (*vii*) of sub-section (1) of section 9, which provides "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

Q.7. **What is the meaning of "Royalty" in reference to S. 194J?**

A.7. Explanation (ba) to Section194J provides that "royalty" shall have the same meaning as in *Explanation 2* to clause (*vi*) of sub-section (1) of section 9, which provides that "royalty" means consideration (including any lump sum consideration but excluding any consideration which

would be the income of the recipient chargeable under the head "Capital gains") for—

(*i*) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;

(*ii*) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;

(*iii*) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;

(*iv*) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;

(*iva*) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB

(*v*) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or

(*vi*) the rendering of any services in connection with the activities referred to in sub-clauses (*i*) to (*iv*), (*iva*) and] (*v*).

To further clarify meaning of royalty explanation 4, 5 and 6 inserted to *Explanation 2* to clause (*vi*) of sub-section (1) of section 9, vide Finance Act, 2012, which are as under:

"Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a license) irrespective of the medium through which such right is transferred.

Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—

(a) the possession or control of such right, property or information is with the payer;(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fiber or by any other similar technology, whether or not such process is secret;"

Q.8. Whether provisions of S. 194J are applicable to Transaction charges paid by assessee-stock broker to Stock Exchange?

A.8. Transaction charges paid by assessee-stock broker to BSE in respect of transactions carried out through BOLT system constituted fees for technical services under section 194J read with Explanation 2 to section 9(1)(vii) and, hence, assessee was liable to deduct tax at source before crediting transaction charges to account of stock exchange. **CIT v. Kotak Securities Ltd.* [2011] 15 taxmann.com 77 (Bom.)also refer DCIT v Angel Broking Ltd (2010)35 SOT 457(Mum).**

Q.9. Whether provisions of S. 194J are applicable to payments made for rendering services in course of carrying on medical profession?

A.9. Payment is made to a recipient for rendering services in course of carrying on medical profession or other professions as stipulated in section 194J, deduction of tax at source has to be made and it is immaterial whether recipient is an individual, firm or an artificial person. **Vipul Medcorp TPA (P.) Ltd. v. Central Board of Direct Taxes [2011] 14 taxmann.com 13 (Delhi)**

Q.10. Whether provisions of S. 194J are applicable to service provided by MTNL/BSNL for services of interconnect/port/access/toll?

A.10. The expression 'fees for technical services' as appearing in section 194J would have reference to only technical service rendered by a human; it would not include any service provided by machines or robots. Therefore service provided by MTNL/BSNL for services of interconnect/ port/access/toll would not fall within the purview of payments as provided for under section 194J, so as to be liable for tax deduction at source. **CIT v. Bharti Cellular Ltd.[2008] 175 TAXMAN 573 (DELHI)** However, the Apex Court remitted the matter to the Assessing Officer,

directing him to examine the case with the help of a technical expert to study whether any human intervention is involved. **[CIT v Bharti Cellular Ltd. & Hutchison Essar Telecome Ltd. (2011) 330 ITR 239 (SC)] see also HFCL Infotel Ltd. v. ITO [2006] 99 TTJ (Chd.) 440**

Q.11. Whether tax deductible u/s 194J on payments made to person engaged in business of providing cellular mobile telephone facility?

A.11. Payments made to person engaged in business of providing cellular mobile telephone facility by subscribers, being firms and companies, are not covered by definition of 'fees for technical services' in section 194J, read with Explanation 2 to section 9(1)(vii) and as such no tax is required to be deducted at source on such payments by subscribers. **Please refer Skycell Communications Ltd. v. Dy.CIT [2001] 119 TAXMAN 496 (MAD.)**

Q.12. Whether tax deductible u/s 194J on payment made to a stockist appointed for sale on commission basis?

A.12. Section 194J is not applicable to a stockist appointed by drug manufacturer for sale of drugs on commission basis. **Please refer Piramal Healthcare Ltd. v. ACIT(TDS) [2012] 21 taxmann.com 225 (Mum.)**

Q.13. Whether TDS u/s 194J deductible on various services provided during the course of carrying of Medical profession?

A.13. Maintaining operation theatre and surgical equipments, RO system, CT scan machine, MRI machine, medical equipments and providing service of lift sterlisation and anti-termite treatment in a hospital, would amount to rendering technical and professional services. Please refer **ITO (TDS) v. Accounts Officer, Govt. Medical College, Jammu*[2012] 22 taxmann.com 149 (Asr.)**

Q.14. Whether the services rendered by news agencies to newspaper Company shall attract TDS u/s 194J?

A.14. Payments made by newspaper Company to news agencies is liable for deduction of tax at source under section 194J. **Please refer ACIT v. Ushodaya Enterprises (P.) Ltd.* [2012] 23 taxmann.com 258 (Hyd.)**

Q.15. Whether payments made to hospital for medical services provided by it shall attract TDS u/s 194J?

A.15. Where 'assessee-trust acted as a nodal agency for State of Andhra Pradesh to provide health care coverage to individuals, payments made to hospitals by assessee for medical services received by hospitals were liable to TDS u/s 194J'. **Please refer Arogya Sri Health Care Trust v. ITO [2012] 20 taxmann.com 539 (Hyd.) (see also Medi Assist India TPA (P) Ltd. v DCIT (TDS) (2009) 184 Taxman 359 (Kar)**

Q.16. Whether payment made directly to any actor on account of composite agreement entered into for financing film project shall attract TDS u/s 194J?

A.16. Contractors/sub-contractors payment to' and further having regard to fact that even if assessee had made payment directly to any actor or any person connected with film making then it was only out of composite agreement entered into for financing film project, it could not be concluded that payment made directly by assessee attracted provisions of section 194J, **Please refer Entertainment One India Ltd. * v. ITO (TDS) [2010] 126 ITD 491 (MUM.)**

Q.17. Whether non resident not having PE in India, making payments to CA, Lawyer, advocate or solicitor are required to deduct TDS u/s 194J?

A.17. Any fees paid through regular banking channel to any Resident - CA, Lawyer, advocate or solicitor by a Non Resident who do not have any agent of business connection or permanent establishment in India, may not be subject to the provisions of tax deduction at source u/s 194J. However Foreign Companies & and accounting firms are required to sent quarterly statement stating names and address of the person to whom the payments are made to the Deputy Secretary, Foreign tax Division, CBDT, Department of Revenue, Ministry of Finance, New Delhi. **Please refer Circular No. 726, dated 18/10/1995.**

Q.18. Whether TDS u/s 194J is also deductible on reimbursements?

A.18. TDS u/s 194C & 194J refer to any sum paid i.e including reimbursements – applicable only in cases where bills are raised for the gross amount inclusive of professional fees as well as reimbursement of actual expenses.**Circular No. 715 dated 08/08/1995. Further Circular No. 720 dated 30/8/1995** provides that the provision of sec 194 C &194J is not applicable – where bills were raised separately by the

consultants for reimbursements of actual expenses incurred by them. **ITO vs. Dr. Willmar Schwabe India (P) Ltd (2005) 95 TTJ (Del.)53.**

Q.19. Whether charges paid to International Airport Authority of India for navigational facilities, shall attract TDS u/s 194J?

A.19. Where assessee-airlines paid charges to International Airport Authority of India for navigational facilities, such payments attracted section 194J. **Singapore Airlines Ltd. v. ITO [2006] 7 SOT 84 (Chennai)**

Q.20. Where assessee, a non-resident company, set up a liaison office in India in and appointed consultants – whether tax deductible u/s 192 or 194J?

A.20. Where assessee, a non-resident company, set up a liaison office in India in and appointed six persons as consultants pursuant to agreements, as there was no employer-employee relationship between assessee-company and consultants, case was governed by section 194J and not section 192. **Please refer Dy CIT v. Coastal Power Co. [2006] 9 SOT 89 (Delhi)**

Q.21. At what rate TDS deductible u/s 194J by an advertising agency making payments for professional services to a film artist?

A.21. Where an advertising agency makes payments for professional services to a film artist such as an actor, a Cameraman, a director etc, tax will be deducted at the rate of 5%. **Please refer Circular No. 714, dated 03/08/1995.**

Q.22. Whether the services of a regular electrician on contract basis will fall in the ambit of technical services to attract the provisions of section 194J of the Act? In case the services of the electrician are provided by a contractor, whether the provisions of section 194C or 194J would be applicable?

A.22. The payments made to an electrician or to a contractor who provides the service of an electrician will be in the nature of payment made in pursuance of a contract for carrying out any work. Accordingly, provisions of section 194C will apply in such cases**. Please refer Circular No. 715, dated 08/08/1995.**

Q23. Whether a maintenance contract including supply of spares would be covered under section 194C or 194J of the Act?

A.23. Routine, normal maintenance contracts which includes supply of spares will be covered under section 194C. However, where technical services are rendered, the provision of section 194J will apply in regard to tax deduction at source. **Please refer Circular No. 715, dated 08/08/1995.**

Q.24. Whether the deduction of tax at source under sections 194C and 194J has to be made out of the gross amount of the bill including reimbursements or excluding reimbursement for actual expenses?

A.24. Sections 194C and 194J refer to any sum paid. Obviously, reimbursements cannot be deducted out of the bill amount for the purpose of tax deduction at source. **Please refer Circular No. 715, dated 08/08/1995.**

Q.25. Whether TDS u/s 194J deductible on payment made for purchase of course or study material?

A.25. NO, **Please refer ACIT v Frontline Software Services (P) Ltd. (2009) 24 DTR 232 (Ind-Trib)**

Q.26. Whether the provision of TDS u/s 194J applicable to payments made for facilities of bandwidth and internet?

A.26. Since bandwidth and net working operating facilities for VSNL/MTNL were standard facilities and were not in the nature of technical services with the meaning of section 194J the assessee would not be liable to deduct tax at source under section 194J. **Please refer – Pacific Internet (India) (P) Ltd. v. ITO TDS Mumbai (2009) 27 SOT 523 (Mum)]**

Chapter - VII

MISCELLANEOUS ISSUES (SECTION 193, 194, 194A, 194B, 194BB, 194D, 194E, 194EE, 194G, 194LA, 194LB, 194LC)

Q.1. **Whether assessee liable to deduct TDS u/s 193 on provision of interest in case payee is not identified.**

Ans. Explanation to section 193 cannot be invoked in a case where person who is to receive interest cannot be identified at stage at which provision for 'interest accrued but not due' is made and therefore there was no obligation upon assessee to deduct tax at source, there could not be any question of levy of penalty and interest under section 201 upon assessee. ***Industrial Development Bank of India v. ITO [2007] 107 ITD 45 (ITAT- MUM.).***

Q.2. **Whether TDS u/s 193 deductible on Interest on own debentures?**

Ans. No**, please refer *CIT V Nattarasankottai Electric Supply Corporation (1947) 15 ITR 495 (Mad).***

Q.3. **Whether TDS u/s 193 deductible on Interest on debentures issued by cooperative bank?**

Ans. No**. please refer *CIT v. Lakshmi Vilas Bank Ltd. (1997) 228 ITR 697 (Mad).***

Q.4. Whether TDS u/s 194 applicable to both types of dividends, i.e., normal dividend as well as deemed dividend?

Ans. Section 194 requires TDS only when payment is made to a shareholder. Payments to shareholders will cover both types of dividends, i.e., normal dividend as well as deemed dividend. Otherwise also, deemed dividend will be taxed in the hands of the shareholder and not in the hands of non-shareholder payee. Therefore, section 194 does not require TDS when payment is made to a non-shareholder. Please refer ***NZ Reality (P.) Ltd. v. ITO, [2009] 29 SOT 61 (ITAT- JP.)(URO).***

Q.5. Whether TDS u/s 194 is deductible at the time of preparation of Warrant or at the time of dispatch of warrants?

Ans. When company declaring dividend is liable to deduct tax from dividends when warrants are sent out to shareholders and not on date on which dividends warrants are prepared. ***CIT v. Hindustan General Industries Ltd. 2000] 113 TAXMAN 506 (DELHI)***

Q.6. Whether credit of TDS can be denied on the footing that TDS certificate does not show the actual date of payment of tax to Government treasury.

Ans. Assessing Officer could not deny credit of TDS from dividend on ground that TDS certificate filed in Form No. 19 did not show actual date of payment of tax to Government treasury and that it did not contain seal of company. ***M.M. PUBLICATIONS LTD. V. ACIT [1997] 92 TAXMAN 51 (ITAT-COCH.) (MAG.)***

Q.7 Whether TDS u/s 194A deductible on interest on delayed payment of purchase bills?

Ans. Payment which has direct link and immediate nexus with trading liability will not fall within category of interest; while paying interest on delayed payment of purchase bills, no TDS obligation arises. ***Sri Venkatesh Paper Agencies (Hyd.) (P.) Ltd. v. Dy. CIT [2012] 24 taxmann.com 52 (Hyd.)***

Q.8. Whether TDS u/s 194A deductible on reimbursement of Interest?

Ans. Reimbursement of interest by subsidiary to parent company which, in turn, had repaid it to lender bank, did not involve any element of income and, thus, no TDS liability would arise under section 194A on reimbursement. ***Onward e-Services Ltd. v. ACIT* [2012] 22 taxmann. com 60 (ITAT-Mum.)***

Q.9. Whether TDS u/s 194A deductible on delayed receipt of compensation on land acquisition?

Ans. Interest received as a payment for delayed receipt of compensation on land acquisition is a revenue receipt liable to TDS under section 194A. ***Rameshwar v. Ujjain Development Authority [2012] 23 taxmann.com 6 (MP)***

Q.10. Whether TDS u/s 194A deductible on interest paid to RRRDA?

Ans. Where Rajasthan Rural Road Development agency (RRRDA) kept funds released by Ministry of Rural Development in a separate account opened with assessee-bank to be utilized for purpose of approved work under Pradhan Mantri Gram Sadak Yojna (PMGSY), interest paid by assessee to RRRDA would not be liable to tax deduction at source under section 194A**. *ITO v. Branch Manager, State Bank of Bikaner & Jaipur* [2012] 19 taxmann.com 221 (ITAT-JP.)***

Q.11. Whether TDS u/s 194A deductible on interest neither credited nor paid during relevant period?

Ans. Where assessee has not credited interest in its books of account and such interest has not been paid in relevant year, mandate of section 194A cannot be attracted to further invoke disallowance under section 40(a)(ia). ***Pranik Shipping & Services Ltd. v. ACIT*[2012] 19 taxmann. com 107 (ITAT-Mum.)***

Q.12. Whether credit of TDS and assessment of income permissible in two different years?

Ans. Credit of tax based on TDS certificates be allowed in respect of interest income in the year in which subject-matter of deduction of tax is assessed. ***CIT v. H. Krishna Vijoy Arora* [2012] 20 taxmann.com 655 (Ker.)***

Q.13. Whether TDS u/s 194A deductible on interest credited but not paid due to loss?

Ans. Tax was to be deducted at source under section 194A where due to losses no interest was paid by assessee to its creditor but credit entry was made as if interest was paid to creditors. ***Solar Automobiles India (P.) Ltd. v. Dy.CIT (TDS), [2012] 17 taxmann.com 260 (Kar.).***

Q14. Whether interest u/s 194A deductible on interest income of trust where beneficiaries are individuals?

Ans. No, Please refer ***ML family trust v State of Gujrat (1995) 213 ITR 152 (Guj), see also Food Corporation of India v ITO (2007) 18 SOT 289 (Del), ITO v Arihant Trust (1995) 214 ITR 306 (Mad).***

Q.14. Who is responsible to deduct tax u/s 194B.

Ans. A person, who conducts any scheme in name of lottery or drawing by lot by giving a person a chance to win by participating in scheme, is responsible to deduct tax at source on value of goods given to winner. ***Hind Motors India Ltd.* v. ITO 2006] 9 SOT 556 (ITAT-CHD.)***

Q.15. Whether provisions of S. 194B applicable where participants identified on the basis of their skill or knowledge?

Ans. In 'World Cup Football Forecast' or 'Lok Sabha Election Forecast' contests were held by assessee-company and no price was paid for participation, but only skill or knowledge was criterion and prize winners were selected by lot, said contests did not amount to lottery and, therefore, assessee was not liable to deduct tax at source before distribution of prize money of said contests as contemplated under section 194B. ***ITO v. Malayala Manorama Co. Ltd. [2005] 94 ITD 195 (ITAT-COCHIN)***

Q.16. Whether provisions of S. 194B applicable on amount of refund of prize money from unsold tickets of lotteries and unclaimed prizes?

Ans. Refund by Directorate of State Lotteries to organising agent of prize money from unsold tickets of lotteries and unclaimed prizes would not attract provisions of section 194B ***ACIT v. Director of State Lotteries . [2002] 123 TAXMAN 405 (GAU.) see also Commercial Corporation of India V ITO (1993) 201 ITR 348 (Bom).***

Q.17. Whether provisions of S. 194B applicable on monthly prize scheme?

Ans. Assessee was carrying as a prized scheme, in which 250 members were enrolled - Members were required to subscribe Rs. 300 every month for a period of 52 months - Every month there was a lucky draw and once a subscriber was declared a winner in any such draw, he need not make any payment thereafter - All others, who were not successful in previous draw had to go on paying every month till completion of Scheme - After completion of scheme all subscribers who were not

successful in monthly draws would get back their contributions without interest - Whether scheme in question could be treated as `lottery' scheme and assessee was liable to deduct tax at source under section 194B - Held, yes. ***Lakshmi Gnaneswara Enterprises & Financiers v. ITO [2000] 72 ITD 295 (ITAT-HYD.)see also CIT v Sanjiv Kumar (1980)123 ITR 187 (P&H).***

Q.18. Whether deduction of floor limit of Rs. 2,500 is to be allowed from each winning from horse race?

Ans. Yes. Please refer ***Delhi Race Club (1940) Ltd. V. Dy.CIT [2007] 17 SOT 39 (Delhi)(URO)***

Q.19. Whether tax u/s 194BB is deductible only from net income?

Ans. Tax is required to be deducted only from net income arising out of horse race to punter from any particular race after deducting investment made by him in purchasing all tickets relating to such horse race. ***Royal Calcutta Turf Club v. Dy. CIT [2001] 76 ITD 237 (ITAT-CAL.)***

Q.20. Whether TDS u/s 194D is deductible on commission paid on reinsurance accepted by assessee?

Ans. No. *Please refer* ***General Insurance Corpn. of India v. Asstt. CIT [2009] 28 SOT 453 (Mum.), Tata AIG General Insurance Co. Ltd. * v. ITO [2011] 43 SOT 215 (ITAT- Mum)***

Q.21. Whether TDS u/s 194E deductible on payments to non-resident sportsman or sports association for participation in match in India ?

Ans. Amount paid to foreign team for participation in match in India in any shape, either as prize money or as administrative expenses, is income deemed to have accrued in India and is taxable under section 115BBA and, thus, section 194E is attracted. ***INDCOM* v. CIT [2011] 11 taxmann.com 109 (Cal.)***

Q.*22*. Whether obligation to deduction under section 194E is not affected by DTAA ?

Ans. Obligation to deduction under section 194E is not affected by the DTAA, since such a deduction is not the final payment of tax nor can it be said to be an assessment of tax. The deduction has to be made and after it is done, the assessee concerned gets the credit of the same and once it is found later on, that income from which the deduction

is made is not exigible to tax, then on application being made refund with interest is always allowed. Fundamental distinction between the deduction at source by the payer is one thing and obligation to pay tax is another thing. Advantage of the DTAA can be pleaded and taken by the real assessee on whose account the deduction is made and not by the payer. Therefore, irrespective of the existence of the DTAA, the obligation under section 194E has to be discharged once the income accrues under section 115BBA. ***Pilcom* v. CIT [2011] 198 Taxman 555 (Cal.)***

Q. *23.* Whether TDS u/s 194E deductible on guarantee fee paid by assessee to overseas cricket boards?

Ans. The guarantee fee paid by the assessee was to the cricket bodies of the countries with which India had entered into tax treaties. It is settled legal position that in view of the provisions of section 90(2), the provisions of the tax treaty prevail over that of the domestic law unless the domestic law is more beneficial to the assessee. Therefore, in case it was concluded that the payment in question was not taxable in terms of the provisions of the applicable tax treaty, there was no need to address to the scope of provisions of the domestic law. Unless it is of the income nature, there is no question of taxability thereof. ***ITO v. Board for Cricket Control in India [2007] 14 SOT 287 (ITAT-MUM.)***

Q.*24.* Whether TDS u/s 194G is applicable where petitioner purchased lottery tickets at discount from State Government?

Ans. Section 194G envisages deduction of tax at source only if any commission, remuneration or prize is paid. Here in present case petitioner, who was authorized lottery ticket agent, purchased lottery tickets in bulk at a discount from State Government. Whether since tickets were given to agents on a discount and there was no payment of commission to agent at time of purchase of ticket, section became automatically inapplicable. ***M.S. Hameed v. Director of State Lotteries[2001] 114 TAXMAN 394 (KER.)***

***Q.25.* Whether question of deducting tax at source arises at time of making payment and it has nothing to do with date of award of compensation?**

Ans. Section 194LA was not on the statute book on the date of the award, *i.e.*, 30-5-1995 and that the said section was inserted, subsequently, by the Finance Act, 2004 with effect from 1-10-2004. *Compensation was paid on 28-4-2010 and on that day, section 194LA was on the statute*

book and, therefore, tax had to be deducted while making the payment of compensation. ***Leela Bhagwansing Advani v. Union of India*[2012] 21 taxmann.com 124 (Bom.)***

Q.26. **Whether TDS u/s 194LA deducted on compensation paid for acquiring agriculture land?**

Ans. "194LA. Any person responsible for paying to a resident any sum, being in the nature of compensation or the enhanced compensation or the consideration or the enhanced consideration on account of compulsory acquisition, under any law for the time being in force, of any immovable property **(other than agricultural land),** shall, at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent, of such sum as income-tax thereon: There is no jurisdiction to make deduction from compensation for agricultural land. ***Risal Singh v. Union of India2010] 321 ITR 251 (PUNJ. & HAR.)***

Q.27. **Whether definition of 'agricultural land' contained in section 2(14)(iii)(a) & (b) cannot be borrowed to influence definition of 'agricultural land' contained in Explanation to section 194LA?**

Ans. There are two definitions of the agricultural land in the Act. One is provided in section 2(14) and the other in section 194LA. The question now arises which definition is to be used for deciding the issue, whether land acquired by the LAO is agricultural land or not or what is acquired is part and parcel of or inclusive of agricultural land. For deciding the issue one has to see the purpose and object for which the two definitions have been enacted. Since in section 2(14)(iii)(a) & (b) definition of agricultural land is given in the context of deciding what should be the capital asset then this definition can be used only for that purpose. The definition in section 2(14)(iii) is linked with section 45 where chargeability of capital gains is provided on transfer of capital asset. Therefore, the definition of agricultural land as capital asset in section 2(14), read with section 45, cannot be imported to influence the concept of agricultural land as specifically provided for in section 194LA.

The definition of immovable property given in section 194LA, and the definition of agricultural land given therein are specific to the activity of deduction of tax. Specific enactment for specific purpose should alone be invoked. ***Special Land Acquisition Officer * v. ITO[2010] 42 SOT 9 (ITAT-AHD.)***

Q.28. **Whether interest on delayed payment of enhanced compensation in respect of acquisition of immovable property is revenue receipt eligible to tax u/s 4 and, therefore, is liable to TDS u/s 194A?**

Ans. It has been concluded by the Supreme Court in various cases that interest on delayed payment on the acquisition of immovable property would be revenue receipt and would, thus, be exigible to tax.

Once interest is regarded as revenue receipt, then it would fall within the mischief of section 4, which is a charging section. Therefore, TDS under section 194A was to be paid by the petitioner in respect of the interest income on the delayed payment***. Karnail Singh v. State of Haryana*[2010] 326 ITR 501(PUNJ. & HAR.)***

Q.29. **Whether claimant is not liable to pay income-tax or if he is entitled to pay tax at lower rates, he will have to obtain necessary tax deduction certificate from Land Acquisition Officer and claim such benefit before competent authority under Act?**

Ans. It is a well settled position of law that whenever any authority deducts income-tax at source, he is bound to issue a tax deduction certificate to the claimant. So, the claimant is entitled to get a certificate of tax deducted at source or tax paid under sub-section (1A) of section 192 by the Land Acquisition Officer. Under rule 31(1) a certificate shall be issued within the time fixed under the rules and in the form prescribed. If the compensation and interest due under a decree is to be divided among a number of claimants, income-tax has to be deducted from the share found due to each claimant and separate tax deduction certificates issued to each of them. ***State of Kerala* v. Mariyamma[2006] 280 ITR 225 (KER.)***

Chapter – VIII

FAQ ON E-FILLING OF TDS RETURNS

1. What is annual e-TDS/TCS Return?

Annual e-TDS/TCS return is the TDS return under section 206 of the Income Tax Act (prepared in Form Nos. 24, 26 or 27) or TCS return under section 206C of the Income Tax Act (prepared in Form No. 27E), which is prepared in electronic media as per prescribed data structure. Such returns furnished in a CD/Pen Drive should be accompanied by a signed verification in Form No. 27A in case of Annual TDS returns or Form No. 27B in case of Annual TCS return

2. What is quarterly e-TDS/TCS statement?

TDS/TCS returns filed in electronic form as per section 200(3)/206C, as amended by Finance Act, 2005, are quarterly TDS/TCS statements. As per the Income Tax Act, these quarterly statements are required to be furnished from FY 2005-06 onwards. The forms used for quarterly e-TDS statements are Form Nos. 24Q, 26Q and 27Q and for quarterly e-TCS statement is Form No. 27EQ. These statements filed in CD/Pen Drive should be accompanied by a signed verification in Form No. 27A in case of both e-TDS/TCS statements.

3. Who is required to file e-TDS/TCS return?

As per Income Tax Act, 1961, all corporate and government deductors/ collectors are compulsorily required to file their TDS/TCS returns on electronic media (i.e. e-TDS/TCS returns). However, deductors/collectors

other than corporate/government can file either in physical or in electronic form.

4. e-TDS/TCS returns have been made mandatory for Government deductors. How do I know whether I am a Government deductor or not?

All Drawing and Disbursing Officers of Central and State Governments come under the category of Government deductors.

5. Under what provision should e-TDS/TCS returns be filed?

An e-TDS return should be filed under Section 206 of the Income Tax Act in accordance with the scheme dated August 26, 2003 for electronic filing of TDS return notified by the Central Board of Direct Taxes (CBDT) for this purpose. CBDT Circular No. 8 dated September 19, 2003 may also be referred.

An e-TCS return should be filed under Section 206C of the Income Tax Act in accordance with the scheme dated March 30, 2005 for electronic filing of TCS return notified by the CBDT for this purpose.

As per section 200(3)/206C, as amended by Finance Act 2005, deductors/ collectors are required to file quarterly TDS/TCS statements from FY 2005-06 onwards.

6. Who is the e-Filing Administrator?

CBDT has appointed the Director General of Income Tax (Systems) as e-Filing Administrator for the purpose of electronic filing of TDS/TCS returns.

7. Who is an e-TDS/TCS Intermediary?

BDT has appointed National Securities Depository Limited, (NSDL), Mumbai, as e-TDS/TCS Intermediary. NSDL has established TIN Facilitation Centres (TIN-FCs) across the country to facilitate deductors/ collectors file their e-TDS/TCS returns.

8. How should the e-TDS/TCS return be prepared?

e-TDS/TCS return has to be prepared in the data format issued by e-Filing Administrator. This is available on the Income Tax Department website (www.incometaxindia.gov.in) and NSDL-TIN website (www.tin-nsdl.

com). There is a validation software (File Validation Utility) available along with the data structure which should be used to validate the data structure of the e-TDS/TCS return prepared. The e-TDS/TCS return should have following features:

- Each e-TDS/TCS return file should be in a separate CD/Pen Drive.
- Each e-TDS/TCS return file should be accompanied by a duly filled and signed (by an authorised signatory) Form No. 27A in physical form.
- Each e-TDS/TCS return file should be in one CD/Pen Drive. It should not span across multiple floppies.
- If an e-TDS return file is required to be compressed, it should be compressed using Winzip 8.1 or ZipItFast 3.0 compression utility (or higher version thereof) to ensure quick and smooth acceptance of the file.
- Label should be affixed on each CD/Pen Drive mentioning name of the deductor, his TAN, Form no. (i.e. 24, 26 or 27) and period to which the return pertains.
- There should not be any overwriting/striking on Form No. 27A. If there is any, then the same should be ratified by an authorised signatory.
- No bank challan or copy of TDS/TCS certificate should be filed alongwith e-TDS/TCS return file.
- In case of Form Nos. 26 & 27, deductor need not file physical copies of certificates of no deduction or lower deduction of TDS received from deductees.
- In case of Form 24, deductor should file physical copies of certificates of no deduction or deduction of TDS at lower rate, if any, received from deductees. However, there is no such requirement in case of Form 24Q.
- e-TDS/TCS return file should contain TAN of the deductor/collector without which, the return will not be accepted.
- CD/Pen Drive should be virus-free.
- In case any of these requirements are not met, the e-TDS/TCS return will not be accepted at TIN-FCs.

9. Is there any software available for preparation of e-TDS/TCS return?

NSDL has made available a freely downloadable return preparation utility for preparation of e-TDS/TCS returns. Additionally, you can develop your own software for this purpose or you may acquire software from various third party vendors. A list of vendors, who have informed NSDL that they have developed software for preparing e-TDS/TCS returns, is available on the NSDL-TIN website.

10. Are the forms used for e-TDS/TCS return same as for physical returns?

Forms for filing TDS/TCS returns were notified by CBDT. These forms are same for electronic and physical returns. However, e-TDS/TCS return is to be prepared as a clean text ASCII file in accordance with the specified data structure (file format) prescribed by ITD.

11. What are the forms to be used for filing annual/quarterly TDS/TCS returns?

Following are the forms for TDS/TCS returns and their periodicity:

Form No.	Particulars	Periodicity
Form No. 24	Annual return of 'Salaries' under Section 206 of Income Tax Act, 1961	Annual
Form No. 26	Annual return of deduction of tax under section 206 of Income Tax Act, 1961 in respect of all payments other than 'Salaries'	Annual
Form No. 27	Statement of deduction of tax from interest, dividend or any other sum payable to certain persons	Quarterly
Form No. 27E	Annual return of collection of tax under section 206C of Income Tax Act, 1961	Annual
Form No. 24Q	Quarterly statement for tax deducted at source from 'Salaries'	Quarterly
Form No. 26Q	Quarterly statement of tax deducted at source in respect of all payments other than 'Salaries'	Quarterly
Form No. 27Q	Quarterly statement of deduction of tax from interest, dividend or any other sum payable to non-residents	Quarterly
Form No. 27EQ	Quarterly statement of collection of tax at source	Quarterly

12. What is Form No. 27A?

Form No. 27A is a control chart of quarterly e-TDS/TCS statements to be filed in paper form by deductors/collectors alongwith quarterly statements. It is a summary of e-TDS/TCS returns which contains control totals of 'amount paid' and 'income tax deducted at source'. The control totals of 'amount paid' and 'income tax deducted at source' mentioned on Form No. 27A should match with the corresponding control totals in e-TDS/TCS return. A separate Form No. 27A is to be filed for each e-TDS/TCS return.

In case of Annual Returns the relevant control charts are Form 27A for e-TDS and Form 27B for e-TCS.

13. What are the precautions to be taken while submitting Form No. 27A/B?

While submitting Form No. 27A/B, one should ensure that:

1. There is no overwriting/striking on Form No. 27A/B. If there is any, then the same should be ratified (signed) by the authorised signatory.
2. Name and TAN of deductor and control totals of 'amount paid' and 'income tax deducted at source' mentioned on Form No. 27A/B should match with the respective totals in the e-TDS/TCS return.
3. All the fields of Form No. 27A/B are duly filled.

14. What is the data structure (file format) for preparing e-TDS/TCS return?

e-TDS/TCS return should be prepared in accordance with the data structure (File Format) prescribed by the e-filing administrator. Separate data structure has been prescribed for each type of form whether it is annual return (up to FY 2004-05) or Quarterly return (FY 2005-06 onwards).

15. What is Challan Serial Number given by the Bank?

Bank Challan Number is a receipt number given by the bank branch where TDS is deposited. A separate receipt number is given for each challan deposited. You are required to mention this challan number in the e-TDS/TCS return and not the preprinted numbers on the bank challan form i.e. ITNS 269 or ITNS 271.

16. What is 'Bank Branch Code'? Where do I get it from?

Reserve Bank of India has allotted a unique seven-digit code to each bank branch. You are required to mention the code of the bank branch where TDS is deposited in the e-TDS/TCS return. You can get this code from the bank branch where TDS amount is deposited.

17. Is it mandatory to mention Tax Deduction Account Number (TAN) in e-TDS/TCS return?

Yes, it is mandatory to mention the 10 digit reformatted (new) TAN in your e-TDS/TCS return.

18. Can I file Form No. 26Q separately for contractors, professionals, interest etc.?

No. A single Form No. 26Q with separate annexures corresponding to each challan payment for each type of payment has to be filed for all payments made to residents.

19. I do not know the Bank Branch Code of the branch in which I deposited tax. Can I leave this field blank?

Bank Branch code or BSR code is a 7-digit code allotted to banks by RBI. This is different from the branch code, which is used for bank drafts etc. This number is given in the OLTAS challan or can be obtained from the bank branch or from the search facility at NSDL-TIN website. It is mandatory to quote BSR code both in challan details and deductee details. Hence, this field cannot be left blank. Government deductors transfer tax by book entry, in which case the BSR code can be left blank.

20. What should I mention in the field 'paid by book entry or otherwise' in deduction details?

If payment to the parties (on which TDS has been deducted) has been made actually i.e. by cash, cheque, demand draft or any other acceptable mode, then 'otherwise' has to be mentioned in the specified field. But if payment has not been actually made and merely a provision has been made on the last date of the accounting year, then the option 'Paid by Book Entry' has to be selected.

21. By whom should the control chart Form 27A be signed?

Form 27A is the summary of the TDS/TCS statement. It has to be signed

by the same person who is authorized to sign the TDS/TCS statement in paper format.

22. What if e-TDS/TCS return does not contain PANs of all deductees?

In case PANs of some of the deductees are not mentioned in the e-TDS/TCS return, the Provisional Receipt will mention the count of missing PANs in the e-TDS/TCS return. The details of missing PANs (to the extent it can be collected from the deductees) may be filed within seven days of the date of Provisional Receipt to TIN-FC. e-TDS/TCS return will be accepted even with missing PANs. However, if PAN of deductees is not given in the TDS return, tax deducted from payment made to him cannot be posted to the statement of TDS to be issued to him u/s 203AA.

23. Is the Challan Identification Number compulsory?

Yes. Challan Identification Number is necessary for all non-Government deductors.

24. Is PAN mandatory for deductors and employees/deductees?

PAN of the deductors has to be given by non-Government deductors. It is essential to quote PAN of all deductees failing which credit of tax deducted will not be given.

25. I am a deductor having more than one office/branch, do I file separate e-TDS/TCS returns for each office/branch or can I file a consolidated return for all offices/branches? Can I quote the same TAN for filing e-TDS/TCS returns for each branch?

If you have more than one office/branch you can file a consolidated e-TDS/TCS return for all offices/branches. In this case you should quote the same TAN. You can also file e-TDS/TCS returns office/branch-wise individually. In such cases you need to have separate TAN for every branch. In case you do not have separate TAN for each branch then you should apply for TAN for each of the branches filing separate e-TDS/TCS return.

26. Should I file copies of certificate for no deduction or concessional deduction of tax along with the e-TDS/TCS return?

In case of salary e-TDS/TCS return (Form No. 24), you have to file certificate for no deduction or concessional deduction of TDS alongwith

the e-TDS/TCS return. In case of non-salary (Form No. 26/27) you need not file certificates for no deduction or concessional deduction of TDS alongwith the e-TDS/TCS return. This is not required in case of any quarterly statements

27. How do I file my quarterly e-TDS/TCS return, if I don't have PANs of all deductees?

You can file your e-TDS/TCS return for the deductees who have valid PANs and subsequently file correction return for remaining deductees whose PANs were not available with you while furnishing regular return.

28. How do I include deductees whose details were not provided earlier due to unavailability of PAN?

You are required to file a correction return in a prescribed file format available at **www.tin-nsdl.com**

29. What amount should be mentioned in the challan details in case a regular return is filed only for those deductees whose PAN is present and subsequently a correction is filed with the remaining deductees?

The amount deposited vide that particular challan should be mentioned in the original as well as correction return. Refer below example:

- Suppose a challan payment of Rs.1,00,000/- has been made for non-salary TDS against 100 deductees each with TDS of Rs.1,000/-. Under the existing procedure the deductor will have to quote at least 85 PAN failing which his return will be rejected.
- If there are only 50 deductees whose PAN is available and the deductor attempts to file a return with details of 100 deductees with PAN of only 50 deductees, the return will automatically be rejected at present.
- However, if he files a return with challan amount of Rs. 1,00,000/- and with details of 50 deductees with PAN, with deductee total of Rs.50,000/-, the return will be accepted. It means the deductor can furnish the details relating to such deductees whose PANs are available.
- The deductor can later file correction returns with other details of remaining deductees with the same challan details, i.e., the challan amount should be the amount deposited (in this case Rs. 1,00,000/-).

- The return will be accepted so long as the TDS total of incremental deductees is less than or equal to the balance of Rs.50,000/-.

30. After I prepare my e-TDS/TCS return, is there any way I can check/ verify whether it conforms to the prescribed data structure (file format)?

Yes, after you have prepared your e-TDS/TCS return you can check/verify the same by using the File Validation Utility (FVU). This utility is freely downloadable from the NSDL-TIN website.

31. What is File Validation Utility (FVU)?

FVU is a program developed by NSDL, which is used to ascertain whether the e-TDS/TCS return file contains any format level error(s). When you pass e-TDS/TCS return through FVU, it generates an 'error/response file'. If there are no errors in the e-TDS/TCS return file, error/response file will display the control totals. If there are errors, the error/response file will display the error location and error code along with the error code description. In case you find any error, you can rectify the error and pass the e-TDS/TCS return file again through the FVU till you get an error-free file.

32. What is the 'Upload File' in the new File Validation Utility?

Earlier the e-TDS/TCS return file after validating using File Validation Utility (FVU) had to be filed with TIN-FC. Now 'Upload File' that is generated by the FVU when the return is validated using the FVU has to be filed with TIN-FC. This 'upload file' is a file with the same filename as the 'input file' but with extension .fvu. Example 'input file' name is 27EQGov.txt, the upload file generated will be 27EQGov.fvu.

33. What are the platforms for execution of FVU?

For Annual Returns, FVU can be executed on any of the Windows platforms mentioned below: Win 95/Win 98/Win 2K Professional/Win 2K Server/Win NT 4.0 Server/Win XP Professional.

For Quarterly Returns, Java has to be installed to run FVU. Details are given in FVU section of NSDL-TIN website.

34. What are the Control Totals appearing in the Error/Response File generated by validating the text file through File Validation Utility (FVU) of NSDL?

The Control Totals in Error/Response File are generated only when a valid file is generated. Otherwise, the Error/Response File shows the nature of error. The control totals are as under:

- **Number of deductee/party records:** In case of Form 24/24Q, it is equal to the number of employees for which TDS return is being prepared. In case of Form 26/27/26Q/27Q, it is equal to the total number of records of tax deduction. 10 payments to 1 party would mean 10 deductee records.
- **Amount Paid:** This is the Total Amount of all payments made on which tax was deducted. In case of Form 24/24Q, it is equal to the Total Taxable Income of all the employees. In case of Form 26/27/26Q/27Q, this is equal to the total of all the amounts on which tax has been deducted at source.
- Tax Deducted: This is the Total Amount of tax actually deducted at source for all payments.
- Tax Deposited: This is the total of all the deposit challans. This is normally the same as Tax Deducted but at times may be different due to interest or other amount.

35. Are the control totals appearing in Form 27A same as that of Error/ Response File?

Yes, the control totals in Form 27A and in Error/Response File are same.

36. WHAT IF ANY OF THE CONTROL TOTALS MENTIONED IN FORM NO. 27A DO NOT MATCH WITH THAT IN E-TDS/TCS RETURN?

In such a case the e-TDS/TCS return will not be accepted by the TIN-FC. You should ensure that the control totals generated by FVU and that mentioned on Form No. 27A match. In case of any difficulties/queries, you should contact the TIN-FC or TIN Call Centre at NSDL.

37. Where can I file my TDS/TCS return?

You can file your TDS/TCS return at any of the TIN-FCs managed by NSDL. TIN-FCs are set-up at specified locations across the country. Details

are given in the NSDL-TIN website. These can also be furnished directly at NSDL-TIN web-site.

38. Will annual returns/quarterly statements furnished by entities who are eligible to file the same in physical form be accepted by the Income Tax Department?

No. Physical TDS/TCS returns/statements will be received at TIN-FCs.

39. What are the basic details that should be included in the of e-TDS/TCS return?

Following information must be included in the e-TDS/TCS return for successful acceptance. If any of these essential details is missing, the returns will not be accepted at the TIN-FCs:

- Correct Tax-deduction/collection Account Number (TAN) of the deductor/collector should be clearly mentioned in Form No. 27A as also in the e-TDS/TCS return, as required by sub-section (2) of section 203A of the Income-tax Act.
- The particulars relating to deposit of tax deducted at source in the bank should be correctly and properly filled.
- The data structure of the e-TDS/TCS return should be as per the structure prescribed by the e-Filing Administrator.
- The Control Chart in Form No. 27A (enclosed in paper form with the e-TDS/TCS return on CD/Pen Drive) should be duly filled and signed.

40. What are the charges for filing e-TDS/TCS return with TIN-FCs?

You have to pay charges as mentioned below:

No. of deductee records in e-TDS/TCS return	Upload charges (inclusive of service tax)
Returns having up to 100 records	₹31
Returns having 101 to 1000 records	₹185
Returns having more than 1000 records	₹618

41. What are the due dates for filing quarterly TDS Returns?

The due dates for filing quarterly TDS returns, both electronic and paper are as under:

Quarter	Due Date for Form Nos. 24Q & 26Q	Due Date for Form No. 27Q	Due Date for Form No. 27EQ
April to June	15 July	15 July	15 July
July to September	15 October	15 October	15 October
October to December	15 January	15 January	15 January
January to March	15 May	15 May	15 May

42. Is the procedure for filing of e-TCS different from that of filing e-TDS return?

The procedure for filing of e-TCS return is the same as those of e-TDS return except the forms to be used are different. The relevant forms for filing the e-TCS return are:

a) **Annual return:** Form No. 27E, 27B (Control Chart)

b) **Quarterly statement:** Form No 27EQ, 27A (Control Chart).

The e-TCS returns are also to be filed with NSDL at the various TIN-FCs

43. Should I file TDS certificates and bank challans along with the e-TDS/TCS return?

No, you need not file TDS certificates and bank challans for tax deposited along with the e-TDS/TCS return.

44. Can more than one e-TDS/TCS return be filed in a single computer media (CD/Pen Drive)?

Yes, More than one e-TDS/TCS statements can be furnished in same computer media.

45. Can a single e-TDS/TCS return be filed in two or more CD / Pen Drive?

No, one return cannot be furnished in two computer media.

46. Can e-TDS/TCS return be filed in compressed form?

Yes, if e-TDS/TCS return file is filed in compressed form, it should be compressed using Winzip 8.1 or ZipItFast 3.0 (or higher version compression utility only), so as to ensure quick and smooth acceptance of the file.

47. Do I have to affix a label on the e-TDS/TCS return CD/Pen Drive? What do I mention on the label affixed on the e-TDS/TCS return CD/Pen Drive?

No, there is no need to affix a label on computer media.

48. What if e-TDS/TCS return does not contain PANs of all deductees?

In case PANs of some of the deductees are not mentioned in your e-TDS/TCS return, the Provisional Receipt will contain the count of missing PANs in the e-TDS/TCS return. You may file the details of missing PANs within seven days of the date of Provisional Receipt to TIN-FC as a corrected e-TDS/TCS return.

49. If a deductor faces any difficulty in filing of e-TDS return where can it approach for help?

The details regarding the help required for filing of e-TDS are available on the Income-Tax Department website and the NSDL-TIN website. The TIN-FCs are also available for all related help in the e-filing of TDS returns.

50. Will computer media be returned by TIN-FC after acceptance of e-TDS/TCS statement?

Yes, computer media will be returned to deductor after acceptance of the e-TDS/TCS statements.

51. Whether the particulars of the whole year or of the relevant quarter are to be filled in Annexures I, II and III of Form No. 24Q?

(i) In Annexure I, only the actual figures for the relevant quarter are to be reported.

(ii) In Annexures II & III, estimated/actual particulars for the whole financial year are to be given. However, Annexures II & III are optional in the return for the 1st, 2nd and 3rd quarters but in the quarterly statement for the last quarter, it is mandatory to file Annexures II & III giving actual particulars for the whole financial year.

52. In Form No. 24Q, should the particulars of even those employees be given whose income is below the threshold limit or in whose case, the income after giving deductions for savings etc. is below the threshold limit?

(i) Particulars of only those employees are to be reported from the 1st quarter onwards in Form No. 24Q in whose case the estimated income for the whole year is above the threshold limit.

(ii) In case the estimated income for the whole year of an employee after allowing deduction for various savings like PPF, GPF, NSC etc. comes below the taxable limit, his particulars need not be included in Form No. 24Q.

(iii) In case, due to some reason, estimated annual income of an employee exceeds the exemption limit during the course of the year, tax should be deducted in that quarter and his particulars reported in Form No. 24Q from that quarter onwards.

53. How are the particulars of those employees who are with the employer for a part of the year to be shown in Form No. 24Q?

(i) Where an employee has worked with a deductor for part of the financial year only, the deductor should deduct tax at source from his salary and report the same in the quarterly Form No. 24Q of the respective quarter(s) up to the date of employment with him. Further, while submitting Form No. 24Q for the last quarter, the deductor should include particulars of that employee in Annexures II & III irrespective of the fact that the employee was not under his employment on the last day of the year.

(ii) Similarly, where an employee joins employment with the deductor during the course of the financial year, his TDS particulars should be reported by the current deductor in Form No. 24Q of the relevant quarter. Further, while submitting Form No. 24Q for the last quarter, the deductor should include particulars of TDS of such employee for the actual period of employment under him in Annexures II & III.

54. The manner of computing total income has been changed in the budget for the current year by allowing deduction under section 80C. However, the present Form No. 24Q shows a column for rebate under section 88, 88B, 88C and 88D. How should Form No. 24Q be filled up in absence of a column for section 80C?

While filling up Form No. 24Q, the columns pertaining to sections 88, 88B, 88C and 88D may be left blank. As regards deduction under section 80C, the same can be shown in the column 342 pertaining to 'Amount deductible under any other provision of Chapter VI-A'.

55. Form No. 24Q shows a column which requires explanation for lower deduction of tax. How can a DDO assess it? Please clarify.

Certificate for lower deduction or no deduction of tax from salary is given by the Assessing Officer on the basis of an application made by the deductee. In cases where the Assessing Officer has issued such a certificate to an employee, deductor has to only mention whether no tax has been deducted or tax has been deducted at lower rate on the basis of such a certificate.

56. From which financial year will the Annual Statement under Sec. 203AA (Form No. 26AS) be issued?

The annual statement (Form No. 26AS) will be issued for all tax deducted and tax collected at source from FY 2005-06 onwards after the expiry of the financial year.

57. How will the PAN-wise ledger account be created by NSDL in respect of payment of TDS made by deductors in banks?

The PAN-wise ledger account will be created after matching the information in the TDS/TCS statements filed by the deductor/collector and the details of tax deposited in banks coming through On Line Tax Account System (OLTAS).

58. What essential information should be given in the quarterly statements to enable accurate generation of PAN-wise ledger account?

The accuracy of PAN-wise ledger account will depend on:

- Correct quoting of TAN by the deductor.
- Correct quoting of PAN of deductor.

- Correct and complete quoting of PAN of deductee.

Correct quoting of CIN (Challan Identification Number) wherever payment is made by challan.

59. Will a deductee be able to view his ledger account on NSDL-TIN website?

Yes. The scheme for such views is expected to be notified by ITD soon.

60. Can the e-TDS/TCS return be filed online?

Yes e-TDS/TCS return can be filed online under digital signature.

61. What are the different views available for Tax Payers?

On the NSDL-TIN website, three types of views are available for a tax payer:

a) Access without authentication.

b) Access with Digital Signature Certificate (DSC).

c) Access through TIN-FC.

62. What is access without authentication?

On providing the TAN and provisional receipt number / Token Number, the deductor can view the following details:

- Whether quarterly statements have been uploaded to TIN central system by TIN-FC.
- Whether quarterly statements have been accepted by TIN central system.
- Whether challans in statements have been matched with challans uploaded by banks.
- Number of deductees whose PAN accounts have been booked.
- Line no. of deductees in statements whose PAN accounts could not be booked.
- Confirm whether a specific PAN account has been booked.

63. What is access with authentication?

To access this view, the tax payer should have a Digital Signature Certificate (DSC) which has to be registered with NSDL in advance. (Details of the same are available at Online Uploads section of the NSDL-TIN website.) The tax payer has to authenticate its identity using the DSC. All the views mentioned above will be available with financial details.

64. What is access through TIN-FC?

Deductors can access details of their statements through the TIN-FC who has uploaded their statements.

65. ill the Paper TDS data be available online on TIN?

Yes, the Paper TDS data will also be available in TIN database after the digitalization of the Paper TDS return by the e-intermediary.

66. Will the TIN-FC give any acknowledgment/receipt after acceptance of e-TDS/TCS return?

If the e-TDS/TCS return file is complete in all aspects, TIN-FC will issue a provisional receipt to you. The provisional receipt issued by TIN-FC is deemed to be the proof of e-TDS/TCS return filed by you.

67. What if my e-TDS/TCS return is not accepted by TIN-FC, how will I know the reason for rejection?

In case of non-acceptance of your e-TDS/TCS return file, TIN-FC will issue a Non-Acceptance Memo which will state reason for rejection.

68. What is course of action in case a regular statement is rejected

Please refer to Course of action - regular rejection for the common causes for rejection of a regular statement and corresponding course of action for a deductor.

69. What is course of action in case a correction statement is rejected?

Please refer to Course of action - correction rejection for the common causes for rejection of a correction statement and corresponding course of action for a deductor.

70. What is a correction TDS/TCS statement?

Deductor/collector is required to furnish one regular TDS/TCS statement for a particular TAN, Form, Financial year and quarter. In case there are any additions/updations to be made to the details of the regular statement accepted at the TIN central system, the same should be done by furnishing a correction statement.

71. Why should I furnish a correction statement?

The payment information provided in the regular TDS/TCS statement, is verified with the corresponding details provided by the bank where tax was deposited. On successful verification credit of tax deducted/collected by you is reflected in the annual tax statement (Form 26AS) of the deductees/transacting parties where PAN of deductee / transacting party is present.

In case of deficiencies in the accepted regular TDS/TCS statement such as incorrect challan details or PAN not provided or provided incorrectly, the tax credit will not reflect in the Form 26AS of the deductees in your statement.

To facilitate correct credit in Form 26AS of the deductees you are required to remove deficiencies, if any, in the accepted regular TDS/TCS statement by filing a correction statement.

72. What are the different types of corrections that I can make?

The following are the various types of corrections that you can make to an accepted regular TDS/TCS statement:

- Update deductor details such as Name, Address of Deductor. This type of correction is known as C1
- Update challan details such as challan serial no., BSR code, challan tender date, challan amounts etc. This type of correction is known as C2.
- Update/delete /add deductee details. This type of correction is known as C3.
- Add / delete salary detail records. This type of correction is known as C4.

- Update PAN of the deductee or employee in deductee/salary details. This type of correction is known as C5.
- Add a new challan and underlying deductees. This type of correction is known as C9.
- Cancel accepted statement. This type of correction is known as Y. Regular TDS /TCS statement can be cancelled only if the TAN of the deductor is to be corrected. After the regular statement with incorrect TAN is cancelled a regular TDS / TCS statement with the correct TAN should be filed.

73. Can I update / add deductee and challan details in the same correction statement? Do I need to file separate correction statements for updating a PAN as well as adding a challan and its underlying deductees?

Yes. There is no need to file separate statements for different types of corrections. In case you need to update or add different deductees / challans in the same statement, it can be done in a single correction file.

Depending on the type of correction a single correction file may contain multiple correction statements. A correction file containing more than one correction statement is called "multiple batch correction statement".

74. Can I file the correction e-TDS/TCS statement with any TIN-FC?

You can file the corrected e-TDS/TCS return at any TIN-FC.

75. Do I have to pay upload fee for filing correction e-TDS/TCS return?

Yes. Upload fee is payable for each and every e-TDS/TCS return accepted by the TIN-FC, irrespective of whether it is a correction e-TDS/TCS statement or an original e-TDS/TCS statement. Upload fees applicable for correction statement is as per table below:

No. of deductee records in e-TDS/TCS return	Upload charges (inclusive of service tax)
Returns having up to 100 records	Rs.30
Returns having 101 to 1000 records	Rs.182
Returns having more than 1000 records	Rs.606

76. Do I have to pay upload fee for filing correction e-TDS/TCS return?

Yes. Upload fees are applicable for cancellation (Y) statements. Charges would be as per regular statement being cancelled.

77. Will the TIN-FC give any acknowledgment/receipt after acceptance of corrected e-TDS/TCS return?

Yes, TIN-FC will issue a Provisional Receipt in case corrected e-TDS/TCS return file is valid and accepted by the TIN-FC. The Provisional Receipt issued by TIN-FC is deemed to be the proof of corrected e-TDS/TCS return filed by you.

78. What are the prerequisites for furnishing a correction TDS/TCS statement?

The following are the prerequisites for furnishing a correction TDS/TCS statement:

- check the status of the regular statement on the TIN website by entering the TAN and PRN at **https://onlineservices.tin.nsdl.com/TIN/JSP/tds/linktoUnAuthorizedInput.jsp**
- Correction statement should be prepared only if the corresponding regular statement has been accepted at the TIN central system.
- .fvu file of the corresponding accepted regular statement should be available for preparing a correction statement
- Provisional receipt of the corresponding accepted regular statement should be available.

79. How can I check the status of the TDS/TCS statement submitted by me?

You can check the status of the statement submitted by you at **https://onlineservices.tin.nsdl.com/TIN/JSP/tds/linktoUnAuthorizedInput.jsp**

You need to mention the TAN and PRN in the field provided. Details of the statement along with status whether accepted (displayed as Received by TIN) or rejected (along with reason for rejection) will be displayed to you.

In case statement is accepted, you can further check the status of challans and deductee PANs in the statement.

80. What are the different statuses of a challan in the TDS/TCS statement?

The following are the various statuses of challans in a TDS/TCS statement:

- **Booked:** Challan / transfer voucher detail in the statement matches with corresponding details received from banks / PAO.
- **Match Pending:** Corresponding challan details not received from the bank.
- **Match Failed (Challan):** TAN and/or amount relating to a challan in the statement do not match with the corresponding details received from banks.
- **Match Failed (Transfer Voucher):** Amount relating to a transfer voucher does not match with corresponding details received from PAO.
- **Provisionally Booked:** In case of Government deductors where TDS/TCS statement is received by TIN and mode of payment of TDS/TCS is through book entry (transfer voucher) and e-TBAF details from PAO is not received by TIN.

81. What is the significance if the status of challan is 'Booked'?

If the challan is in Booked status, credit of tax deducted will be reflected in the annual tax statement (Form 26AS) of all the underlying deductees with a valid PAN.

Correction in challan details is not allowed once a challan is booked. Correction can be made on underlying deductee records of a booked challan.

82. What should I do if the status of challan is Match pending?

A challan is in Match pending status as the CIN is not present in the payment information provided by the Bank. As a result the credit of tax deducted will not be reflected in the Form 26AS of corresponding deductees with valid PAN.

The possible cause could be due to error in quoting CIN details (Challan serial no., BSR code and challan tender date) either in the TDS statement or in the details provided by the Bank. Error in TDS statement can be rectified by filing a correction statement, where as error.

83. What should I do if the status of challan is in status 'Match failed'?

A challan is in Match failed status as the TAN/challan amount in the statement does not match the details provided by the Bank. As a result the credit of tax deducted will not be reflected in Form 26AS of corresponding deductees with valid PAN.

The possible cause could be error in quoting challan amount. The same can be rectified by filing a correction statement.

84. How do I prepare the first correction on a regular TDS/TCS statement?

Correction statement should be prepared as per data structure prescribed by Income Tax Department which is different from the data structure of a regular TDS/TCS statement. Data structure of correction statement is available on the NSDL TIN website at **http://www.tin-nsdl.com/Downloadsquarreturns_correct.asp**

Correction in challan details is not allowed once a challan is booked. Correction can be made on underlying deductee records of a booked challan.

85. Is any utility/software available for preparing correction TDS/TCS statement?

There are many software providers who have developed softwares for preparation of TDS/TCS statements. List of software providers along with their website details are available on the TIN website at **http://www.tin-nsdl.com/eTDSswProviders.asp**

Alternatively, freely downloadable return preparation utility (RPU) developed by NSDL is available on the TIN website at **http://www.tin-nsdl.com/Downloadsquarreturns_correct.asp.**

86. What are the steps involved in preparing a statement using NSDL RPU?

NSDL RPU can be used to prepare correction statements being filed the first time on an accepted regular statement. The steps to be followed for making a correction statement using NSDL RPU are as under:

1. You should have the .FVU file of the accepted regular statement on which corrections need to be made.

2. After downloading the NSDL RPU, you have to execute the same (double click the exe).

3. You have to select the option "Correction" for preparation of correction statement and import the .FVU file of the regular TDS/TCS statement into the RPU.

4. You will have to provide the provisional receipt number / Token Number of the regular statement to be corrected.

Details of the regular statement will be displayed to you in the utility. You can make the required corrections by selecting the option Add/Update/ Delete in the utility.

After making the corrections, you need to click on "Create file" and the correction statement will be created.

87. Can I update a challan?

Yes. You can update a challan.

88. How can I update a challan?

You can update any of the details provided in the challan viz; CIN details, amounts etc.

Points to be kept in mind while updating challan:

- identify the challan to be updated by
- its sequence no as per regular statement
- CIN, deposit amount as per regular statement
- Update the challan detail as required.
- Along with the updated values, the correction statement should contain value of the CIN and deposit amount as per regular statement as well.

Example: In order to correct challan serial number from 013 to 014 in the sixth challan of the regular statement filed by you, the steps as under need to be followed

1. Identify the challan by the sequence number as well as the CIN and deposit amount as per regular statement.

2. Update the value in the field challan serial number to 014.

3. Ensure that the value in the field Last Bank challan no is 013, i.e. as per regular statement.

89. Can I add a challan?

Yes. You can add a challan.

90. How can I add a challan?

You can add a new challan as well as the underlying deductee records. The procedure for adding a challan is as under:

1. Maintain the sequence of the new challan record in continuation to the sequence number of the last challan as per regular statement and add details of challan in this record.

2. Add the underlying deductee records and associate the same with the sequence number of the newly added challan.

Example: If a regular statement filed by you has six challans and you wish to add one more challan and underlying five deductees, the steps as under need to be followed:

1. Sequence of new challan being added should be 7.

2. Add underlying five deductees in the deductee annexure and associate them with new challan having sequence no. 7.

91. Can I delete a challan?

No. You cannot delete a challan.

92. Can I update a deductee record?

Yes. You can update a deductee record.

93. How can I update a deductee record?

You can update deductee details viz; PAN of deductee, name, amount etc. Steps to update a deductee record are as under:

- Identify the challan corresponding the deductee record to be updated by

- its sequence no as per regular statement
- CIN, deposit amount as per regular statement

- Identify the underlying deductee record to be updated by
  - its sequence number as per regular statement under the challan identified as above.
  - PAN of deductee, total tax deducted and total tax deposited as per regular statement.
- Update the deductee details as required.
- Along with the updated values, the correction statement should contain CIN, deposit amount in challan details, PAN of deductee, total tax deducted and total tax deposited in deductee details as per regular statement as well.

Example: In order to correct deductee PAN from PANINVALID to AAAPI0147G in the sixth deductee record of the fourth challan of the regular statement filed by you, the steps as under need to be followed:

1. Identify challan no. 4 and corresponding deductee record having sequence no. 6 as per regular statement
2. Update the value in the field deductee PAN to AAAPI0147G.
3. Ensure that the value in the field Last deductee PAN is PANINVALID, i.e. as per regular statement.

94. Can I add a deductee?

Yes. You can add a deductee record.

95. How do I add a deductee record?

You can add a new deductee records under an existing challan. The procedure for adding deductee records is as under:

- identify the challan corresponding the deductee record to be updated by
  - its sequence no as per regular statement
  - CIN, deposit amount as per regular statement
- Add the new deductee record

- Maintain sequence of the new deductee record in continuation to the sequence number of the last deductee record under the said challan as per regular statement add details of deductee in this record.
- Along with newly added deductee record, correction statement should contain value of CIN and deposit amount as per regular statement as well.

Example: If a regular statement filed by you has six challans and you wish to add five more deductees to challan 4 which has 4 deductees as per regular statement, the steps as under need to be followed:

1. Identify challan having sequence no. 4
2. Sequence of new deductee being added to 5 in the challan details section
3. Add underlying five deductees in the deductee annexure and associate them with challan having sequence no. 4.

96. Can I delete a deductee record?

Yes. You can delete a deductee record.

97. How can I delete a deductee record?

Steps to delete a deductee record are as under:

- identify the challan corresponding the deductee record to be updated by
  - its sequence no as per regular statement
  - CIN, deposit amount as per regular statement
- Identify the deductee record to be updated by
  - its sequence number as per regular statement under the challan identified as above.
  - PAN of deductee, total tax deducted and total tax deposited as per regular statement.
- Flag the deductee details to be deleted
- Along with the flag for deletion, the correction statement should contain CIN, deposit amount in challan details, PAN of deductee, total tax deducted and total tax deposited in deductee details as per regular statement as well.

98. Can I update a salary detail?

Yes. You can update a salary detail record.

99. How can I update a salary record?

You can update salary details viz; Name and PAN of employee, salary amount, deductions etc. Steps for updating salary record are as under:

- Identify the salary detail record by
  - its sequence number as per regular statement
  - Value in the field 'Gross total Income' as per regular statement.
- Update the salary details as required
  - Along with updated values, Gross Total Income as per regular statement should also be provided in the correction statement.

100. Can I add a salary record?

Yes. You can add a salary record.

101. How can I add a salary record?

You can add a new salary records as per following procedure.

1. Maintain the sequence of the new challan record in continuation to the sequence number of the last challan as per regular statement and add details of challan in this record..

Example Regular statement filed by you has three salary records and you wish to add one more salary record

1. Sequence of new record being added should be 4 in the Annexure II.
2. Add new salary record.

102. Can I delete a salary record?

Yes. You can delete a salary record.

- **How can I delete a salary record?**

  Steps for deleting a salary record are as under:

  - Identify the salary record to be deleted by

- its sequence number as per regular statement
- Gross total income as per regular statement

- Flag the salary detail record to be deleted.
- Along with flag for deletion, correction statement should also contain value of the field Gross total Income as per regular statement.

103. Can I update the Assessment Year of a regular TDS/TCS statement by filing a correction statement?

No, the fields TAN, Form no., quarter, FY and A.Y quoted in a regular statement cannot be updated by furnishing a correction statement

104. What is the significance of a identifying a record while updating/deleting the same?

While preparing a correction statement, the record to be updated/deleted is required to be identified by its sequence number as well as values of certain fields as per regular statement. List of fields used for identifying a record are as under:

1. Challan detail – CIN details and deposit amount
2. Deductee detail – PAN of the deductee, total tax deducted and total tax deposited
3. Salary details – Gross total income.

The correction statement should contain values of the fields referred to above as per regular statement along with the corrections made. Once the correction statement is received at TIN central system, the values of the identification fields are verified with the corresponding values as per TIN central system.

If the values match, the correction statement will get accepted. If the values do not match, the correction statement will get rejected at the TIN central system.

Example: If the value in the field Last Bank challan no. (i.e. challan no. as per regular statement) in the correction statement does not match the corresponding details as per the regular statement in the TIN central system, the correction statement will get rejected for the reason **"Last Bank challan serial number of the correction statement is not matching with corresponding statement details available at TIN Central system".**

105. Can I rectify the details of a challan if the status of the same on the NSDL website is displayed as 'Booked'?

Once the challan is updated with status 'Booked' modifications or rectifications to the details of the said challan are not allowed. As a result any correction TDS/TCS statement with modifications/rectifications on a booked challan will get rejected at the TIN central system.

106. How many times can I furnish a correction TDS/TCS statement?

A correction TDS/TCS statement can be furnished multiple times to incorporate changes in the regular TDS/TCS statement whereas a regular TDS/TCS statement will be accepted at the TIN central system only once.

107. What are the important points to be kept in mind while preparing correction statement more than once on the same regular statement?

You have to kept in mind, the following points while preparing correction statement more than once on the same regular statement:

1. The TDS/TCS statement on which correction is to be prepared should be updated with details as per all previous corrections.
2. Modifications/addition/deletion in correction statements accepted at the TIN central system only should be considered.

108. The first correction filed by me contains three types of correction (three PRNs / Token Number) and one of the types of correction has got rejected at the TIN central system. What should I do?

The steps as under should be followed:

1. You have to update modifications as per the accepted corrections in the TDS statement.
2. Identify the record for which correction was rejected earlier by its sequence no. and fields for identification
3. Correct the said record.
4. Correction statement should contain updated values as well as value of identification field as per regular statement.

109. Which Provisional Receipt Number / Token Number should I quote while preparing correction statement more than once on the same regular statement?

There are two fields for Provisional Receipt Number (PRN) / Token Number in a correction statement as under:

a. Original Provisional Receipt Number / Token Number - PRN of the regular statement should be mentioned in this field.

b. Previous Provisional Receipt Number / Token Number - PRN of the last accepted correction statement should be mentioned in this field. In case the value in this field is incorrectly mentioned, the statement will get rejected at TIN central system for the reason: **"Either Previous Provisional Receipt No. provided is incorrect or combination of Original Provisional Receipt Number / Token Number and Previous Provisional Receipt Number / Token Number is not in sequence"**

Example:

Single batch correction statement - Only one type of correction in the file

a. You have filed a regular statement having PRN / Token Number 010010200083255 and subsequently filed a single batch correction statement having PRN / Token Number 010010300074112. While preparing correction statement, you have to mention PRN / Token Number 010010200083255 in the field original PRN and the PRN / Token Number 010010300074112 in the field Previous PRN.

Multiple batch correction statement - different types of correction in a single file

b. You have filed a regular statement having PRN / Token Number 010010200083255 and subsequently filed a multi batch correction statement having three batches and corresponding PRNs / Token Numbers as 010010300074112, 010010300074123 and 010010300074134. While preparing the correction statement, you have to mention PRN / Token Number 010010200083255 in the field original PRN and check the status of all the three PRNs of correction statement.

- If all the three PRNs / Token Numbers are accepted at the TIN central system, you may mention any of the three PRNs / Token Numbers in the field previous PRN.

- If any of the three PRNs / Token Numbers is rejected, then you should mention the PRN / Token Number which has been accepted at the TIN central system in the field Previous PRN.
- If all the three PRNs / Token Numbers are rejected, then you must mention the PRN / Token Number of the regular statement, i.e. 010010200083255 in the field Previous PRN.

110. How many times can I update PAN of a deductee/transacting party?

Structurally valid PAN of a deductee in the regular statement can be updated to another structurally valid PAN only once.

111. When does a statement get 'Partially Accepted'?

A correction statement containing updates in PAN of deductee/employee may get Partially Accepted. This is possible when the PAN in the any of the records being updated by you in the correction statement is invalid, i.e. PAN not present in PAN Master Database. In such a scenario, the said record gets rejected resulting in partial acceptance of the statement.

112. What should I do if the status of correction statement filed by me is 'Partially accepted'?

In case correction statement is in status 'Partially accepted', you have follow steps as under:

1. You have to update modifications as per the accepted records in the TDS statement.
2. Identify the deductee/salary record which has got rejected due to invalid PAN.
3. Rectify the incorrect PAN
4. Correction statement should contain value of identification keys as per regular statement along with the updated values.

113. What could be the cause of rejection of TDS/TCS statement for the reason "Total Deposit amount of deductees is more than Challan amount actually deposited in bank"?

The total tax deposited amount as per challan should be greater than or equal to the total tax deposited amount as per deductee details, else a regular TDS/TCS statement will not get validated through FVU.

If you file a correction statement for adding deductee records under a particular challan, the total tax deposited as per challan in regular statement should be greater than or equal to the total tax deposited in deductee details as per regular as well as correction statement.

Note: Amount in the fields Interest and others in the challan is not considered in the total tax deposited as per

VOICE OF CA

Part-III

HINDU UNDIVIDED FAMILY
Under the Hindu Law & Income Tax Act, 1961

(As Ammended By Finance Act, 2012 &
Hindu Succession (Amendment) Act, 2005)

Chapter-I

CONCEPT OF HINDU UNDIVIDED FAMILY

I. MEANING OF HUF

Income Tax Act provides a special status to HUF under the Act and covers it in the definition of person u/s 2(31) of the Act. The Hindu Undivided Family (HUF) has not been defined under Income Tax Act, 1961, however, as per Hindu Law

A Hindu Undivided Family (HUF) is ordinarily joint not only in estate but in food and worship. The members of a Hindu Family live in a state of union, unless the contrary is established. HUF is a creation of law and cannot be created by the act of parties, except in the case of adoption by member of HUF. HUF is a separate legal entity as per section 2(31) of the Income Tax Act and therefore, as long as the HUF is in existence, no individual member can be separately assessed in respect of its income. **[*ITO vs. BachuLalKapoor (1966) 60 ITR 74 (SC)*].** Even if the family is reduced to sole - surviving coparcener (male or female) with other family members, income tax is leviable on the joint family and not on male members as individual.

Concept of Coparcener

A HUF, as such, can consist of a very large number of members including female members (w.e.f. 9th September, 2005, whether married or unmarried) as well as distant blood relatives in the male line. However, out of this, coparceners are only those males who are within 4 degrees in lineal descendent from the common male ancestor and including the common ancestor and the daughter of the common ancestor.

The relevance of concept of coparcener is that only coparceners can ask for partition. The other male family members; i.e, other than coparceners in a HUF, have no direct claim over HUF property, but can claim only through the coparceners. The coparcener must be a member of the family but a member of the family need not be a coparcener.

HUF may be composed of

- Large or
- Small or
- Nuclear Joint Families

HUF is a Joint Hindu Family consisting of:-

Male members lineally descended from a common male ancestor, together with their-

- Mothers.
- Wives.
- Unmarried daughters and
- The Hindu coparcenary *

[CGT v. B.K. Sampangiram (1986) 160 ITR 188 (Karn.)]

Note: STRANGER can be introduced in HUF only by adoption ***[CIT vs. M.M. Khanna (1963) 49 ITR 232 (Bom)].***

Distinction - Co-parcener and a member

A HUF, as such, can consist of a very large number of members including female members as well as distant blood relatives in the male line.

However, out of this, coparceners are only those males & females who are within 4 degrees in lineal descendent from the common male ancestor. The relevance of concept of coparcener is that **only coparceners can ask for partition**. The other family members; i.e., other than coparceners in a HUF, have no direct claim over HUF property, but can claim only through the coparceners.

School of Thoughts under Hindu Law

There are two principle school of thoughts under Hindu Law, namely Mitakshara and Dayabhaga.

1. Mitakshara Scool:

- The Mitakshara School exists throughout India except in the State of Bengal and Assam. The Inheritance is based on the principle or propinquity i.e. the nearest in blood relationship will get the property.
- Sapinda relationship is of blood. The right to Hindu joint family property is by birth. So, a son immediately after birth gets a right to the property.
- The system of devolution of property is by survivorship. The share of co-parcener in the joint family property is not definite or ascertainable, as their shares are fluctuating with births and deaths of the coparceners. The coparcener has no absolute right to transfer his share in the joint family property, as his share is not definite or ascertainable.
- A woman could never become a coparcener. But, the amendment to Hindu Sucession Act of 2005 empowered the women to become a coparcener like a male in ancestral property. A major change enacted due to western influence.
- The widow of a deceased coparcener cannot enforce partition of her husband's share against his brothers.
- There are four Sub-Schools under the Mitakshara School:
  - Dravidian School of thought (Madras school)
  - Maharashtra school (Bombay school of thought)
  - Banaras school of thought:
  - Mithila school of thought:

2. Dayabhaga school:

- It exists in Bengal and Assam only. It has no sub-school. It differs from Mistakshara School in many respects.

- Inheritance is based on the principle of spiritual benefit. It arises by pinda offering i.e. rice ball offering to deceased ancestors.
- Sapinda relation is by pinda offerings.
- The right to Hindu joint family property is not by birth but only on the death of the father.
- The system of devolution of property is by inheritance. The legal heirs (sons) have definite shares after the death of the father.
- Each brother has ownership over a definite fraction of the joint family property and so can transfer his share.
- The widow has a right to succeed to husband's share and enforce partition if there are no male descendants.
- On the death of the husband the widow becomes a coparcener with other brothers of the husband. She can enforce partition of her share.

Rights and liabilities of members of HUF

As specified under the Hindu law and the codified law, various members of the family are entitled to rights, etc., as given below:

1. The coparceners of the HUF are entitled to demand partition. Besides the coparceners, the Hindu widows under the Hindu Women's Right to Property Act, 1937, are also entitled to demand partition just as her husband could have done. However, wife of a coparcener cannot claim for partition.
2. The members of the HUF which include male and female members, daughters and children of the male members are entitled to maintenance. Maintenance includes food, shelter, clothing, education, medical aid and marriage.
3. A members of the HUF is entitled to own and possess his separate property besides his interest in the HUF property.
4. The widow and children of a deceased coparcener have the right to be maintained out of the HUF property and are also entitled to demand partition.
5. If a coparcener or other member converts himself into any other religion like Islam or Christianity, he ceases to be a member of family and he cannot enjoy joint status along with other members.

6. A coparcener or member may enter into partnership with Karta of HUF by bringing his capital or even without bringing any capital but contributing his skill and labour only.

2. CHARACTERISTICS OF HUF

1. The Karta can function in Dual capacity and can claim remuneration and other benefits from the HUF.
2. Hindu Undivided family may be composed of
   - Large or
   - Small or
   - Nuclear Joint Families
3. Every above said families may hold the property in its own RIGHT, may be assessed for its income as a separate unit.
4. There need NOT be more than one MALE member to form HUF.
5. If the family is reduced to Sole - Surviving coparcener with other family members, income tax is leviable on the joint family and not on male members as individual.
6. There can be a HUF comprising only of FEMALE members.
7. A member of the family can carry on any other business individually, it will be his individual income not of family even if he borrows requisite capital from the joint family fund.
8. Mostly fees or salary earned by Karta as director or partner may be considered as his individual income.
9. Salary income of the individual will not be assessed as income of the HUF merely by the reason that the person having been educated, maintained, supported wholly by joint family funds.

3. CONCEPT OF CO-PARCENERY

The Hindu Coparcenary - a narrower body than Joint Family.

A Hindu joint family consists of the common ancestor and all his lineal male descendants upto any generation together with the wife/ wives (or widows)

and unmarried daughters of the common ancestor and of the lineal male descendants. Whatever the skeptic may say about the future of the Hindu joint family, it has been and is still the fundamental aspect of the life of Hindus.

Whereas a co-parcenery is a narrow body of persons within a joint family. It exclusively consists of male members. A Hindu coparcenery is a corporate entity, though not incorporated. A coparcenery consists of four successive generations including the last male holder of the property. The last male holder of the property is the senior most member of the family.

HUF coparcenery is a limited body, a part of the HUF, smaller than the membership of HUF. It includes those persons who acquire interest in joint coparcenary property by BIRTH, namely:-

- Sons
- Grand Sons
- Great Grand Sons

Under the Mitakshara School of thoughts, a Coparcener is that member of HUF who acquires by birth an interest in the joint property of the family whether inherited or otherwise acquired by the family. The members of the family who are not Coparceners have no right to claim partition.

Characteristics of Coparcenery

A Hindu coparcenery has following essential characteristics as under according to ***CED v. Alladi Kuppuswamy (1977) 108 ITR 439 (SC)*:**

1. The male descendants as well as female descendants after the Succession (Amendment) Act, 2005, up to the third generation acquire an independent right of ownership by birth and not representing their ancestors. After the commencement of Hindu Succession (Amendment) Act, 2005, a daughter of a coparcener shall have the same right in the coparcenery as she would have had if she had been a son.

2. The members of the coparcenery have the right to work out their rights by demanding partition.

3. Until partition, each member has got ownership extending over the entire property co-jointly with the others and so long as no partition takes place, it is difficult for any coparcener to predict the share which he might receive.

4. As a result of such co-ownership, the possession and enjoyment of the property is common.

5. There can be no alienation of the property without the concurrence of the other co-parceners unless it is to be for legal necessity.

6. The interest of a deceased member lapses on his death and merges in the coparcenery property.

Rights of Mistakshara coparcener

1. A Mitakshara Coparcener has right to claim partition of the family property and to separate himself from the family.

2. A coparcener has his/her right and interest by birth in the whole of the joint family property without having a definite share in that property. According to ***Appovier v. Rama Subba Aiyan (1866) 11 MIA 75, 90***, no coparcener of an undivided family can predict in the joint and undivided property that he has a certain definite share.

3. Every coparcener has a right to be maintained out of the joint family fund. However, the extent of maintenance available to him is at Karta's sole discretion.

4. It was held in **Attorney General of Ceylon v. A.R.A Arunachalam Chettiar & Ors. (1958) 34 ITR (ED) 42 (PC),** that a coparcener can Initiate proceedings against the Karta to ensure recognition of his future maintenance rights where he is excluded entirely from the benefits of joint enjoyment of family property and income. He can also claim compensation for his earlier exclusion.

5. The coparceners are tied together with unity of interest and unity of possession between them.

6. Every coparcener has a right to challenge an improper alienation made by Karta, apart from those made for legal necessity, benefit of estate or indispensable duties or for legitimate acts of management.

7. As held in **State Bank of India v. Ghamandi Ram AIR 1969 SC 1330 and N.V.Narendra Nath v. CWT (1969) 74 ITR 190 (SC),** a Mitakshara coparcener has the right of survivorship meaning that he takes the joint family property by survivorship.

However, w.e.f. 9-9-2005 as a consequence of commencement of Hindu Succession (Amendment) Act, 2005, the interest in Joint Hindu Family shall devolve by testamentary or intestate succession and not by survivorship.

Right of coparceners under Dayabhaga School

The right of the coparceners under Dayabaga and Mitakshara Schools have many things in common. There are, however, certain points of distinction which are as under:

1. Under the Dayabhaga school, no person has any interest or right by birth. The interest of each coparcener is a specified and fixed one.

2. A coparcener under the Dayabhaga schools, has the right to joint possession and enjoyment of the HUF properties.

Chapter-II

KARTA OF HUF

The Karta is the manager of HUF and have wide powers by way of controlling the affairs of the HUF. The Karta enjoys his position in the HUF by operation of law without any agreement and consent of other members of HUF. He stands in a fiduciary relationship with other members, but he is not accountable to anyone.

Article 236 of the Mulla Hindu Law defines "Karta" as follows:

"Manager *- Property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family: The Manager of a joint family is called Karta."*

The Karta is entrusted not only with the management of properties of the family but is also entrusted with the general welfare of the family. Karta is the head of the family and acts on the behalf of all members of the family but an agent of members of the family.

Who can be 'KARTA'?

1. **The Karta is the senior most male coparcener of the HUF.**

   Even if the Karta becomes aged, infirm, ailing, or even a leper, he may continue to be Karta. Where the senior most member is not Karta, the next senior male member takes over as Karta. ***[Man vs. Gaini ILR (1918) 40 All 77].***

2. A junior coparcener can be Karta

Only if the senior most member gives up his right, a junior coparcener can become Karta of the HUF, with the consent of all other members as held by Supreme Court in ***Narendra Kumar J. Modi Vs CIT (1976) 105 ITR 109 (SC).***

3. There can be more than one KARTA of a HUF

Darshan Vs Prabhu ILR (1946) All 692

4. Only Coparcener can become Karta

The Supreme Court in ***CIT vs. Seth Govindram Sugar Mills [1965] 57 ITR 510 (SC)*** held that coparcenership is a necessary qualification for the managership of a joint Hindu family.

5. Minor as Karta

In absence of the father, the elder minor son could act as the Karta of the family. Therefore, a minor can be the managing member of a Hindu undivided family.***[Budhi Jena v. DhobaiNaik (AIR 1958 Orisss 7)]***

POWERS OF KARTA

1. Managing the affairs of HUF
2. Control & become custodian of the finances
3. Can borrow money for & on behalf of HUF
4. Spend money for the family & not accountable for it.
5. NOT liable to submit account to anybody.
6. Can make partition of the family suo moto.
7. Quantum of partition shall be with KARTA's liking.
8. HUF cannot enter in to contracts, or form partnership firm, or represent except through Karta, however Karta may allow others to represent HUF.
9. Can Gift away the movable properties of HUF for natural love & affection but within reasonable limit.
10. May transfer immovable properties for pious purposes or for the benefit of the family.

Position of Female in HUF

After amendment made by Hindu Succession (Amendment) Act, 2005, daughter can be coparcener of HUF like the sons of HUF. After her marriage she becomes member of her husband's HUF and continues to be a coparcener of her father's family. Being a coparcener, she can also seek partition of the dwelling house where the family resides and she can also dispose of her share in coparcenery property at her own will. If a Hindu dies, the coparcener property shall be allotted to the daughter as is allotted to sons. If a female coparcener dies before partition, then children of such coparcener would be eligible for allotment, assuming a partition had taken place immediately before her demise. A widow of a pre-deceased son even though remarried is now eligible for share in property as legal heir of the pre-deceased son of the family.

Female as Karta

Many courts had held that only a coparcener can become Karta of HUF. Since, a female was not considered as coparcener, she was not empowered to act as Karta prior to amendment in Hindu Succession Act. However, w.e.f. 6thSeptember, 2005, after amendments made by Hindu Succession (Amendment) Act, 2005 in respect of position of female member, the daughter of coparcener shall by birth become a coparcener in her own right in the same manner as the son.

Powers of Alienation

The power of alienation cannot be exercised except by Karta the joint family property can be alienated for the following three purposes only:

a. Legal necessity(Apatkale)

b. Benefit of estate of the family(Kutumbarthe)

c. Acts of Indispensable duty (Dharmamarthe)

The Karta can alienate the joint family property with the consent of the coparceners even if none of the above exceptional cases exist and if all the coparceners are adult, the alienation is binding on the entire joint family. ***[Kandasami V. Somakanda ILR (1912) 35 Mad 177]***

Legal Necessity-

The cases of legal necessity can be so numerous and varied.Some of the instances of a necessity may be outstanding revenue dues, ancestral debts, marriage expenses, discharge of outstanding decrees, personal necessities arising from poverty, sickness, incapacity for work, etc., legal expense in defending estate, litigation to protect estate, etc..

Property sold and mortgaged for an unlawful purposeand immoral purposes cannot be said to be legal necessity. As the property was alienated for the purpose of marriage of minor daughters, it cannot be called as lawful alienation. ***[DevKishan v. Ram Kishan AIR 2002 Raj 370]***

a. Alienation Is Voidable

The alienation of property by Karta without any legal necessity/ benefit of estate/ discharge of indispensable duties is only voidable at the instance of any coparcenery and not void. [***CIT v Gangadhar Sikaria Family Trust (1983) 142 ITR 677]***

Where HUF is governed by Mitakshara School of Hindu law and property is alienated by Karta without legal necessity or benefit of minors, it is only voidable and not void, and therefore, any income derived from properties so transferred is not assessable in hands of HUF. ***[R.C. Malpanivs CIT [1995] 80 Taxman 546 (GAU.)]***

b. Benefit of Estate–It includes anything which is done for the positive benefit of the joint family property.

c. Indispensable Duties - This term implies performance of those acts, which are religious, pious, or charitable.

Chapter-III

SOLE SURVIVING COPARCENER

A coparcener outliving all other coparcener is known as the sole surviving coparcener. He may be alone in the family or there may be other female member along with him in the family. The nature of property in the hands of such sole surviving coparcener is that of HUF property.

Sole Coparcener without any male or female member

- SINGLE person CANNOT constitute a family.
- If ONLY a widow was left in the family after the death of sole male coparcener. It was laid down by the court that the family was brought to an end.
- If it was not possible to add a male member by nature or by law.

  [Anant Bhikappa Patil Vs Shankar Rama chandra Patil AIR 1943 PC 196]

Other forms of Sole coparcener

- Temporary reduction to a single coparcener **[Attorney General of Ceylon Vs A.R. ArunachalamChettiar&Ors. (1958) 34 ITR (ED) 42 (PC)]**

  CANNOT convert the property of undivided family to separate property of the sole coparcener.

- Sole coparcener with a female member can constitute HUF. **[Gowli Buddanna Vs CIT (1966) 60 ITR 293 (SC)]**

Effect of Subsequent marriage of sole surviving coparcener and not getting a son

In **CIT v. Parshottamdas K. Panchal [2002] 257 ITR 0096 [Gujarat]**, it was held that:

An individual who receives ancestral property at a partition and who subsequently acquires family, but has no male issue, would hold that property only as the property of the family. Under the Hindu law the wife of the coparcener is certainly a member of the family. Whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu undivided family in the sense of who can be its members is just the same. Thus, in order to constitute a joint family, it is not always necessary that there must be two male members.

Cases where property before partition was HUF or self acquired property in father's hands, distinguishable from each other

1. Self acquired property In the hands of father. **{KalyanjiVithaldas&Ors. Vs CIT (1937) 5 ITR 90 (PC)}**
   - it's NOT a joint family property
2. HUF property in the hands of father. **{Attorney General of Ceylon Vs A.R. ArunachalamChettiar&Ors. (1958) 34 ITR (ED) 42 (PC)}**
   - it's a joint family property

Powers of Sole coparcener

- Sole coparcener can dispose of the coparcenary property as it were his separate property, he can sell or mortgage it or gift of it. **{CIT Vs Anil J. Chinai (1984) 148 ITR 3 (Bom)}**
- Sole coparcener can settle property as he likes. **{Anil Kumar B. Laskari Vs CIT (1983) 142 ITR 831 (Guj)}**
- Sole Coparcener cannot make partition of property nor he grants share. **{B.T. Ravindranath Punja Vs CIT (1989) 179 ITR 243 (Kar.)}**
- Sole coparcener can make valid gift of immovable property. **{CIT Vs Admiralty Flats Motel (1982) 133 ITR 895 (Mad)}**

CHAPTER-IV

CONSEQUENCES OF AMENDMENT IN HINDU SUCCESSION ACT, 2005

Consequence of Amendment made by Hindu Succession (Amendment) Act, 2005 - rights & liabilities of a daughter member

- Daughter shall be a Coparcener of Hindu Family Property.
- If a Hindu dies, the coparcener property shall be allotted to the daughter as is allotted to sons.
- If a female coparcener dies before partition, then children of such coparcener would eligible for allotment assuming a partition had taken place immediately before her demise.
- No recovery is made for ancestors dues from son, grandson, or great grandson by applying doctrine of pious obligation.
- A female member can also seek partition of the dwelling house where the family resides.
- A widow of a pre-deceased son even though remarried is now eligible for share in property as legal heir of the pre-deceased son of the family.
- A female can also dispose of her share in coparcenery property at her own will.

Expenses incurred on Marriage of a Daughter by HUF

Even daughter has become coparcener after Amendment of Hindu Succession Act, 1956, but marriage of daughter still an obligation of the Family under

Hindu law.

Thus, reasonable amount of gift given on her marriage should not objected by the male coparcener.

Devolution of Interest in Co-parcenary Property

Section 6 as substituted by the Hindu Succession (Amendment) Act, 2005.

Section 6(1) provides that w.e.f. 06/09/2005, in a joint Hindu family governed by the Mitakshara law, the daughter of coparcener shall by birth become a coparcener in her own right in the same manner as the son. She shall have the same rights in the coparcenery property as she would have had if she had been a son and she shall be subject to the same liabilities in respect of the said coparcenary property as that of a son.

Section 6(2) of the new post amendment section 6 provides that any property to which a female Hindu becomes entitled by virtue of sub section (1) shall be held by her with the incidents of coparcenary ownership. And property is capable of being disposed of by her by testamentary disposition.

Section 6(3) *provides that*

- Where a Hindu dies after the commencement of Hindu Succession Act 2005, his interest in the property of joint family, Shall devolve by testamentary of intestate succession.
- As the case may be, under this Act and not by survivorship, & the coparcenary property shall be deemed to have been divided as if a partition has taken place and, daughter is allotted the same share as son.
- The share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter. [---- do --- with the predeceased child of pre-deceased son or a pre-deceased daughter].

Section 6(4) provides that no court shall recognize any right to proceed against a son, grandson, or great grandson for the recovery of any debt due from his father, grand father or great grand father.

Explanation to Section 6(5) provides that partition for the purposes of this section means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected

by a decree of a court.

Section 6(6) provides that nothing contained in this section shall apply to a partition, which has been effected before the 20-12-2004.

Applicability of I.T. Act in case of deemed partition under section 6 of Hindu Succession Act

For the purpose of partition of HUF, Sec. 6 of Hindu Succession Act would govern the right of the parties, however, so far as the Income Tax Law is concerned, the matter has to be governed by Section 171(1). ***{CT Vs Maharani Raj Laxmi Devi (1997) 224 ITR 582 (SC)}***

General Rule of Succession - Section 8

The property of male Hindu dying intestate shall devolve as per the provisions given below:-

- Firstly amongst the heirs specified in **Class I** of the schedule.
- If no heirs of class I exists than amongst the heirs of **Class II**.
- If no heirs in both classes then amongst **agnates** of the deceased.
- Lastly, if no agnates then amongst the **cognates** of the deceased.

Class I heir

→ Son
→ Son of Predeceased son.
→ Son of Predeceased son of Predeceased son.
→ Widow
→ Widow of Predeceased son
→ Widow of Predeceased son of Predeceased son
→ Mother
→ Daughter
→ Son of Predeceased Daughter.
→ Daughter of Predeceased Daughter.
→ Daughter of Predeceased Son
→ Daughter of Predeceased Son of Predeceased Son.
→ Son of Predeceased Daughter of Predeceased Daughter.
→ Daughter of Predeceased Daughter of Predeceased Daughter.
→ Daughter of Predeceased Son of Predeceased Daughter.
→ Daughter of Predeceased Daughter of Predeceased Son.

Class II heir

- → Father
- → Son's Daughter's Son.
- → Son's Daughter's Daughter.
- → Brother.
- → Sister.
- → Daughter's Son's Son.
- → Daughter's Son's Daughter.
- → Daughter's Daughter's Son.
- → Daughter's Daughter's Daughter.
- → Brothers Son.
- → Sister's Son.
- → Brothers Daughter.
- → Sister's Daughter.
- → Father's Father, Father's Mother.
- → Father's Widow.
- → Brothers Widow.
- → Father's Brother.
- → Father's Sister.
- → Mothers Father.
- → Mothers Mother.
- → Mother's Brother .
- → Mothers Sister.

Agnates

Agnates of the deceased are relatives from the parental side. 'A Person is said to be an agnate of another if the two are related to blood or adoption wholly through males'.

Cognates

Cognates of the deceased are relatives through maternal side. 'A person is said to be cognate of the deceased if the two are relative by blood and adoption not wholly through the males'.

Applicability of Section 8

Section 8 is applicable to the property of a male Hindu dying intestate.

The initial part of section 6 permits coparcenary property to devolve on heirs by survivorship, and hence where this part of section 6 applies, section 8 will have no application. In such a case section 8 applies and the divided son will get by succession as if it were the separate property of the deceased.

Distribution of property on Succession - Section 10

Following are the rules provided for the distribution of property among class I heirs:-

Rule 1- Intestate's widow – one share [if he had more than 1 widow then also 1 share in total]

Rule 2 - Surviving sons, daughters & mother of deceased –one share each

Rule 3- The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4- The distribution of the share referred to in rule 3 –

- Amongst the heirs in the **branch of the predeceased son** shall be so made that his widow (or widows) together and his surviving sons and daughter get equal portions; and the branch of his predeceased son gets the same portion;
- Amongst the heir in the **branch of predeceased daughter** shall so made that the surviving sons and daughter get equal portions.

Chapter- V

MODES OF CREATION OF HUF

A Hindu Undivided Family can be created by following ways:

A. **Blending** of individual property with the family Hotchpot

B. Receipts of **Gifts**

C. Doing **Joint labour** for the benefit of HUF

D. Inheritance through a specific bequest under a **Will**

E. **Partitio**n of a larger Hindu Undivided Family

F. **Reunion** of separated coparceners

A. Creation of HUF Corpus by Blending

Blending means transfer of one's individual property in the common hotchpot and make it a part of the common property of the HUF. There must be an intention to throw the separate property into the common stock and it is necessary to waive all separate rights in respect of the property, which must be clearly established through a declaration. Only the coparcener is entitled to throw in HUF's common property.

a. Blending can be utilized for creating smaller HUF. HUF can be created by impressing one's self acquired property with the character of HUF property by bringing in to existence an HUF comprising the person himself, his wife & children.

b. Applicability of Section 64(2) of I. T. Act, 1961

Transfer of individual property in the common hotchpot is deemed to be a gift and income from the transferred asset is deemed to be the income of individual under Section **64(2) of the Income Tax Act, 1961**. As per section 64(2) of the Income Tax Act, if any property has been transferred by the individual, directly or indirectly, to the family otherwise than for adequate consideration then the income derived from such property shall be deemed to arise to the individual and not to the family and where the converted property or any part thereof is received by the spouse of that individual on partition the provisions of sub-section (1) shall apply. Similarly provision was inserted in the Wealth Tax Act, 1957 under section 4(1A).

c. Rights of members of HUF do not get enlarged on throwing property into family hotchpot, income from said property had to be treated as assessee's individual income only. The property can change its legal incidents on the birth of son.

d. Partition of HUF after blending

This is for achieving distribution of immovable property among members because giving it in any other manner will require registration for effective transfer.

Each division is entitle to claim exemption under Sec 5 (vi) of the Wealth Tax Act.

B. Creation of HUF by receipts of Gifts

HUF is a creation of law and cannot be created by the act of parties, therefore, HUF cannot be created for the first time by a gift from the stranger. If HUF already exists, gift can be made by a stranger to such HUF.

The gifted property will be HUF property if the gift is made to HUF.

Intention of donor & the character of the gifted property will depend on the construction of the gift deed.

Precautions to be taken by family while accepting gifts

- Clear declaration of intention through affidavit. ***{C.N. Arunachala Mudaliar Vs C.A. Muruganatha Mudaliar & Anr. AIR 1953 SC 495: (1954) SCR 243 (SC)}***

- Gift to be valid & genuine.

No specific bar to a gift by the father to the HUF of his son, his wife & minor children. However, for avoiding the clutches of sec 64 (1)(vi) such gifts better be avoided.***{CIT Vs Smt. T. SuryamaniKothavalsala (2003) 263 ITR 271 also see CIT Vs S.N. Malhotra (1989) 178 ITR 380 (Cal)}***

- HUF can accept gifts from relative who may not be the member of the family.

C. Creation of HUF by Doing Joint labour for the benefit of HUF

Property acquired in the course of some business carried on by the persons constituting a joint Hindu family, takes the characteristic of joint family property.

As per Hindu law, in case of properties not acquired with the aid of joint family property, it is presumed that property acquired by coparceners by working together is joint family property unless the persons concerned desire to hold it as co-owners. This is valid if the coparceners are carrying on work together and belong to the same line of ancestors.

The income from such property is out of the purview of section 64(2) of the Income Tax Act, 1961 and section 4(1A) of the Wealth Tax Act, 1957.

In the cases of properties acquired with the aid of joint family property is also the joint family property.

D. Creation of HUF by Inheritance through a specific bequest under a Will

A HUF can also be created by will of a person provided the will is valid and there is a specific bequest in favour of the HUF as held by Punjab & Haryana High Court in *CIT vs. GhanshamDassMukim (1979) 118 ITR 930*. Moreover, HUF need not be in existence at the time of execution of will. Even a stranger can bring a HUF into existence by making a will in the favour of HUF of a person.

Creation by will

- No existence of HUF at the time of execution of will.
- Valid will should be there. ***{CIT VsGhanshyam Das Mukim (1979) 118 ITR 930 (Punj & Har)}***
- *An HUF is created if there exist a valid will.*

E. Creation of HUF by Partition of a larger Hindu Undivided Family

Partition of an existing HUF can also result in creation of many smaller HUFs. As per Hindu Law, the property does not change its character on partition. Property received by a coparcener having a family, continues to have characteristic of HUF. An unmarried coparcener receiving any property will own the property in the status of HUF until he acquires the status of HUF. In case of married coparceners who have no child, the property will continue with the status of HUF as held by High Court of Madhya Pradesh in ***CIT vs. Krishna Kumar (1982) 10 Taxman 292 (MP).***

However, the partition has to be total partition because the law does not recognize partial partition as per section 171(9) of the Income Tax Act, 1961.

F. Creation of HUF by Reunion of separated coparceners

Even after partition of HUF, members may re-unite to form a new HUF. However, there are certain conditions to make such reunion valid in the eyes of law. Reunion can take place only when there **was in existence a HUF** and there was **total partition** of such HUF. It can take place **only between persons who were parties to the original partition** and to support such reunion, there must be an agreement between the parties. To constitute a reunion there must be an **intention of the parties to reunite in estate & interest** and such intention is evident. As per Mitkarsha, Dayabhaga and SmritiChandrika, a member of a joint family once separated can reunite only with his

- father,
- brother or
- paternal uncle but not with any other relation.

Gems of Judiciary

1. ***Paramanand L. Bajaj Vs CIT (1982) 135 ITR 673(Kar)-*** Under the Hindu Law:
   - It is possible among persons who were on earlier date, members of HUF.
   - There must have been a partition in fact.
   - Reunion must be effected by the parties or some of them who had made their partition.

- Must be a junction of estate & reunion of the property

Further, share of property of reunited members got at an earlier partition &

- its possession at the reunion
- becomes the property of the joint family.

2. **CIT*Vs A.M. Vaiyapuri Chettiar & Anr. (1995) 215 ITR 836 (Mad)***- It is not necessary that all the property
   - Belong to HUF should be brought back
   - in to the re-united joint family
   - This reunion is said to be VALID
3. ***CIT Vs Rupchand Routhmall (1963) 50 ITR 295 (Cal) -*** The minor cannot be a part of reunion neither by self nor by someone on behalf of such minor.

Chapter-VI

SOME IMPORTANT ASPECTS OF HUF UNDER INCOME TAX, 1961

a. Partition of HUF under Income Tax Act, 1961 and its assessment after Partition.

b. Residential Status of HUF

c. Taxability of Income from house property in the name of HUF

d. Proprietorship and Partnership by HUF

e. Capital Gain Exemption available to HUF

f. Deductions under Chapter VIA

g. Taxability of gift received in cash or in kind by HUF without consideration

h. Return of Income

i. Clubbing Provisions of Section 64(2) in case of HUF

j. Miscellaneous Issues

A. Partition of HUF under Income Tax Act, 1961 and its assessment after Partition.

The Partition of HUF should be recognized as per the Income Tax Act and not as per the Hindu Law. Section 6 of the Hindu Succession Act would govern the rights of the parties but insofar as income-tax law is concerned, the matter has to be governed by section 171(1) of the Income Tax Act, 1961 **[Add. CIT**

***v.* Maharani Raj Laxmi Devi [1997] 091 Taxman 020 (SC)]**. The Hindu Law does not require that the property in every case be partitioned by metes and bound or physically into different portions to complete a partition. But the Income Tax Law introduced certain additional conditions of its own to give effect to the partition u/s 171.

Section 171 of the Income Tax Act, 1961 defines the partition of HUF and deals with the provisions of assessment after its partition. Thus a transaction may be treated as severance of status under Hindu Law but not a partition under 1961 Act as physical division of property is necessary under 1961 Act **[CIT v. Smt. Meera Prem Sundar (HUF) [2005] 147 TAXMAN 535 (ALL.)].**

The various practical aspects related to partition of HUF are discussed as under:

Q1. What is the Partition of HUF?

- The Partition of HUF can be categorized as under:-

  1. **Partial Partition** - Partial partition means a partition which is partial as regards the persons constituting the HUF, or the properties belonging to the HUF, or both.

  2. **Total or Complete Partition** – Assets of HUF are physically divided. As per explanation to section 171 of the Income Tax Act,

'Partition' means

(i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or

(ii) where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition.

Therefore a transaction can be recorded as a partition u/s 171 only if, where the property admits of a physical division, such division has actually taken place. ***[Kalloomal Tapeshwari Prasad (HUF) v. CIT [1982] 133 ITR 690 (SC)]***

Q2. What is the tax implication of Partial Partition of HUF?

A Partial partition taken place after 31-12-1978 is not recognized the Income Tax Act, 1961 (Sub-section 9 of section 179. Therefore even after the Partial partition, the income of the HUF shall be liable to be assessed under the Income-Tax Act as if no partition had taken place.

Q3. What is the tax Implication of Full Partition of HUF?

After the Partition, the assessment of HUF shall be made as per the provisions of Section 171 of the Income Tax Act and order to be passed by the Assessing Officer.

Q4. What is the procedure of partition and assessment after partition of HUF under Income Tax Act

The following procedure u/s 171 is prescribed under the Income Tax Act regarding partition and assessment after partition of HUF:

1. The HUF hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the HUF.

2. Where, at the time of making an assessment u/s 143 or u/s 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, whether total or partial, has taken place among the members of such family, the AO shall make an inquiry thereinto after giving notice of the inquiry to all the members of the family.

3. On the completion of the inquiry, the AO shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.

4. Where a finding of total or partial partition has been recorded by the AO and the partition took place during the previous year,—

   (i) the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and

   (ii) each member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding

anything contained in clause (2) of section 10, be jointly and severally liable for the tax on the income so assessed.

5. Where a finding of total or partial partition has been recorded by the AO and the partition took place after the expiry of the previous year, the total income of the previous year of the joint family shall be assessed as if no partition had taken place; and each member of group of members shall be jointly and severally liable for the tax on the income so assessed.

6. Notwithstanding anything contained in this section, if the AO finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, whether total or partial, the AO shall proceed to recover the tax from every person who was a member of the family before the partition, and every such person shall be jointly and severally liable for the tax on the income so assessed.

7. For the purposes of this section, the several liability of any member or group of members thereunder shall be computed according to the portion of the joint family property allotted to him or it at the partition, whether total or partial.

8. The above provisions shall, so far as may be, apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to date of the partition, whether total or partial, of a HUF as they apply in relation to the levy and collection of tax in respect of any such period.

Q5. Whether the sum received by a member as and towards his share as coparcener of HUF, on its partition is taxable as income?

The sum received by a member as and towards his share as coparcener of HUF, on its partition cannot be brought to tax as income **[Smt. Sudha V. Iyer *v. ITO* 15 taxmann.com 234 (ITAT-Mum.) [2011]**

Q6. Whether setting apart of certain assets of HUF in favour of certain coparceners on a condition that no further claim in properties will be made by them, is a partition under Income Tax Act?

Setting apart of certain assets of HUF in favour of certain coparceners on the condition that no further claim in properties will be made by them, is nothing but a partial partition and not a family arrangement

and not recognised in view of section 171(9) of the Act. **[ITO v. P. Shankaraiah Yadav 91 ITD 228 (2004) (ITAT-Hyd.)].**

Q7. Whether there is an ipso facto partition of joint family properties immediately after the death of a male coparcener having coparcenary interest in coparcenary property?

The gist of the various pronouncements of the Hon'ble Supreme Court is that there is no ipso facto partition of joint Hindu family properties immediately after the death of a male coparcener of the Mitakshara school having coparcenary interest in the coparcenary property. The fiction given by Explanation 1 to section 6 of 1956 Act has nothing to do with the actual disruption of the status of a HUF. It freezes or quantifies the share of a female heir in the coparcenary property on account of the death of a coparcener at the relevant point of time.

Therefore, there was no partition and disruption of the HUF as per Explanation 1 to section 6 of the 1956 Act, in the instant case. **[CIT vs. Charan Dass (HUF) [2006]153Taxman 307(All.)]**

B. Residential Status of HUF

Q1. What is the residential status of the HUF under Income Tax Act?

Section 6(2) of the Income-tax Act, 1961, clearly contemplates a situation where a HUF can be non-resident also. In fact, HUF can also be Not Ordinarily Resident.

HUF will be considered to be resident in India unless, during the previous year, the control and management of its affairs is situated *wholly outside India*. In such a case, it will be treated as non-resident HUF.

Section 6(6)(b) of the Income-tax Act, 1961 further provides that, in case of a HUF whose manager has not been resident in India in nine out of ten previous years preceding the previous year or has, during the seven previous years preceding that year, been in India for a total 729 days or less, such HUF is to be regarded as not-ordinarily resident within the meaning of the Income-tax Act, 1961. As such, it is not necessary for a HUF to be resident in India.

Q2. How the residential status of the HUF can be determined in case of change of Karta of HUF during the relevant year?

In case of change of Karta of HUF during the year, the residential status of HUF can be determined by considering the period of stay in India of both Karta of HUF i.e. previous Karta and successive Karta.

Q3. Whether different residential status for HUF is possible for different years?

Under the Income Tax Act the residential status is determined with reference to the previous year relevant to a particular assessment year. Therefore the residential status of HUF may also be different for different assessment years considering the facts of relevant previous year.

Q4. Whether the non-residential status of Karta would alter the residential status of HUF?

As discussed in the earlier answer, the test is not where the Karta resides; ***the test is where the control and management of the affairs of HUF is situated.*** Even if a part of control and management is situated in India, such HUF will be treated as resident in India.

Though, generally, Karta is supposed to manage the affairs of HUF, it is not an absolute rule and, by consent, the power of control and management may be delegated to other members of the family, either fully or partially.

The relevant factor for determining the status is where the control and management of HUF is situated (even in part). Therefore the HUF may be resident even where the Karta was residing outside India for whole of the year.

Q5. Whether the income received by members from HUF is taxable?

As per Section 10(2) of the Income-tax Act, 1961, any sum received by an individual from Hindu Undivided Family of which he is member is exempt from tax.

But the amount received not as a member of Joint Family but in pursuance of some statutory provision, etc. would not be exempted in this section. Also the position of member of joint family in law to claim the right u/s 10(2) does not get affected only with the reason that they are living apart from the other members of the family.

C. Taxability of Income from house property in the name of HUF

1. Self occupied one Residential House & the tax gain specially by way of Interest on Loan & Repayment of Loan
2. Special 30% deduction on Rental Income also to HUF.
3. Exemption from Wealth-tax the real estate of HUF - One House Wealth Tax Free (Commercial / Rented Residential)

Q1. Whether the Property purchased with the joint fund is assessed in the hands of HUF only?

Property purchased with the aid of joint family funds, howsoever small that may be, still the property would be HUF income and cannot be income of the individual with major portion of purchase price.

The Hon'ble Madras High Court has held in the case of S. Periannan v. CIT (1991) 191 ITR 278, that

"When once the estate had become the property of the assessee-Hindu undivided family on its coming into existence, there could be no change in its character by reason of the fact that, subsequently, in the books of the assessee-Hindu undivided family, the account of Sathappa Chettiar was debited with the amount which have been drawn for the purchase of the estate. In these circumstances. The Tribunal rightly held that the Grove Estate should be considered as belonging to the assessee-Hindu undivided family."

Q2. Whether the Income from House property to be charged in the hands of HUF only where property is purchased in the name of HUF?

In the case of ACIT vs. Rakesh S. Agrawal [2010] 36 SOT 148 (AHD.) it was held that:

AO found that the assessee had purchased a house property from 'A'. The assessee's case was that since the investment was made in the name of HUF, it was not declared in his individual return. The AO, however, took a view that the funds for acquiring the property in question were met from the personal sources of the assessee. He thus determined annual letting value of the property resulting in certain addition to the assessee's income. On appeal, the Commissioner (Appeals) directed the AO to consider the annual letting value of the property in the hands of HUF and deleted the impugned addition.

D. Proprietorship and Partnership by HUF

Q1. Whether HUF can do a business in its own name?

1. HUF can be a Proprietor of one or more than one Business concerns.
2. Separate name can be kept of HUF business entity.
3. No tax Audit of HUF business if Turnover within Rs. 1 crore (F.Y. 2012-13).
4. Business Income Computation @ 8% without books of account in case turnover is upto Rs. 1 crore – The Presumptive Basis

Q2. Can a Karta of HUF become partner in a firm?

The Hon'ble Supreme Court in Ram Laxman Sugar Mills vs. CIT [1967] 66 ITR 613 observed that a HUF is undoubtedly a "Person" with in the meaning of section 2(31), it is however not a juristic person for all purposes and cannot enter in to an agreement of partnership either with another HUF or Individual. It is open to the manager of a Joint Hindu family, as representing the family, to agree to become a partner with another person. And therefore any remuneration received by Karta would be the personal income of Karta and not the income of the HUF as there is no real connection between the investment of the assets of HUF and remuneration received by Karta.

Q3. Whether the amount received by Karta from partnership firm as remuneration is assessed in the hands of HUF?

The remuneration received by Karta as representative of HUF cannot be treated as income of the HUF. Remuneration will be income of HUF only when there is direct nexus between family funds and remuneration paid.

In ***Brij Mohan vs. CIT 201 ITR 831 (1993), the Supreme Court*** held that where the *receipt is a compensation made for the services rendered* and not for the return of investment, it is to be treated as individual income of the partner.

However, where members of HUF become the partners in a firm by investment of family funds & not because of any Special Services rendered by them, then the income will belong to HUF. ***{Lachman Das Bhatia & Sons vs. Commissioner of Income-tax [2007] 162 Taxman 118 (Delhi)} {D.N. Bhandarkar v. CIT 158 ITR 724 Kar (1986)}***

Once the character of an individual has been treated differently than HUF for the purposes of interest, there is no reason as to why that would not extend to the salary and bonus paid to such partners on account of their personal services rendered to the firm in contra-distinction to their capacity as representatives of HUF .

Therefore, the same reasoning would apply to the cases where payment in the form of salary and bonus has been made to a partner in his individual capacity in contra-distinction to his representative character of the HUF. **[*CIT v. Unimax Laboratories [2007] 164 Taxman 373 (P & H)].***

Q4. Whether deduction is available to partnership firm u/s 40(b) in respect of salary or commission paid to a partner who was a partner in representative capacity of HUF.

As per Section 40(b)(i)

"in the case of any firm assessable as such,—

> *any payment of salary, bonus, commission or remuneration, by whatever name called (hereinafter referred to as "remuneration") to any partner who is not a working partner"*

Partner of a firm is an individual *even if he is partner as a representative of HUF*

- Where assessee-firm paid salary to a partner who was actively engaged in conducting affairs of business of firm, it was to be held that requirement of Explanation 4 to Section 40(b) stood complied with, and, thus, assessee-firm would be entitled to deduction in respect of salary paid to said partner even though he was a partner in representative capacity of HUF. ***[P. Gautam & Co. vs. JCIT [2011] 14 taxmann.com 79 (Ahd.)]***

- Salary paid to working partner even though as Karta of HUF, is received as individual and as working partner, hence allowable as deduction while computing income of firm. **[*CIT vs. Jugal Kishor & Sons [2011] 10 taxmann.com 82 (All.)]***

- It is individuals of HUF who indirectly become partner in firm in which HUF is said to be partner and therefore provisions of Section 40(b) that prohibits deduction of payments of commission to any partner who is not a working partner, in computing income

under the head PGBP, will not be applicable. Therefore deduction of any commission payable to any individual of HUF shall be allowable. ***[CIT v. Central Scientific Instrument Corporation [2010] 1 DTLONLINE 149 (All.)]***

Q5. Whether the Salary income of wife of Karta is club in the Income of HUF?

Where a person is a partner in a partnership firm not in his individual capacity but as the karta of the Hindu undivided family, the **income accruing to his wife on account of her being a partner** in the same partnership firm cannot be included in the total income of such person in an individual assessment or in the assessment of the Hindu undivided family. **[*CIT v. Om Prakash [1996] 217 ITR 785 (SC) See also CIT v. Ram Krishna Tekriwal [2005] 274 ITR 266 , Satish Chand Gupta v. CIT [2007] 160 Taxman 224 (All.)].***

In the case of Pratap H. Desai (HUF) v. ACIT [2009] 118 ITD 29 (Pat.) it was held that:

Assessee was a partner in a firm which was dissolved with effect from 1-1-1999 and its business was taken over by the assessee in the capacity of a HUF - the assessee sought to set-off loss of the said firm against the profit of his business as HUF

Section 78(2) prohibits carry forward and set-off of losses of one person by another person except when the other person receives the losses by inheritance. Section 78 shows that where succession to business is by inheritance, then loss will be allowed to be set-off and not otherwise.

Therefore, assessee was not entitled to set-off of losses of firm against his individual income

E. Capital Gain Exemption available to HUF

General provisions applicable to HUF:

- Cost Inflation Index benefit available to Calculate Cost of the Asset.
- Tax benefit of 20% Tax on Long-term Capital Gains.
- Long-term Capital Gains Saving by investing in Residential Property u/s 54/ 54F.
- Exemption on sale of Agricultural land u/s 54B.
- Saving Tax on Long-term Capital Gain possible by investing in Capital Gains Bonds of NHAI / RECL u/s 54EC.
- Exemption from tax on LTCG on transfer of residential property if invested in a manufacturing small or medium enterprise u/s 54GB (introduced vide ***Finance Act, 2012***)

Various practical aspects of taxability of Capital gain the hands of HUF are discussed as under:

Q1. To avail the benefit of adopting market value as on 1-4-1981, upto which date the capital asset should have become property of the previous owner?

Capital asset should have become property of previous owner before 1-4-1981 to make assessee entitled to benefit of adopting market value as on 1-4-1981

but where construction of building was completed in 1988 and possession of flat was handed over to previous owner, i.e., HUF, it could not be said that flat itself became property of HUF prior to that date and, hence, assessees were not entitled to adopt market value of flat as on 1-4-1981.In view of specific provisions of Explanation (iii) to section 48, indexing had to be allowed of the financial year in which flat was held by assessee on partition of HUF. **[*DCIT v. Kishore Kanungo 102 ITD 437 (Mum.) [2006]*].**

Q2. Whether the benefit u/s 54 can be available on purchase of more than one residential house Properties?

A plain reading of section 54(1) discloses that when an individual assessee or an HUF assessee sells a residential building or land appurtenant thereto, he can invest capital gain for purchase of a

residential building to seek exemption of the capital gain tax. The expression 'a residential house' should be understood in a sense that building should be residential in nature and 'a' should not be understood to indicate a singular number.

That when an HUF's residential house is sold, the capital gain should be invested for the purchase of only one residential house, is an incorrect proposition. After all, the property of the HUF is held by the members as joint tenants. **If the members, keeping in view the future needs in event of separation, purchase more than one residential building, it cannot be said that the benefit of exemption is to be denied u/s 54(1)**.

[*CIT v. D. Ananda Basappa 180 Taxman 4 (Kar.) [2009]]*

Q3. Whether to claim benefit of section 54F, residential house which is purchased or constructed has to be of same assessee whose agricultural land is sold?

To claim benefit u/s 54F, residential house which is purchased or constructed has to be of same assessee whose agricultural land is sold.

The, it is written it same view is expressed by Delhi High Court in the case of Vipin Malik (HUF) Vs CIT 183 Taxman 296 (2009), It was held that:

> *"The agricultural land, which was sold was of the HUF of the assessee but the flat purchased in the co-operative society was not in the name of the HUF. The flat was in the individual name of the assessee along with his mother. To claim the benefit of section 54F, the residential house which is purchased or constructed has to be of the same assessee whose agricultural land is sold and it was not the case in the instant case. [Para 9]*
>
> Clearly, therefore, there was no question of applicability of section 54F in the aforesaid facts and circumstances."

Q4. Whether in terms of section 48, payment made by assessee for education, maintenance and marriage of his unmarried daughter, though under consent decree, could be said to be an expenditure wholly and exclusively incurred in connection with transfer of property?

Under section 48, any payment made by assessee for education, maintenance and marriage of his unmarried daughter, though under

consent decree, could not be said to be an expenditure wholly and exclusively incurred in connection with transfer of property or could also not be considered as a cost of acquisition or cost of improvement. **[*Krishnadas G. Parikh v. DCIT [2008] 114 ITD 362 (AHD)].***

Q5. Whether the exemption u/s 54B of the IT Act is available to HUF?

Exemption under Section 54B is also available to HUF subject to the following condition:

If HUF transfer a land which is used for agricultural purposes by a HUF, **the rollover relief u/s 54B is available to the HUF.** The amendment is applicable on transfers made after **01-04-2013.**

*Even before the amendment, exemption was being allowed to HUF.

Same view is expressed in K.S. Jain & Sons (HUF) v. ITO 173 Taxman 114 (Delhi) (Mag.) [2008], it was Held, AO was wrong in denying deduction u/s 54B to assessee on ground that assessee being an HUF was not entitled to deduction u/s 54B.

Q6. Whether exemption from Capital Gain u/s 54GB newly introduced vide Finance Act, 2012 is available to HUF?

Exemption from tax on LTCG on transfer of residential property if invested in a manufacturing small or medium enterprise.

- Available to an Individual or **HUF**.
- Transfer made on or before 31st March, 2017.
- Amount is reinvested before due date of furnishing return of income u/s 139 (1)
- In Equity of a new start up SME company in the manufacturing sector in which in hold more than 50% share capital or voting rights
- Amount is utilized by the company for purchase of new plant & machinery
- The share cannot be transferred within a period of 5 years

F. Taxability of gift received in cash or in kind by HUF without consideration

1. If any sum of money exceeding Rs. 50,000 is received by the HUF without consideration then provisions of section 56(2)(vii) are applicable and the same is taxable in the hands of HUF.

2. Gift received in kind by HUF without consideration is also taxable subject to the provisions of s. 56(2)(vii).

The definition of relative provided under Explanation to Section 56(2)(vii) shall be amended by Finance Act, 2012. The amendment is as under:

The provisions of section 56 are amended so as to provide that ***any sum or property received without consideration or inadequate consideration by an HUF from its members would also be excluded from taxation [w.r.e.f. 1-10-2009].***

For this purpose, clause (e) of the *Explanation* below section 56(2)(vii) is to be substituted to provide that in case of HUF, relative means members of the HUF.

After the amendment,

"(e) "***relative***" means,—

(i) in case of an individual—

*(A) ******; and*

(ii) ***in case of a Hindu undivided family, any member thereof."***

The amendment as above is inspired by the decision of ITAT in ***Vineetkumar Raghavjibhai Bhalodia v. ITO 46 SOT 97 (Rajkot-ITAT) (2011) where it was*** held that ***Gift received from HUF is gift from relative.***

G. Deductions under Chapter VIA available to HUF

S.No.	Section	Deduction
1	Section 80C	Deduction available to HUF [Insurance Premium can be paid on the life of any member which does not exceed 10% of total sum assured for policies issued on or after 1st Apr, 2012]
2	Section 80CCF	Investment in Infrastructure Bonds up to Rs. 20,000/-
3	Section 80D	Mediclaim Policy on the health of any member of the family. Deduction for payment on account of preventive health check ups not available.
4	Section 80DD	For maintenance including medical treatment of a dependant member of the family.
5	Section 80DDB	Medical treatment for any dependant member of the HUF
6	Section 80G	Donation to certain funds, charitable institutions ,etc.
7	Sections 80IA / 80IAB / 80IB / 80IC / 80ID / 80IE / 80JJA	New Industrial undertakings

H. Return of Income

HUF is required to furnish return in Form ITR-2 or ITR-3 or ITR-4S or ITR-4, as the case may be.

However, ITR-4S (Sugam) not applicable to residents HUFs

(i) having assets (including financial interest in any entity) located outside India; or

(ii) signing authority in any account located outside India.

[Inserted vide Finance Act, 2012]

In case of above HUFs, the return to be furnished

(i) electronically under digital signature, or

(ii) transmitting the data in the return electronically and thereafter submitting the verification of the return in Form ITR-V.

Note: E- filing is mandatory if total income exceeds Rs. 10 lakhs, (*Inserted vide Finance Act, 2012).*

HUFs to whom Section 44AB is applicable, shall furnish the return electronically in ITR-4 under digital signature.

I. Clubbing Provisions of Section 64(2) in case of HUF

Where any member of HUF converts any property belonging to it, in to the common property of HUF, then :

- Individual shall be deemed to have transferred the property to the HUF i.e. to the members of the family for being held by them Jointly.
- The Income from the property so transferred shall be taxable in the hands of Individual and not in the hands of HUF.
- On partition amongst the members – the income derived from such property as is received by the spouse shall be taxable in the hands of spouse itself.

J. Miscellaneous Issues

Q1. Whether tax liability of an individual member of the HUF can be recovered in full extent from the HUF?

Demand against member of HUF can be recovered from HUF to the extent of its share in property of HUF. **[Naresh B. Chheda v. JCIT [2011] 9 taxmann.com 86 (Bom.)]**

"'N', a constituent of the HUF, would, therefore, have an undivided share in the amount lying in the bank account of the HUF. The Assessing Officer, therefore, would not be entitled to attach and appropriate entire amount which was in the account of the HUF for the liabilities of 'N' as an individual. It could attach and appropriate the amount lying in the bank account of the HUF only to the extent falling to the share of the said 'N'."

Q2. What is the scope and effect of a reopening of assessment of HUF where the notice was issued to the individual member of HUF?

The Act recognizes status of HUF different from individual status of Karta of HUF and two are treated as different legal entities, it is necessary that notice u/s 148 should be sent in correct status because jurisdiction to make assessment is assumed by issuing valid notice and it cannot be conferred by consent of parties. After having issued notice u/s 148 to individual, AO had no jurisdiction to assess HUF of assessee and that defect of jurisdiction could not be cured by obtaining consent of assessee to assess him in status of HUF. [**Suraj Mal, HUF v. ITO 109 ITD 327 (Delhi) (TM) [2007], also see CIT v. Rohtas 167 Taxman 233 (P & H) [2008]].**

Q3. Whether the HUF property loses the character of HUF merely because one male member or coparcener at one point of time?

- Bombay High Court held in the case of **Dr. Prakash B. Sultane v. CIT [2005] 148 Taxman 353** that,
- Joint family property does not lose its character merely because at one point of time there was only one male member or one coparcener.
- An assessee who has received share on partition of HUF property but subsequently gets married is entitled to be assessed in respect of the said share in said property in status of HUF.

Q4. What are the relevant provisions for unreasonable payments made by HUF under the Income Tax Act?

According to the provisions of Section 40A(2)

"Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-sec., and the AO is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction."

Note that the Expenditure must be unreasonable or excessive

- Provision of Sec. 40A(2) has no application unless it is first held that the expenditure was excessive or unreasonable. **[Upper India Publishing House (P) Ltd. v. CIT (1979) 117 ITR 569 (SC)].**

For the purpose of Sec. 40A(2)(a) following persons are specified:

1. where the assessee is a HUF- any member of the family, or any relative of such member;
2. HUF having a substantial interest in the business or profession of the assessee or any member of such family, or any relative of such member;

3. a HUF of which a member, has a substantial interest in the business or profession of the assessee; or any member of such family or any relative of such member;

4. any ***person who carries on a business or profession, where the assessee being HUF or member of the family, or any relative of such member, has a substantial interest in the business or profession of that person.***

Provisions related to stock market, mutual funds & HUF's

1. HUF can have a separate Demat Account.
2. Make money by investing in shares of companies:-
   (a) Primary Market
   (b) Secondary Market
3. Enjoy Tax Free Income for Long-term Capital Gains by holding shares for more than one year.
4. Enjoy lower tax rate of 15% on Short-term Capital Gains u/s 111A.
5. HUF can also invest in Mutual Fund.

Gift Vis-à-Vis HUF

- The gift made by the family of a sole coparcener to the wife of the Karta of the family is considered to be VALID. ***{M.S.P. Rajah Vs CGT (1982) 134 ITR 1 (Mad)}***
- Gift by HUF to bride of male member in the form of jewellery at the time of marriage is valid. Obligation of Karta is towards marriage of both sons & daughters. ***{CIT Vs A.K. Daga & Sons (2008) 296 ITR 623 (Mad) also see CGT Vs Basant Kumar Aditya Vikram Birla (1982) 137 ITR 72 (Cal)}***
- *Gift of HUF Property* By Father
  - Within reasonable limits
  - as a "gift of affection".

  [Gift of affection can be made to a wife, daughter & son]

- Gift to stranger

  - *Gift to Strangers void –* ***Guramma v. Mallappa AIR 1964 SC 510***
  - *Karta is NOT entitled to give any gifts to strangers, EXCEPT for pious purposes.* ***{Gangadhar Narsingda sAgarwal (HUF) Vs CIT (1986) 162 ITR 320 (Bom)}***
  - *A coparcener can dispose of his undivided interest in the coparcenary property by a will, BUT he CANNOT make a gift of such interest . It is said to be void.* ***{Thamma Venkata Subbamma VsThamma Ratanamma & Ors. (1987) 168 ITR 760 (SC)}***
  - *Gift to a stranger of a joint family property by the manager of the family is void. Manager has NO absolute power of disposal over HUF property* ***{Guramma Bharatar Chanbasappa Deshmukh Vs Mallappa Chanbasappa AIR 1964 SC 510}***

Who is regarded as stranger?

The other persons may be related to the Karta or the coparceners in the contest of family. Other persons means excluding relatives not being members of HUF.

Gift to coparcener & members

The gift of family property by Karta of an HUF to coparceners or non-coparceners is void ab initio & not merely voidable.***{CGT Vs TejNath (1972) 86 ITR 96 (P&H) (FB)}***

- Gift to daughter

Hindu father can make a gift of ancestral property within reasonable limits at the time of marriage or even long after marriage. ***{R. Kuppayee Vs Raja Gounder (2004) 265 ITR 551 (SC)***

- Gift to wife by Karta

The Karta is empowered to make gifts to his wife within reasonable limit of the movable assets. But the Karta CANNOT make gifts to his second wife. It is invalid.**{Commissioner of Gift Tax VsBanshilalNarsidas (2004) 270 ITR 231 (MP)}**

- **Gift by Karta to nephew**

Gift made by Karta to nephew & interest on the amount gifted was deposited in the firm. It was held that gift was void. **Pranjivandas S. Patel Vs CIT (1994) 210 ITR 1047 (Mad)}**

- **Gift by Karta to minor children of family**

Gift made by Karta from

– Natural love & Affection

– within reasonable limits

The gift was said to be Valid **{CWT/CGT Vs Shanmugasundaram (1998) 232 ITR 354 (SC)]**

- **Some other relevant issues in respect of gift**

- *Elementary proposition that Karta of HUF cannot gift or alienate property except to the extent recognized under the Hindu Law, namely necessity etc-* ***CGT v. P. Hanumanthappa 68 ITR 363, K.P. Gupta v. CIT 233 ITR 456***
- *Reasonable limits depends upon facts -* ***CGT v. B.V. Narasimharaju 101 ITR 74.***
- *Karta can make reasonable gifts to daughters –* ***Sushil Kumar & Sons v. ITO 234 ITR 98***
- *Gift on Marriage Occasion is valid –* ***S. Lakshmamma v. Kotayya AIR 1936 Mad. 825.***
- *Gift of immovable property should be for pious purpose –* ***CIT v. Ram Gopal Rajgharia 123 ITR 693***

Expenses incurred on Marriage of a Daughter by HUF.

Marriage of daughter still remains an obligation of the Family under Hindu law. Thus, reasonable amount of gift given on her marriage should not objected by the male coparcener.

VOICE OF CA

Part-IV

PRACTICAL ASPECTS OF CAPITAL GAINS

Under the Income Tax Act, 1961

(As amended by Finance Act, 2012)

Chapter-I

BASIC CONCEPTS-I

Q. When does Capital Gain arises?

- The capital gain can arise when either of the section 45(1)/ (1A)/ (2)/ (3)/ (4) or (5) gets attracted;

- **As per section 45 (1)** - "Any profit/gain arising from the ***transfer of any capital asset*** is chargeable to tax in the previous year in which the transfer took place such gains are taxable only if no exemption is available u/s 54,54B,54D,54EC,54F,54G,54H,54GA, 54GB (newly inerted by Finance Act, 2012)."

- **As per section 45(1A)**, notwithstanding anything contained above where any person receives at any time during any previous year any money or other assets under an insurance from an insurer on account of damage to, or destruction of, any capital asset, as a result of—

  1. flood, typhoon, hurricane, cyclone, earthquake or other convulsion of nature; or
  2. riot or civil disturbance; or
  3. accidental fire or explosion; or
  4. action by an enemy or action taken in combating an enemy (whether with or without a declaration of war),

  then, any profits or gains arising from receipt of such money or other assets shall be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of such person of the previous year in which such money or other asset was received.

- **As per section 45(2)**, notwithstanding anything contained in section 45(1), Where any person has had at any time during previous year any beneficial interest in any securities, then, any profits or gains arising from transfer made by the depository or participant of such beneficial interest in respect of securities shall be chargeable to income-tax as the income of the beneficial owner of the previous year in which such transfer took place and shall not be regarded as income of the depository who is deemed to be the registered owner of securities.

- **As per section 45(3)**, The profits or gains arising from the transfer of a capital asset by a person to a firm or other association of persons or body of individuals (not being a company or a co-operative society) in which he is or becomes a partner or member, by way of capital contribution.

- **As per section 45(4)**, the profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place.

- **Section 45(5)**, notwithstanding anything contained in section 45(1), when capital gain arises from transfer of capital asset by way of compulsory acquisition under any law.

Q. What is meant by Capital Asset?

- Any income profit or gains arising from the transfer of a capital asset is chargeable as capital gains. Now let us understand the meaning of capital asset. Under Section 2(14)- Capital Assets means:

  Property of ***any kind*** held by an assessee, whether or not connected with his business or profession.

  Property of any kind is wide term and include all

  - Movable assets – shares, securities , gold , silver etc..
  - Immovable assets – land ,building
  - Tangible / intangible assets – goodwill, patents ,copyrights etc
  - Any right in an asset- tenancy right , right of a lessee etc.

Held by the assessee means either

- he is a legal owner in possession of the property
- has a legal right to take possession

Capital Assets exclude the following:

- Stock in trade held for business
- Agricultural land in India not in urban area i.e., an area with population more than 10,000.
- Items of personal effects*, i.e., personal use excluding jewellery, costly stones, silver, gold
- Special bearer bonds 1991
- 6.5%, 7% Gold bonds & National Defense Bonds 1980.
- Gold Deposit Bonds 1999.

Some Practical Issues

- Property transferred must be capital asset on the date of transfer, however it may not be a capital asset on the date of acquisition. ***[Nachiappan (M.) v CIT (1998) 230 ITR 98 (Mad). Also see Alexander George V CIT (2003) 262 ITR 367 (Ker) and Arun Sunny v CIT (2009) 184 Taxmann 498 (Ker)].***
- The word held by assessee include physical, actual, constructive and also symbolic possession of property of any kind. ***[CIT v All India Tea and Trading Co. Ltd. (1979) 117 ITR 525(Cal.)]***
- In case of sale of land and building, a capital gain is bifurcated between LTCG & STCG. ***[CIT V. C. R. Subramanian 242 ITR 342 (KAR) (2000)]***

*Personal Effects

Q. Do Personal Effects also comes under the ambit of Capital Assets?

The transfer of personal asset does not attract the provisions of section 45.
Personal effects have been held to be the property

- which is **'movable' and**
- which is **used by the assessee for his/her own personal needs**.

But excludes (w.e.f. 01-04-2008)

i. Jewellery	ii. Archaeological collections
iii. Drawings	iv. Paintings
v. Sculptures	vi. Any work of art

For the purpose of this sub-clause 'Jewellery' includes:-

1. Ornaments made of gold, silver, platinum or any other precious metal or alloy.
2. Precious or semi-precious stones – *[includes embedded in to any furniture, utensils or other articles or worked or sewn in to any wearing apparel.]*

Some Practical Issues

Issue 1- What Constitute or do not constitute - personal effects

- Silver utensils of the type which were used in the kitchen by the assessee are personal effects and not capital assets. ***[CIT V. Sitadevi N. Poddar 148 ITR 506 (Bom.) (1984)]***
- Silver bars, sovereign, bullion and silver coins were held not to be personal effects. ***[Maharaja Rana Hemanth Singhji (H E G) V. CIT 103 ITR 61(SC) (1976)]***
- Gold caskets, gold tray, gold cups, saucers, spoons and photo frames were not regarded as personal effects. ***[Poddar (GS) V. CWT 57 ITR 207(Bom.) (1965)]***

Q. What are the types of capital asset?

- There are two types of Capital Assets:

1. Short Term Capital Assets (STCA): An asset, which is held by an assessee for less than 36 months, immediately before its transfer, is called Short Term Capital Assets. In other words, an asset, which is transferred within 36 months of its acquisition by assessee, is called Short Term Capital Assets.**[Section 2(42A)]**
2. Long Term Capital Assets (LTCA) : An asset, which is held by an assessee for 36 months or more, immediately before its transfer, is

called Long Term Capital Assets. In other words, an asset, which is transferred on or after 36 months of its acquisition by assessee, is called Long Term Capital Assets. **[Section 2(29A)]**

- The period of 36 months is taken as 12 months under following cases:
  - Equity or Preference shares,
  - Securities like debentures, government securities, which are listed in recognized stock exchange,
  - Units of UTI
  - Units of Mutual Funds
  - Zero Coupon Bonds

Note: ***The entire period of holding i.e. from the date of initial acquisition upto the date of transfer has to be taken into account, although it may not have held as capital asset initially.*** **[Keshavji Karsondas v. CIT 207 ITR 737(Bom.)(1994)]**

Q. How to compute the Holding Period of the asset?

a) For computing period of holding the following point should be considered:

b) For computing holding period of asset both date on which asset is acquired & date on which said asset is sold or transferred are not to be excluded. ***[Bharti Gupta Ramola v. CIT [2012] 20 taxmann.com 762 (Delhi)]***

c) Expression 'immediately preceding date of transfer, in section 2(42A) is a cut off point for determining and deciding period during which asset was held by an assessee.

d) Section 2(42A) refers to holding period and for computing said period date on which asset is acquired is not to be excluded because holding starts from said date; further, date of sale/transfer is also not to be excluded.

Therefore, if an asset is sold very next day after period of 12/36 months is over, asset would be treated as a long-term capital asset.

Exclusion/Inclusion of certain period

Particular	Exclusion/Inclusion of period
Shares held in a company in **liquidation**	Exclude the period subsequent to the date of liquidation.
Property acquired in any mode given u/s 49(1) i.e. **by way of gift / will**	Include the holding period of previous owner also.
Shares in an Indian Amalgamated Company acquired in a scheme of Amalgamation.	Include the holding period of shares in the Amalgamating Company by the assessee.
Shares in Indian Resulting Company acquired in case of demerger.4	Include the period for which the person was a member of the recognized stock exchange in India.
Equity shares in a company acquired by a person pursuant to the demutualization or corporatization of recognized stock exchange.	Include the period for which the person was a member of the recognized stock exchange in India.

Some Practical Issues

Q. In Case of adverse possession by a tenant what should be taken as date of transfer for the assessee?

A. Where an assessee entered in to an agreement to purchase property in adverse possession of a tenant, but ultimately succeeded in taking possession from the tenant, the date of transfer is the date on which the assessee had entered in to an agreement for purchase of property. Indexation has to be given from this date. The date of the assessee getting possession from the tenant does not postpone date of ownership to date of possession.**[Ms. Nita A Patel V Income Tax Officer 007 ITR 0659 (ITAT – Mum) [2011]]**

Q. If right in the property is transferred but the property is not in existence on the date of transfer of such right then which date is to be considered for the purpose of determining period of holding?

A. In case where assessee acquires right to possession and right to title in a property but there was no actual possession or title, since the immovable property is not in existence, the period of holding of immovable property will be calculated since the assessee actually held the asset. **[DCIT v Kishore Kanungo 290 ITR (AT) 0298 (ITAT–Mum)(2007)]**

Q Whether the date of allotment should be considered for the calculation of period of holding or the date of payment of last instalment?

A. The date of allotment of flat should be considered for the calculation of period of holding and not the date of payment of last instalment. **[Jagdish Chander Malhotra v ITO (1998) 64 ITD 251 (Del)]**

Q. Whether capital gain is to be determined separately for land and building in case of combined sale?

A. Capital gains to be determined separately in respect of both land & building on the basis of period of holding. **[CIT v. lakshmi B Menon 184 CTR 52 (Ker)(2003), CIT v Citibank N.A. 261 ITR 570 (Bom)(2003).** Also see **CIT v Vimal Chand Golecha (1993) 201 ITR 442 (Raj)]**

Q. What is the period of holding in case of Lease cum sale agreement?

A. Lease cum sale agreement - Where lease hold right had sunk or drowned in the larger interest and extinguished. Period of holding will be considered from the date of superior right comes in to existence and not from the date that the earlier inferior right was acquired.**[CIT v Mody (VV) 218 ITR 1 (Karn)[1996]].**

Q. From which date period of holding is to be considered in case of co-operative housing societies?

A. Period of holding in case of cooperative housing society shall be reckoned from the date on which the member acquires shares in the cooperative housing society. **(CIT v Anilben Upendra Shah 262 ITR 657 (Guj) (2003)]**

Q. What will constitute as transfer?

A. Transfer includes:

- Sale of asset
- Exchange of asset
- Relinquishment of asset (means surrender of asset)
- Extinguishments of any right on asset (means reducing any right on asset)
- Compulsory acquisition of asset.

The definition of transfer is inclusive, thus transfer includes only above said five ways. In other words, transfer can take place only on these five

ways. If there is any other way where an asset is given to other such as by way of gift, inheritance etc. it will not be termed as transfer.

Q. What are the transactions which are not regarded as transfer?

As per the provisions of Section 47 of Income Tax Act, 1961, the following transactions are not regarded as transfer:

Section	Transaction not regarded as Transfer	COA in the hands of Transferee	Period of holding by Previous owner to be included.
47(i)	Distribution of capital asset on total or partial partition of HUF **[Mrs. P Sheela V ITO [2009] 308 ITR (A.T.) 0350 ITAT (Bang), see also CIT v Kay Arr Enterprises [2008] 299 ITR 0348 (Mad) SLP pending].**	Cost to Previous owner	YES
47(ii)	Transfer of capital asset under a gift or will or an irrevocable trust.	Cost to Previous owner	YES
47(iii)	Transfer under a scheme of amalgamation of a capital asset by the amalgamating company to the amalgamated provided amalgamated company is an Indian company.	Cost to Previous owner	YES
47(iv)	Transfer of Capital asset by company to its 100% Subsidiary.	Cost to Previous owner	YES
47(v)	Transfer of capital asset by 100% subsidiary company to its holding company.	Cost to Previous owner	YES
47(vi)	Transfer of capital assets in a scheme of amalgamation.	Cost to Previous owner	YES
47(via)	Transfer of shares in an Indian company held by a foreign company to another foreign company under a scheme of amalgamation of the two foreign companies.	Cost to Previous owner	YES
47(viaa)	Capital assets transferred in a scheme of amalgamation of a banking company with a banking institution.	Cost to Previous owner	YES
47(vib)	Transfer in a demerger of a capital asset by the demerged company to a resulting company.	Cost to Previous owner	NO

47(vic)	Transfer of shares held in an Indian Company by a demerged foreign company to resulting foreign company.	Cost to Previous owner	NO
47(vica)	Any transfer in a business reorganization of a capital asset by the predecessor cooperative bank to the successor cooperative bank.	Cost to Previous owner	NO
47(vicb)	Any transfer of shares in a predecessor cooperative bank by a shareholder in case of a, business reorganization, if the transfer is made in consideration of the allotment to him of any share or shares in the successor cooperative bank.	Cost to Previous owner	NO
47(vid)	Transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of the demerged company.	Proportionate COA of shares in demerged Co.	YES
47(vii)	Allotment of shares in amalgamated company in lieu of shares held in amalgamating company.	Cost of shares in the amalgamating co.	YES
47(viia)	Transfer of a capital asset being foreign currency convertible bonds or GDR by a non resident to another non – resident.		NO
47(viii)	Transfer of agricultural land in India before March 1970.		
47(ix)	Transfer of capital asset being work of art, manuscript, painting etc.) to Government / University		
47(x)	Transfer by way of conversion of bonds or debentures in to shares.	Cost of shares would be cost of bonds / debentures.	NO
47(xa)	Transfer by way of conversion of bonds [referred to in section 115AC(1)(a) in to shares or debentures of any company.	Cost of shares / debentures would be cost of original bonds.	NO
47(xi)	Transfer by way of exchange of a capital asset being membership of a recognized stock exchange for shares of a company.		NO
47(xii)	Transfer of land by a sick industrial company which is managed by its workers cooperative.		NO
47(xiii)	Transfer of a capital asset by a firm to a company in the case of conversion of firm in to company.		NO

47(xiiia)	Membership right held by a member of recognized stock exchange in India for acquisition of shares and trading or clearing rights acquired by such member in that recognized stock exchange in accordance with a scheme for demutualization or corporatisation.	In case of Shares, the cost of acquisition would be cost of acquisition of original membership of the exchange. Cost of trading & clearing right would be Nil.	

Some Practical Issues

ISSUE 1 – Do transfer of RIGHTS attract capital gain?

- Right to possession and enjoyment of property and such rights were in nature of capital assets for purpose of section 45 and therefore consideration received by assessee for transfer of his rights in property was liable to be treated as long term capital gains. ***[ITO v Balram Bhasim 154 Taxmann (118) (Delhi – Trib) (2006)].***

- The right to obtain conveyance of an immovable property was held to be a capital asset. **[CIT v Tata Services Ltd. 122 ITR 594 (Bom) (1980)].**

- Right to claim specific performance of an agreement was held to be a capital asset. ***[K.R. Srinath V ACIT 268 ITR 436 (Mad) (2004].***

Amendment made by Finance Act, 2012 in definition of capital asset and transfer

Prior to the amendment made by the Finance Act, 2012 in Section 2(14) and Section 2(47), there is no transfer of shares of the Indian Company on transfer of shares of a foreign company to a non-resident offshore, though held by the foreign company, in such a case it cannot be contended that the transfer of shares of the foreign holding company, results in an extinguishment of the foreign company control of the Indian company and it also does not constitute an extinguishment and transfer of an asset situate in India. Transfer of the foreign holding company's share offshore, cannot result in an extinguishment of the holding company right of control of the Indian company nor can it be stated that the same constitutes extinguishment and transfer of an asset/ management and control of property situated in India- *Vodafone International Holdings B.V.*

- **Section 2(14)-** Explanation to Section 2(14) [Newly Inserted, w.e.f. 1st April, 1962]

Explanation.—For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever."

- **Amendment in definition of transfer in Section 2(47)** - Explanation to Section 2(47) renumbered as explanation 1 and new explanation 2 inserted w.e.f 01.04.1962.

  Explanation - "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India"

- ***Brief of Amendment-*** To be classified as capital asset under the act the precondition is that it has to be property of any kind held be the assessee. The amendment seems to overcome famous Judgment in so far it alluded to distinction between legal or contractual rights to constitute property. The amended provisions provide that property shall include and shall always deemed to have been included *any rights in or in relation* to an Indian company including rights of management or control or any other rights whatsoever. Noteworthy is the Fact that such deeming will not happen when such rights are held in the company but also when such rights are held in relation to an Indian Company. The implication of the amendment will abound not only for non residents assesses but for resident assessee as well.

LONG TERM & SHORT TERM CAPITAL GAINS

Q. What are the types of Capital Gain?

- There are two types of Capital Gains:

  1. Long Term Capital Gain;
  2. Short Term Capital Gain

  As per Section 2(29B) – "**Long term Capital gain**" means capital gain arising from the transfer of a long term capital asset.

  As per Section 2(42B) - "**Short term capital gain**" means capital gain arising from the transfer of a short term capital asset.

Q. Difference between short term and long term capital gains?

S. No	Short Term Capital Gain	Long Term Capital Gain
I	STCG is included in the Gross total income of the assessee and taxed as per rate applicable to that assessee	LTCG is in Gross total income and) s taxed on the flat rate of 20% (10%in certain case or Nil in certain cases
Ii	Deductions u/s 80C TO 80U are available	Deductions u/s 80C TO 80U are not available
Iii	Set off of minimum exemption limit is available from all STCG for resident as well as Non-resident.	Set off of minimum exemption limit is available only for resident.
Iv	STCL can be set off against STCG and LTCG	LTCL can be set off against only LTCG
V	Cost of acquisition & Cost of improvement are not indexed in case of STCG.	Cost of acquisition & Cost of improvement are indexed in case of long term capital gains

Q. At what rate do "Short Term Capital Gain" is taxed?

- Where the *total income* of an assessee *included* any income chargeable under the head *"Capital Gain"* arising from the transfer of a *short term capital asset*, being an *equity share in a company or a unit of an equity oriented fund* **and**

  a) The transaction of sale of such asset is entered on or after 1-10-2004, and

b) Such transaction is chargeable to STT

The tax payable by the assessee on the total income shall be aggregate of -

i) the amount of income-tax calculated on such ***STCG at the rate of 15%*** *(as amended by F. Act, 2008)* ***and***

ii) the amount of income-tax payable on the balance amount of the total income as if such balance amount were the total income of the assessee.

- **STCG u/s 111A – taxed @ 15% as per Income Tax Act.**
- **STCG other than 111A- Will be included in total income and taxed as per applicable slab rate.**

Q. What is the rate of tax for "Long Term Capital Gain"?

As per Section 112, Where the total income of an assessee includes any income, arising from the transfer of a LTC asset, which is chargeable under the head "Capital Gain", the tax payable by the assessee on the total income shall be the aggregate of:

(a) In case of an individual or HUF, being a resident :

- the amount of income tax payable on the total income as reduced by the amount of such LTCG, had the total income as so reduced been his total income, and
- 20% of LTCG included in total income.

(b) In case of a domestic company

- the amount of income tax payable on the total income as reduced by the amount of such LTCG, had the total income as so reduced been his total income, and
- 20% of LTCG included in total income

(c) In case of a NR or a Foreign company :

- the amount of income tax payable on the total income as reduced by the amount of such LTCG, had the total income as so reduced been his total income, and
- 20% of LTCG included in total income

Proviso to sec 112 (applicable for resident as well as non-resident)

The tax on capital gains from listed securities or units or zero coupon bonds being long term shall be the lower of the following:

- tax on capital gains computed normally @20%
- tax on capital gains computed normally but without giving the benefit of indexation @10%

After introduction of exemption u/s10(38) by Finance Act, 2004, the proviso to section 112 applies in the following cases:

- Where listed equity shares are sold on or after 1-10-2004 other than through recognized stock exchange.
- Where units of equity oriented fund are sold on or after 1-10-2004 other than through recognized stock exchange or other than to mutual fund.
- Where listed debentures/bonds are sold since exemption u/s 10(38) is not available for listed debentures/bonds.
- Where units of a mutual fund other than equity oriented fund are sold since exemption u/s 10(38) is not available to units of a mutual fund other than equity oriented fund.

Chapter-II

BASIC CONCEPTS-II

I. SECTION 48- COMPUTATION OF CAPITAL GAIN

Q. What is the mode of computation of capital gain?

- The capital gain can be computed by subtracting the cost of capital asset from its transfer price, i.e., the sale price. The computation can be made by making a following simple statement.

Statement of Capital Gains

Particulars	Amount
Full Value of Consideration	-
Less: Cost of Acquisition*(COA)	-
Cost of Improvement*(COI)	-
Expenditure on transfer	-
Capital Gains	-
Less: Exemption U/S 54	-
Taxable Capital Gains	-

** To be indexed in case of LTCA*

The benefit of indexation is not available in the following cases:

- An assessee mentioned u/s 115AB,115AC,115AD & 115D
- benefits of indexing is not available for transfer of bonds and debenture of any company whether public or private or govt. co. or bonds of govt. [however, benefit is available to capital indexed bonds issued by govt.]
- no indexation in case of slump sale
- no indexation in case of depreciable asset
- No indexation incase of STCA

Q. What is the method of computing capital gain in case shares or debentures of Indian Company sold by a non – resident?

The computation of capital gains in case of non – resident is explained in Proviso 1 to sec 48. Where assessee who is a **non resident**, the capital gain arising from the transfer of shares or debentures in an Indian Company, shall be computed by converting

1. COA
2. Expenditure on transfer.
3. Sale Consideration.
4. **In to the same foreign currency, in which the asset was purchased.**
5. **The capital gain so computed in the foreign currency shall be reconverted in to Indian Currency.**

Note:

1. Debentures includes bonds
2. Shares, debentures and bonds of Government company are also covered by the first proviso. However the bonds of CG, SG and RBI are not covered.
3. Proviso shall not apply to units of UTI and Mutual Funds.
4. Application of proviso is mandatory under respective circumstances.
5. This proviso is applicable for computing both STCG and LTCG.

"Assessee should be NR (may be foreign or Indian citizen, corporate or non corporate assessee) in the year the shares or debentures are sold. "

Q. How do determine whether the person is non - resident?

Section 6 of the Income Tax Act contains the provisions regarding the determination of residential status of a person in India in the following manner:

Individuals

An individual shall be regarded as non – resident if he does not satisfy any of the two conditions specified below:

He is a Non-Resident in India in 9 out of 10 previous years preceding the previous year; or

He has stayed in India for 729 days or less during 7 years preceding the previous year.

HUF/FIRM/AOP

Non-resident: They will be regarded as non-residents, if control and management is wholly outside India.

COMPANY

An Indian company is always treated as resident. Any other company would be a resident if the control and management of its affairs is situated wholly in India.

Q. Method of conversion to be applied in case of non – resident.

The following rates are required to be applied for computing capital gains in case on non – residents:

1. COA (conversion) – Average of **Telegraphic Transfer Buying Rate** (TTBR) and the **Telegraphic Transfer Selling Rate** (TTSR) as on the date of acquisition of shares / debentures.
2. Expenditure on Transfer (conversion) – **Average** of TTBR and TTSR as on the date of transfer.
3. Sale Consideration (conversion)– **Average** of TTBR and TTSR as on the date of transfer.
4. Capital Gain (Conversion) – TTBR **as on date of Transfer**.

Some Practical Issues

ISSUE 1 - Some related issues

- Benefit of Indexation- in case assessee made payment in installments after issuance of allotment letter

  Where after issuance of allotment letter of a plot, assessee made payments from time to time in installments, in view of fact that assessee sold said plot after holding it for more than three years, long term capital gain was to be calculated taking into account indexed cost of acquisition as per payment schedule. ***[Nirmal Kumar Seth v. CIT 17 taxmann.com 127 (All) [2012]]***

- Amount paid to tenant for vacating the property is a expenditure incurred wholly and exclusively in connection with the agreement of sale which preceded the transfer and in fulfillment of a condition of sale. Therefore, the same will be treated as expenditure u/s 48(i). ***[CIT v . A. Venkataraman, [1982] 10 Taxman 298 (Mad.). See also Seventh ITO v. L.K.M. Hussain Beevi 1988] 26 ITD 17 (MAD.)]***

- Indexations have to be done from the date of allotment of land and not on the basis of actual payments made by assessee. ***[Charanbir Singh Jolly v ITO (Eigth) 5 SOT 89 (Mum-Trib) (2006), M. Syamala Rao v. CIT 234 ITR 140 (AP) (1998), Smt. Lata G. Rohra v Dy. CIT 22 (II) ITCL 250 (Mum-Trib) (2008)]***

2. SECTION 55- COST OF ACQUISITION

Q. What is meant by cost of acquisition?

- Cost of Acquisition (COA) means any capital expense at the time of acquiring capital asset under transfer, i.e., to include the purchase price, expenses incurred up to acquiring date in the form of registration, storage etc. expenses incurred on completing transfer.

Cost of Acquisition with Reference to Certain Modes of Acquisition (Section – 49)

1. Where the capital asset became the property of the assessee:

   a. on any distribution of assets on the total or partial partition of a Hindu undivided family;

   b. under a gift or will;

c. by succession, inheritance or devolution;

d. on any distribution of assets on the dissolution of a firm, body of individuals, or other association of persons, where such dissolution had taken place at any time before 1.04.1987;

e. on any distribution of assets on the liquidation of a company;

f. under a transfer to a revocable or an irrevocable trust;

g. by transfer from its holding company or subsidiary company;

h. by transfer in a scheme of amalgamation;

i. by an individual member of a Hindu Undivided Family giving his separate property to the assessee HUF anytime after 31.12.1969,

In all above cases, the ***cost of acquisition of the asset shall be the cost for which the previous owner of the property acquired it***, as increased by the cost of any improvement of the asset incurred or borne by the previous owner or the assessee, as the case may be, till the date of acquisition of the asset by the assessee.

If the previous owner had also acquired the capital asset by any of the modes above, then the cost to that previous owner, who had acquired it by mode of acquisition other than the above, should be taken as cost of acquisition.

2. Where shares in an amalgamated Indian company became the property of the assessee in a scheme of amalgamation the cost of acquisition of the shares of the amalgamated company shall be the cost of acquisition of the shares in the amalgamating company.

3. Where a share or debenture in a company, became the property of the assessee on conversion of bonds or debentures the cost of acquisition of the asset shall be the part of the cost of debenture, debenture stock or deposit certificates in relation to which such asset is acquired by the assessee.

4. Where shares, debentures or warrants are acquired by the assessee under Employee Stock Option Plan or Scheme and they are taken as perquisites u/s 17(2) the Cost of Acquisition would be the valuation done u/s17(2).

5. Cost of Acquisition of shares in the Resulting Company, in a demerger.

Net book value of asset		cost of acquisition of shares
Transferred in a demerger	X	in demerged company
Net worth of demerged company		
Immediately before demerger		

The cost of acquisition of the original shares held by the share holder in the demerged company will be reduced by the above amount.

6. Where Capital Gains is not levied on a transfer of capital asset between a Subsidiary Company and a Holding Company or vice-versa but the conditions laid down are violated subsequently and Capital Gains is to be levied, the cost of acquisition to the transferee company would be the cost for which such asset was acquired by it.

7. Where the capital asset is goodwill of a business or a Trade Mark or Brand Name associated with a business, right to manufacture, produce or process any article or thing, right to carry on any business, tenancy rights, stage carriage permits or loom hours, the cost of acquisition is the purchase price paid by the assessee and in case no such purchase price is paid it is nil.

8. Where the cost for which the previous owner acquired the property cannot be ascertained, the cost of acquisition to the previous owner means the Fair Market Value on the date on which the capital asset became the property of the previous owner.

9. Where the capital asset became the property of the assessee on the distribution of the capital assets of a company on its liquidation cost of acquisition of such asset is the Fair Market Value of the asset on the date of distribution.

10. Where share or a stock of a company became the property of the assessee on:

    a. the consolidation and division of all or any of the share capital of the company into shares of larger amount than its existing shares;

    b. the conversion of any shares of the company into stock;

    c. the re-conversion of any stock of the company into shares;

    d. the sub-division of any of the shares of the company into shares of smaller amount; or

e. the conversion of one kind of shares of the company into another kind. Cost of acquisition of the share or stock is as calculated from the cost of acquisition of the shares or stock from which it is derived.

11. The cost of acquisition of rights shares is the amount which is paid by the subscriber to get them. In case a subscriber purchases the right shares on renunciation by an existing share holder, the cost of acquisition would include the amount paid by him to the person who has renounced the rights in his favor and also the amount which he pays to the company for subscribing to the shares. The person who has renounced the rights is liable for capital gains on the rights renounced by him and the cost of acquisition of such rights renounced is nil.

12. The cost of acquisition of bonus shares is nil.

13. Where equity share(s) are allotted to a share holder of a recognised stock exchange in India under a scheme of demutualisation or corporotisation approved by SEBI, the cost of acquisition of the original membership of the exchange is the cost of acquisition of the equity share(s). The cost of acquisition of trading or clearing rights acquired under such scheme of demutualisation or corporatisation is nil.

14. Where any other capital asset has become the property of the assessee before 1st day of April, 1981, the cost of acquisition of the asset to the assessee or the previous owner (depending upon the mode of acquisition) or the fair market value of the asset on 1.4.1981, at the option of the assessee would be its cost of acquisition.

15. Where the capital gain arises from the transfer of specified security or sweat equity shares, the cost of acquisition of such security or shares shall be the fair market value which has been taken into account while computing the value of the respective fringe benefit.

16. Where the capital asset, being a share or debenture of a company, became the property of the assessee in consideration of transfer of bonds or debentures or Global Depository Receipts purchased in foreign currency, the cost of acquisition shall be deemed to be that part of the cost of debentures or bond or deposit certificate in relation to which such asset is acquired by the assessee.

Q. What is meant by cost of improvement?

- Cost of improvement is the capital expenditure incurred by an assessee for making any addition or improvement in the capital asset. It also includes any expenditure incurred in protecting or curing the title. In other words, cost of improvement includes all those expenditures, which are incurred to increase the value of the capital asset. However, any expenditure which is deductible in computing the income under the heads Income from House Property, Profits and Gains from Business or Profession or Income from Other Sources (Interest on Securities) would not be taken as cost of improvement.

  - Cost of Improvement in relation to below mention shall be taken to be nil.

    i) Goodwill.

    ii) Right to manufacture, produce or process any article or thing.

    iii) Right to carry on any business.

  - Any other capital asset.

    i) In case asset acquired before 01/04/1981 – Cost of Improvement incurred since 01/04/1981 either by previous owner or assessee.

    ii) In case asset acquired after 01/04/1981 – All cost incurred by previous owner and assessee.

Q. If the assessee acquires any asset by way of inheritance, partition of HUF or by any other mode specified in sec 49(1) and sec 47 then do the cost of acquisition of previous assessee shall be considered?

- When a capital asset is acquired by an assessee by gift, inheritance, or partition of Hindu Undivided Family or under any of the modes specified in Sec 49(1), or some other mode specified in certain clauses of Sec 47 under explanation 1 to Sec 2(42A), the period for which the asset was held by the earlier owner or in the earlier form is also to be included as part of the holding period of the assessee for determining whether the capital asset is a long term capital asset or a short term capital asset.

  U/s 49(1), where the capital asset became the property of the assessee on the distribution on partition of an HUF, under a gift or will, by succession, inheritance or devolution, on distribution on dissolution of a firm to 1st April 1987, on distribution of assets on liquidation of a company, under

transfer to a revocable or irrevocable trust, or under transfers referred to in Sec 47(iv), (v), (vi), (via), (viaa), (vica) or (vicb), the cost of acquisition of the previous owner is deemed to be the cost of acquisition of the assessee.

U/s 55(2)(b)(ii), where a capital asset became the property of the assessee by any of the modes specified in Sec 49(1), and the capital asset was acquired by the previous owner prior to 1St April, 1981, the assessee is entitled to substitute the fair market value of the asset as on 1ST April, 1981 for the actual cost.

Some Practical Issues

ISSUE 1 – Mortgage & interest expenses to form part of cost of acquisition.

Where assessee purchased a property and on same day mortgage it to raise loan to pay part consideration of property, mortgage expenses incurred in connection with the acquisition of the property and the interest payable on the mortgage amounts, which had been utilized as part of the consideration, would form part of the COA of the property for the purpose of computation of cpital gain.***[CIT V. K. Raja Gopala Rao 252 ITR 459 (MAD) (2001)].***

ISSUE 2 – Compensation paid for eviction.

Compensation paid for eviction of hutment dwellers from land which is sold would be allowable as Cost of improvement. ***[CIT V. Miss Piroja C. Patel 242 ITR 582 (BOM) (2000)].***

Chapter-III

CAPITAL GAIN OR BUSINESS INCOME

Q. When does income be taxed as Capital gain or Business income?

When the transaction involves transfer of capital asset then that will constitute capital gain, whereas transaction which is entered into normal course of business shall constitute business income.

Some Practical Issues

ISSUE - 1

- Where agreement for construction of hostel building, agreement for lease of hostel building and agreement for provision of facilities in hostel building during lease period were part of one composite arrangement for provision of hostel facilities by assessee to lessee, entire income under three agreements was to be assessed as business income. **[*Kenton Leisure Services (P.) Ltd. v. DCIT 18 taxmann.com 158 (ITAT-Cochin) [2012]]***

ISSUE -2 - Taxability of waiver of loan taken for acquiring capital asset.

Section 41(1) -Remission or cessation of trading liability

When loan is taken for acquiring capital asset, waiver thereof would not amount to any income eligible to tax; on other hand, if loan is for trading purpose and has been treated as such from very beginning in books of account, waiver thereof may result in income, more so when it is transferred to profit and loss account.

Bombay Gas Co. Ltd. V ACIT [2012] 23 taxmann.com 22 (Mum-ITAT)]

Facts:

Loans/advances were taken by assessee-company from company B in course of its business activity. Company B approached assessee-company to clear its dues as they had immediate business obligation. Old outstanding dues of Rs. 1,20,67,817 was settled for Rs. 85,00,000. Balance amount of Rs. 35,67,817 was waived by company B. ***Assessee credited this amount into capital reserve account.*** Advance received by assessee from company B had never been allowed as a deduction in any of previous financial year. *It was a case of loan liability and not trading liability.*

Waiver of loan liability credited by assessee under capital reserve account in its books of account would be a capital receipt and could not be deemed as remission or cessation of liability and consequently no benefit would have arisen to assessee in terms of section 41(1).

ISSUE 3 - Investment of land or sale of land after plotting - whether Business Income or Capital Gain.

- A transaction of purchase and sale of land cannot be assumed, without more, to be a venture in the nature of a trade. ***[CIT vs. Jawahar Development Association 127 ITR 431 (MP)(1981)]***

- The activity of an assessee in dividing the land in to plots and not selling it as a single unit as he purchased, goes to establish that he was carrying on business in real property and it is a business venture. ***[Raja J. Rameshwar Rao v CIT 42 ITR 179 (SC)(1961)] also see CIT vs Tridevi (V.A.) (1988) 172 ITR 95 (Bom)]***

- Mode of payment i.e. payment in installments is not a determinative factor if the income is in the nature of trade or capital gain. ***[CIT v Radha Bai 272 ITR 264 (Del) (2005)]***

- Where assessee constructed shops which were let out and rent has been received for 3 years, thereafter the shops were sold – Income from sale of shop is capital gain. ***[ACIT v Janak Raj Chauhan 102 TTJ 297 (Asr.)(2006)]***

- The assessee, after dividing the land into plots, sold the land situated in a village which was beyond 8 kms, of the municipal limit. Such land was sold pursuant to an agreement to sell executed earlier. It was held that land in question was rural agriculture not eligible to capital gain. ***[CIT vs***

Sanjeeda Begum 154 Taxman 346 (All) (2006)]

- When the land was acquired on the basis of a will on the death of her husband & she sold the same in parcels because the huge area could not be sold in one transaction. Such an activity could not amount to trade or business within the meaning of the Act. ***[CIT v Sushila Devi Jain 259 ITR 671 (P&H) (2003)]***

- Selling of own land after plotting it out in order to secure a better price is not in the nature of trade or business, more so when the land was gifted to the assessee. ***[CIT v Suresh Chand Goyal 209 CTR 410 (MP)(2007) see also Ram Saroop Saini (HUF) v ACIT 15 SOT 470 (Del)(2007)]***

- Relinquishment of right in property against consideration shall attract capital gain. ***[CIT v Smt Laxmidevi Ratani 296 ITR 0363 (MP)[2008]]***

Issue 4 – Whether Income from sale of shares are to be taxed as capital gains or as business income.

- Where assessee held shares from seven to eleven months, earned dividend and entered into a few transactions of sale of such shares during relevant year even though he held a huge number of shares, income arising from sale of shares would be taxable as short-term capital gain. ***[CIT v. Vinay Mittal [2012] 22 taxmann.com 151 (Delhi)]***

- Where assessee-company's main business was investment in shares & securities, shares could not be treated as business assets but income from sale of shares was liable to capital gains. ***[CIT v. Trishul Investments Ltd. (2008) 305 ITR 434 (Mad.)]***

Guiding Principles to determine whether sale of shares is taxable as business income or short term capital gains.

Asst. CIT v. Om Prakash Arora [2011] 16 taxmann.com 396 (ITAT-Delhi)

Following principles can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes:

1. What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated as stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.

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

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

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

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

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

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

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

9. **One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them.** Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made?

10. **It is permissible as per CBDTs Circular No. 4 of 2007 of 15-6-2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.**

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

Some Practical Issues

ISSUE – 1 – Default in payment of call money

When the assessee commits a default in payment of call money and consequently the share application money is forfeited by the company, it would be extinguishment of a right and consequently there will be short term capital loss. ***[DCIT v BPL Sanyo Finance Ltd (2009) 312 ITR 63 (Kar.)].***

Chapter-IV

CAPITAL GAINS IN CASE OF DEPRECIABLE ASSETS

Section 50 - Special provision for computation of capital gains in case of depreciable assets

Q. Provisions relating to capital gains in case of depreciable assets.

- **Capital gains in case of depreciable assets** : According to section 50 of Income tax act if an assessee has sold a capital asset forming part of block of assets (building, machinery etc) on which the depreciation has been allowed under Income Tax Act, the income arising from such capital asset is treated as short term capital gain.

  Where some assets are left in block of assets: If a part of such capital asset forming part of a block of asset has been sold and after deducting the net consideration received from sale of such asset from the written down value of the block of such asset the written down value comes to NIL then the gain arising shall be treated as short term capital gain and in such case where written down value has become NIL no depreciation shall be available on such block of asset even if some assets are physically left in the block of assets.

  When no assets are left in block of assets: If the whole of the capital assets forming part of a block of assets have been sold during a year and the assessee has suffered a loss after deducting the net sale consideration from the written down value of the block of assets then such loss shall be

treated as short term capital loss and no depreciation shall be allowed from such block of assets.

It was decided by **Chandigarh tribunal in (2004) 3 S.O.T. 521/ 83 T.T.J. 1057** if the whole of capital assets in a block have been sold in a year and some gain arises after the sale such gain shall not be treated as short term capital gain if some new asset has been purchased within the same year in the same block of assets and the total value of new and old capital assets in the same block is more than the sale consideration of the assets sold, since the block of asset does not cease to exist in such case as is required u/s 50(2).

Statement for Computing Capital Gain in case of depreciable asset

Particulars	Amount
Opening WDV as on 1st April of the relevant PY	-
Add: Actual cost of asst purchased during the year	-
COST OF BLOCK	-
Less: Money Received for asset sold, discarded, demolished, destroyed	
VALUE OF BLOCK	-
Less: Depreciation as per rates under Income Tax Act	-
CLOSING VALUE OF WDV AS ON 31st MARCH	-
	-

Some Practical Issues

ISSUE 1 – Asset on which no depreciation was ever claimed, could not be assessed u/s 50.

- During relevant A.Y., assessee sold certain plant & machinery (not in use) which was partly acquired in year 1997-98 and partly in year 1998-99. AO, by applying section 50, assessed gain arising on transfer of aforesaid plant and machinery as short-term capital gain. On appeal, Tribunal held that section 50 did not apply and plant and machinery (not in use) had to be regarded as long-term capital assets, when they were sold because no depreciation on those assets was ever claimed by assessee. ***[CIT v. Santosh Structural & Alloys Ltd. [2012] 20 taxmann.com 501 (P & H)].***

ISSUE 2 – Applicability of Section 50 in case of Sale of Land

- Since land is not a depreciable asset & it cannot form part of block of assets in absence of rate of depreciation having been prescribed **therefore, provisions of section 50 cannot be invoked in case of sale of land.**

- Land, having been held for a period of more than 36 months, surplus of sale price over indexed cost of acquisition of land was to be taxed as long-term capital gain. ***[CIT v. I.K. International (P.) Ltd. [2012] 20 taxmann.com 197 (Delhi)].***

ISSUE 3 – 'Block of assets' for purpose of section 50 would mean assets of all units of assessee having same rate of depreciation and not assets of one division or unit having same rate of depreciation

CIT v. Ansal Properties & Infrastructure Ltd. [2012] 20 taxmann.com 770 (Delhi)

- Section 2(11), which defines term 'block of assets,' does not make any distinction between different units or different type of businesses, which may be carried on by an assessee. Only requirement is that in respect of assets which form block of assets, same percentage of depreciation should be prescribed.

- All assets, which may be of different types, but in respect of which same percentage of depreciation is prescribed, are to be treated and form part of block of assets.

Chapter-V

COMPUTATION OF CAPITAL GAIN IN CERTAIN CASES

1. Section 51 – Advance Money Received
2. Section 50D- Fair Market Value deemed to be full value of consideration in certain cases
3. Section 50 B – Special provision for computation of capital gains in case of Slump Sale

SECTION 51 - ADVANCE MONEY RECEIVED

Q. What is the treatment of advance money received by the assessee in respect of capital asset?

- Where on any capital asset, on any previous occasion, for the subject of its transfer, any advance or other money received and retained by the assessee in respect of such negotiations, shall be deducted from the COA
    - ❖ Advance or other money will be deducted from COA only if it was received and retained or forfeited by the assessee himself and not by the previous owner
    - ❖ If the advance money forfeited was received by the assessee before 1-4-1981 and the assessee has assumed the FMV of the asset as on 1-4-1981 as the COA ,such advance will still be deducted from FMV.

Q. What if advance money forfeited is more than cost of acquisition?

In such a case the excess of the advance money forfeited over the cost of

acquisition of such asset shall be a capital receipt not taxable. ***[Travancore Rubber & Tea Co. Ltd v. CIT (2000)243 ITR 158 (SC)]***

Some Practical Issues

ISSUE 1 – Treatment in the hands of buyer

- Forfeiture of earnest money by the vendor if due to default on the part of vendee, will not amount to relinquishment of a right in that asset .Therefore the amount forfeited will not be allowed as a capital loss under the head capital gains. ***[CIT V. Sterling Investment Corporation Ltd (1980)123 ITR 441 (BOM)]***

- Due to default on the part of vendor : vendee receives some compensation besides the refund of the earnest money paid by him, such compensation shall be subject to capital gains as it will amount to relinquishment of a right by the vendee. ***[CIT V. Vijay Flexible Container (1990)186 ITR 693(BOM) and K.R.Srinath v. Asst.CIT (2004)268 ITR 436 (MAD)].***

SECTION 50D- FAIR MARKET VALUE DEEMED TO BE FULL VALUE OF CONSIDERATION IN CERTAIN CASES

Prior to section 50D, capital gains are calculated on transfer of a capital asset, as sale consideration minus cost of acquisition. In some recent rulings, it has been held that where the consideration in respect of transfer of an asset is not determinable or ascertainable, then, as the machinery provision fails, the gains arising from the transfer of such assets is not taxable and also that fair market value cannot be taken as deemed full value of consideration unless there is a specific provision in this respect. This particularly happens when shares in Indian companies are transferred 'without consideration' by companies as part of restructuring exercise. Obviously, these transfers are not "gifts" but consideration for them is general improvement in business/ synergies etc. which is not "ascertainable" or "quantifiable"

In order to overcome the judicial decisions, new section 50D is inserted with effect from A.Y. 2013-14 to provide that fair market value of asset shall be deemed to be the full value of consideration if actual consideration is not attributable or determinable. This amendment takes a cue from the following observations of **ITAT in *Dy. CIT* v. *Summit Securities Ltd.* [2012] 19 taxmann. com 102 (Mum.)(SB).**

Provisions of Section 50D are as under as inserted by the Finance Act, 2012, w.e.f. 1-4-2013:

"Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer".

SECTION 50 B - SPECIAL PROVISION FOR COMPUTATION OF CAPITAL GAINS IN CASE OF SLUMP SALE

Q. What is meant by slump sale?

Slump Sale means the transfer of **one or more undertakings** as a result of the sale **for a lump sum consideration** without values being assigned to the individual assets and liabilities is such sales.

Q. Whether sale of undertaking be taxable as 'Business Income' or 'Capital Gain'?

The **Supreme Court in PNB Finance Ltd. V. CIT (175 Taxman 242)** after considering Sections 41(2), and 45, held that gain from slump transactions is neither taxable as business income u/s. 41 (2) nor as Capital gains u/s. 45 of the Act.

To attract section 41 (2), the subject matter should be depreciable assets and the consideration received should be capable of allocation between various assets. In case of a slump sale, there is an undertaking which gets transferred (including depreciable and non-depreciable assets) and it is not possible to allocate slump price to depreciable assets and therefore, the same cannot be taxed u/s. 41 (2).

To attract Capital Gain, held that the charging section and the computation sections are integrated code and if one fails other fails. If the computation sections fail then even the Charging section fails.

Conclusion

In case of slump sale, there are bundle of assets (including intangible assets like goodwill) that are transferred and in absence of any specific provision like Section 50B, it is not possible to determine the cost of the said assets and thus, the computation mechanism fails and so does the charging section. Therefore, it was held that the gains from the transfer of a bundle of asset on a slump basis are not chargeable to capital gains

also. Thus, the slump sale was held to be not chargeable to tax prior to insertion of Section 50B

Q. Is the benefit of indexation is available in case of slump sale?

As per Sec 50B, no indexation benefit is available on cost of acquisition, i.e. net worth.

Q. Whether transfer of assets without transfer of liabilities regarded as Slump Sale?

Slump sale provisions do not apply where assets of an undertaking are transferred without transfer of liabilities. This is clear from the following

Definition of 'undertaking': 'include any part of an undertaking or a unit or division of an undertaking or a business activity taken as a whole'

As per Explanation 1 to S. 50B: Net worth is the difference between 'aggregate value of total assets of the undertaking or division' and 'value of liabilities of such undertaking or division'.

Therefore, transferring the asset without transferring the liabilities shall not be regarded as Slump Sale.

Some Practical Issues

ISSUE 1 – If the transfer of the property in goods is not pursuant to a contract but pursuant to a Court Order?

- The transfer of the property in goods pursuant to an order of a court cannot be regarded as 'Sale'. This is quite clear from definition of "Sale" that only contractual transfer is regarded as 'Sale' and thus, the statutory transfers or transfer effected by orders of the court or operation of law cannot be regarded as Sale.

ISSUE 2 – if undertaking is transferred for a consideration other than 'money consideration', say for allotment of shares in transferee company ?

- The transfer of the property in goods for other than 'money consideration' would be regarded as 'Exchange' and not 'Sale' and therefore wouldn't be covered in the ambit of Slump sale and consequently would not be taxable under the IT Act. Such transaction could be regarded as 'Slump Exchange'. ***[Supreme Court case in CIT vs. R. R. Ramkrishna Pillai]***

Chapter-VI

FULL VALUE OF CONSIDERATION & REFERENCE TO VALUATION OFFICER

I. SECTION 50 C – SPECIAL PROVISION FOR FULL VALUE OF CONSIDERATION IN CERTAIN CASES

Applicability of Section 50C

As per Sec 50C, where the consideration received or accruing as a result of the transfer of land and/or building is less than the value adopted or assessed or assessable by an authority of the state govt. for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration received or accruing as a result of such transfer for computing capital gain.

Sub section (2) of said section provides that where the assessee claims before any assessing officer that the value adopted or assessed by the authority exceeds the fair market value of the property as on the date of transfer and the value so adopted or assessed by the authority has not been disputed in any appeal or revision or no reference has been made before any other authority, court or a high court , the Assessing offer may refer the valuation of the capital asset to a valuation officer.

Q. If the transaction falling u/s 50C then whether section 56(2) also get attract to such transaction?

As per Finance Act, 2010, cases of transfer of immovable property for

inadequate consideration are no longer covered by the provisions of sec. 56(2) i.e. taxability in the hands of buyer as deemed income. The transactions would fall squarely within the ambit of sec. 50C.

Some Practical Issues

ISSUE 1 – Section 50C has no application for determination of sale price of stock-in-trade/ Business assets.

- Where there was no dispute as to fact that property owned by assessee was its inventory and as such forming part of its stock-in-trade, profit on sale of said stock-in-trade was assessable u/s 28 and AO could not make addition on ground that its sale consideration was understated. ***[Asst. CIT v. Excellent Land Developers (P.) Ltd. 1 ITR 563 (DELHI-ITAT) [2010]]***

- Where property is treated as business asset and not as capital asset, S 50C cannot be invoked. ***[CIT v. Thiruvengadam Investments (P.) Ltd320 ITR 345 (Mad.)[2010]]***

ISSUE 2 – Section 50C does not apply to transfer of "leasehold rights" as it is not "land or building".

- Lease right in a plot of land cannot be included within scope of 'land or building or both' and, thus, in case of transfer of leasehold rights in land, provisions of section 50C cannot be invoked. **[*Atul G. Puranik vs. ITO [2011] 11 taxmann.com 92 (ITAT-Mum.)]***

ISSUE 3 – Section 50C is applicable to depreciable assets

- The harmonious interpretation of sec 50 and sec 50C, it is clear that there is no exclusion of applicability of one fiction in a case where other fiction is applicable. Thus, provisions of sec 50C can be applied to the transfer of depreciable capital assets covered by sec 50 and in computing the capital gain arising from the transfer by adopting the stamp duty valuation. ***[ITO v. United Marine Academy 9 ITR 639 (Mum. ITAT) (2011)]***

ISSUE 4 – Legal fiction created by sec. 50C is limited to purposes of sec.48 alone and does not displace legal fiction created by sec. 69, 69A & 69B

- The consideration, which is deemed by sec. 50C to have been received by the transferor, is for the limited purpose of computation of capital gain u/s 48 and for no other purpose. It cannot and does not mean that the

said amount of consideration has been actually received by the assessee or actually paid by the transferee to him so as to be available in his hands for investments or for meeting the expenses. "Deemed consideration" u/s 50C for computation of capital gain u/s 48 is quite different from actual consideration or actual availability of money for the purpose of making investments or for meeting the expenses. Deemed consideration within the meaning of sec. 50C cannot and does not mean that the amount of deemed consideration has actually been paid by the transferee or actually received by the assessee. ***[Subash Chand v. ACIT 18 taxmann.com 149 (ITAT-Chandigarh) [2012]]***

ISSUE 5 – Some other related issues

- In absence of any material to effect that assessee had received any amount over and above value on which stamp duty was payable, Full value of consideration would be the value adopted for purpose of stamp valuation. ***[ITO v. Ms. Namita Singh 15 taxmann.com 19 (ITAT-Delhi) [2011]]***

- While computing capital gains u/s 45, FVC has to be taken as per circle rates prescribed by the State Government for the purpose of stamp valuation unless the AO has material in his possession to prove that the assessee had received higher amount than the circle rates.

- Adoption of the DVO's report without providing opportunity of being heard is also against the principles of natural justice. ***[ADIT v. Ranjay Gulati -TIOL -528 (ITAT-Delhi)(2011)]***

- Value adopted or assessed by any authority of the State Government for purpose of payment of stamp duty in respect of land or building at the time of execution of the transfer deed, cannot be taken as sale consideration received for the purpose of section 48. ***[CIT v. Smt. Shweta Bhuchar 192 Taxman 67 (P&H) [2010]]***

- The deeming fiction of Sec. 50-C could not be applied for ascertaining the undisclosed investment of assessee under Sec. 69-B. Further, in absence of any evidence for applying S 69B, difference b/w value for purpose of stamp duty and value shown in sale deed cannot be added in the income of assessee. ***[ITO v. Fitwell Logic System (P.) Ltd. 1 ITR (TRIB.) 286 (Delhi) [2010] and CIT-II Vs Harley Street Pharmaceuticals Ltd TIOL-391-(Ahm) (2011)]***

- Where the assessee objects to stamp duty valuation, the AO is required to call for report of DVO, and even if the valuation report is received

after the assessment, the value determined may be rectified u/s 154. ***[Mrs. Nandita Khosla v. ITO Taxman 344 (ITAT-Mum.)[2011] and Kanai Lal Sharma Vs ACIT TIOL-324-ITAT-(Kol) (2011)]***

II. SECTION 55A – REFERENCE TO VALUATION OFFICER

Applicability of Section 55A of the Act

- With a view to ascertaining the FMV of a capital asset for the purposes of this Chapter, the AO may refer the valuation of capital asset to a Valuation Officer—

  (a) In a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the AO is of opinion that the value so claimed ***is at variance with its fair market value." (amendment by Finance Act, 2012)***

  (b) In any other case, if the AO is of opinion—

    (i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf ; or

    (ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary to do so,

  Where any such reference is made, the provisions of sub-sec. (2), (3), (4), (5) and (6) of sec. 16A, clauses (ha) and (i) of sub-sec. (1) and sub-sec. (3A) and (4) of sec. 23, sub-sec. (5) of sec. 24, sec. 34AA, sec. 35 and sec. 37 of the Wealth-tax Act, 1957 (27 of 1957), shall with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the AO under sub-sec. (1) of sec. 16A of that Act.

Some Practical Issues

- Where valuation report of approved valuer submitted by assessee suffered from grave infirmity, in as much as it did not take into account a number of items used by assessee for construction of property, AO can adopt the value determined by DVO. ***[Krishan Kumar Jhamb v. ITO 179 Taxman 141 (P& H) [2009]]***

- Where there is nothing on record, to show that the assessee received consideration for the sale of the property in excess of which has been

shown in the agreement to sell. Thus the actual sale consideration recorded in the agreement to sell and received by the assessee could not be substituted by the value as adopted by the District Valuation Officer u/s 55A for the purpose of computing the capital gains chargeable to tax. ***[Dev Kumar Jain V ITO 309 ITR 0240 (Del) [2009] see also CIT v Smt. Nilofer I. Singh 309 ITR 0233 (Del) [2009]].***

Chapter-VII

CAPITAL GAIN ON SALE OF AGRICULTURAL LAND

Q. What is the test that determines land is agricultural land?

The Gujrat HC in **CIT v Siddhartha J. Desai 139 ITR 628 (Guj)(1983)** has laid down the following tests for determining whether the land is agricultural or not:

a) Whether, the land was classified in the revenue records as agricultural and whether it was subjected to payment of land revenue? ***[CIT vs. Smt. Debbie Alemao 331 ITR 0059 (Bom) [2011]]***

b) Whether, the land was actually or ordinarily used for agricultural purposes at or about the relevant time?

c) Whether, such user of the land was for a long period or whether it was of temporary character or by way of stop gap arrangement?

d) Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing land?

e) Whether the land, on the relevant date, had ceased to be put to use? If so, whether it was put to an alternative use? Whether such lessor and/ or alternative user was of permanent or temporary nature?

f) Whether the land, though entered in revenue record, had never been actually used for agriculture, i.e., it had never been ploughed or tilled?

g) Whether the owners meant or intended to use it for agricultural purposes?

Some Practical Issues

ISSUE 1 – Issues related to Agricultural Land

- The use to which the transferee put the land is immaterial and not relevant.
- What is relevant is that, in the hands of transferor, the land must be agricultural in nature at the time of transfer.
- If the transferee converts the agricultural land into non agricultural land or divides it into two plots and sells the same as house sites, the transfer of the land would not give rise to capital gains tax in the hands of transferor. ***[Motibhai Patel v CIT 131 ITR 120 (Guj)(1981)].***
- It was held that the purchaser who had no intention of carrying on agricultural operations, the seller assessee should not loose the benefit as long as he had been using the land for agricultural purposes. ***[M.S. Srinivasa Naicker V ITO 292 ITR 0481 (Mad)[2007]].***
- If the land was put to agricultural use for a long period and the agricultural operations were temporarily suspended, the land does not cease to be agricultural. ***[Ranganatha Sastri (M) V CIT 119 ITR 488 (Mad) (1979)].***
- Where agricultural land which is outside the scope as per section 2(14) (iii) is sold along with standing trees, there will be no liability to capital gains tax even in respect of the standing trees. On the other hand, if the standing trees are sold separately after they are cut and removed, they do not partake of the nature of the land and there will be liability to tax on capital gains arising from the sale. ***[Gokul Rubber and Tea Plantations Ltd. V CIT 172 ITR 197 (Ker)(1988)].***
- Where land was shown as agricultural land in the revenue records and was never sought to be used for non-agricultural purposes by the assessee till it was sold, it was held that such land has to be treated as agricultural land even though no agricultural income is shown by the assessee as the assessee stated that the agricultural income derived by sale of coconut grown on the land was just enough to maintain the land and there was no surplus. ***[CIT v Debbie Alemao 46 DTR 341 (Bom.)(2010)]***

- Agricultural land not covered under specified urban areas and therefore not a capital asset. ***[Ramjibhai P. Chaudhry v DCIT 314 ITR (AT) 0259 ITAT – Ahm.] [2009] .***
- How the distance is to be measured - Distance to be taken by approach road and not as a straight line. ***[Radhasoami Satsang v. CIT 193 ITR 321 (SC) (1992), CIT v. Satinder Pal Singh 188 Taxmann 54 (P&H)(2010)]***
- Jurisdictional Municipality has to be considered for calculating the distance. ***[DCIT v. Capital Local Area Bank Ltd 29 SOT 394 (ASR)(2009) & Srinivas Pandit HUF v. ITO 39 SOT 350 (Hyd.)(2010)]***

Chapter-VIII

SECTION 45(5) - COMPULSORY ACQUISITION

Q. Do consideration received from Government against compulsory acquisition attracts capital gain?

- As per section 45(5), consideration **received** against Compulsory acquisition by the Central Government shall also attract Capital Gain. ***[Jehangir P. Vazifdar V ITO (1992) 42 ITD 67 (Bom-Trib) – Received would mean when it has become finally receivable or the same is received unconditionally.]***

Q. What will be the treatment of consideration further enhanced or reduced?

- Enhanced & further enhanced compensation will also be considered for the purpose of Capital gain in the below mentioned manner:
  - Consideration **determined / awarded / approved at first instance** shall be chargeable in the P.Y. in which, wholly or partly, was **first received.**
  - **Enhanced & Further enhanced compensation** shall be chargeable in the **Year of receipt.**
  - *In case the amount of **compensation** or enhanced compensation is **subsequently reduced** the capital gain shall be **recalculated by the taking the compensation or enhanced compensation so reduced. (Refer Sec 155(16).***

Q. What will be the COA and COI while calculating the enhanced consideration?

- COA & COI shall be taken to be nil while calculating CG from enhanced compensation or further compensation.

Some Practical Issues

ISSUE 1 – Enhanced Compensation 45(5)

❖ Enhanced compensation received by assessee during pendency of dispute before Court cannot be deemed to be his income for purpose of computation of capital gain in year of receipt, in terms of provisions of sec. 45(5). ***[Hari Kishan v. Presiding Officer (2008) 172 Taxman 219 (P & H)]***

ISSUE 2 – Taxability of interest on enhanced compensation

❖ Interest on enhanced compensation is taxable on accrual basis but only if it is undisputed. ***[ITO vs. Amarlal (2007) 14 SOT 239 (Del-Trib)]***

❖ Interest received on delayed payment of compensation is determined and taxable under the head income from other sources on year to year basis. ***[CIT v Ghanshyam (HUF) (2009) 315 ITR 1 (SC)].***

❖ Interest on enhanced compensation is not taxable on lumpsum basis under mercantile system, however spread over on annual basis over the period starting from the date of compulsory acquisition to the date on which court makes an order for enhanced compensation. ***[Rama Bai V CT (1990) 181 ITR 400 (SC), see also CIT vs Hardwari Lal, HUF [2009] 312 ITR 0151 (P&H)].***

❖ Where assessee follows cash system of accounting, interest on enhanced compensation on acquisition of land shall be taxable in year of receipt. ***[CIT v Smt Burfi [2011] 331 ITR 001 (P&H)]***

ISSUE 3 – Date of transfer

❖ If property acquired under Requisitioning and Acquisition of Immovable Property Act, 1952 – Date of publication of the notification for acquisition would be the date of Transfer. ***[G.M. Omer Khan v CIT (1992) 196 ITR 269 (SC) see also Omar khan (G.M.) v Addl CIT (1992) 195 ITR 269 (SC)]***

- If property acquired under Land Acquisition Act, 1894 (The Central Act) or any other state Act – Date of transfer would be the date of actual possession by declaring it to do so. ***[CIT v Shaggy Abdulla (Smt) (2000) 108 Taxman 249 (Ker)]***

- In case of emergency acquisition, effective date of transfer is the date of taking possession under section 17 of the Land Acquisition Act, 1894 and not the date of award of compensation. ***[BC Gupta & Sons Ltd. v CIT (1996) 221 ITR 53 (Gau.) also see Alexander George V CIT (2003) 128 Taxman 851 (Ker)]***

ISSUE 4 - Other related issues

- The Supreme Court in the case of **CIT V Hindustan Housing and Land Development Trust (1986) 161 ITR 524** has held that :

  - Where additional compensation awarded to the assessee has been made subject matter of appeal by the Government then such amount shall be taxable as capital gain only.

  - In the year in which additional compensation is received.

  - In the year in which the dispute is finally settled.

  Whichever is later.

  [New friends Co-operative House Building Society Ltd. v CIT (2010) 327 ITR 0039 (P&H) also see CIT vs. Ghanshyam (HUF) [2009] 315 ITR 0001 (SC), Chandi Ram v CIT [2009] 312 ITR 0139, Anil Kumar Forma (HUF) V. CIT [2007] 289 ITR 0245 (Mad), G.M. Omar Khan V. Addl CIT (1992) 196 ITR 269 (SC)].

- If any amount is received after stay of the award, in pursuance of any interim order, as a payment subject to the final result, it will not be an amount received as 'enhanced compensation' contemplated u/s 45(5)(b), but only an interim payment received subject to final decision. ***[CCIT & Anr v. Smt. Shantavva (2004) 267 ITR 67 (Karn).]***

- Solatium awarded by competent authority constitutes part of consideration for compulsory acquisition. ***[CIT v. Smt. Subaida Beevi (1986) 160 ITR 557 (Ker) see also Vadilal Soda Ice Factory v CIT (1971) 80 ITR 711 (Guj), K.C. Mahajan (1998) 234 ITR 235 (P&H).***

- Expenses for realization of enhanced consideration is allowable in terms of S. 48(1). ***[Chakiri Ashok Kumar v ITO (2002) 80 ITD 410 (Hyd).].***

- The compensation due to injurious effect on the unacquired portion is also taken in to account, the amount awarded for such compensation shall also be a part of the full consideration price for computing the capital gain for the portion acquired. ***[P. Mahalakshmi and Others v CIT (2002) 255 ITR 647 (SC)].***

Chapter- IX

EXEMPTION FROM CAPITAL GAIN

Part-I **Exemption from capital gain is available under Section 10, 11(1A) & Section 13A. Exemptions can be divided in to following two categories - Exemptions allowed to**

A.	B.
only to a specified assessee	***either to all assesses or to more than one assesses***

Exemption to Specified Assessee

Assessee	**Section**
Local Authority	10(20)
Research Association	10(21)
Notified News Agency	10(22B)
Notified Institution for controlling, supervising, regulation or encouragement of the profession of law, medicine, accountancy, engineering or architecture or such other profession.	10(23A)
Institution solely for development of Khadi or village industries or both.	10(23B)
Certain Funds and Institutions	10(23C)
Mutual Funds	10(23D)

Venture Capital Company or Fund (VCC/VCF)	10(23FB)
Funds established under section 10(25) & 10(25A)	10(25) & 10(25A)
Charitable or religious trust or institutions subject to certain conditions being satisfied.	11(1A)
Political Parties	10(13A)

Exemption allowed either to all assesses or to more than one assesses

Sections	Brief of the Section
10(33)	Capital gain on transfer of units of US 64 exempt if transfer takes place on or after 01/04/2002.
10(37)	Exemption of capital gains to an individual or HUF on compensation received on compulsory acquisition of agricultural land situated within specified urban limits as per Section 2(14)(iii)(a) &(b).
10(38)	Exemption of long term capital gain arising from sale of equity shares and units of the equity oriented fund.

Exemption in respect of CG in case of units of US-64 - Sec. 10(33)

Any income arising from the transfer of a capital asset, being a unit of the Unit Scheme, 1964 referred to in schedule I to the UTI Act, 2002 & where the transfer takes place on or after 1st day of April 2002.

Note:

1. Income arising from the transfer of unit held as Stock in trade shall be taxable as business income.
2. The capital loss arising on the transfer of such units shall not be included in the computation of capital gains under sec. 45 and will not be available for set off or carry forward in accordance with sec. 70 and 74.

Section 10(37)-Exemption in respect of CG in case of Urban agricultural Land

In case of an assessee being an **individual or an HUF**

- any income chargeable under the head 'Capital Gains' arising from the transfer of agricultural land , where -
  - i) Such land is situated in any area which is comprised within the jurisdiction of a municipality (having population of not less than 10,000) or a cantonment board.

ii) Such land during the period of 2 years immediately preceding the date of transfer, was being used for agricultural purposes by such an HUF or individual or a parent of such individual.

iii) Such transfer is by way of compulsory acquisition under any law, or a transfer for which the consideration is determines or approved by the CG or RBI,

iv) Such income has arisen from the compensation or consideration for such transfer received on or after 1st day of April,2004.

Explanation: For the purpose of this clause, the expression "compensation or consideration "includes the compensation or consideration enhanced or further enhanced by any court, tribunal or other authority.

❖ **Exemption in respect of LTCG in case of specified securities - Sec. 10(38)**

Any income arising from

- The transfer of LTCA.
- Being an equity share in a company.
- A unit of an equity oriented fund where-

  (a) the transaction of sale of such equity share or unit is entered into on or after 1-10-2004, and

  (b) such transaction is chargeable to STT.

Note:

1. Such LTCG shall be taken into account in computing the book profit and income tax payable under section 115JB.
2. Exemption is available for all assessees whether R or NR, FII, etc.

Points to be considered:

- The exemption is available to all assessees including FIIs and NR.
- The exemption is available to an investor who holds the equity shares/ units of equity oriented fund as capital asset not as stock-in-trade.
- The exemption is not available to securities other than equity shares and units of equity oriented funds

- The exemption is available if the sale transaction is chargeable to securities transaction tax
- The acquisition may not be through a recognized stock exchange (i.e. Purchase of asset)
- Loss from sale of securities- if income from a particular source is altogether exempt, then loss from that source cannot be set off.

PART-II EXEMPTIONS SECTION 54, 54EC & 54F OF INCOME TAX ACT, 1961

The assessee can claim exemption from capital gains on sale of residential house property under the following sections:

Particulars	Sec. 54	Sec. 54EC	
Exemption claimed	Individual/ HUF	Any person	Individual/ HUF
POH of Capital asset	Long-Term	Long-Term	Long-Term
Eligible specific asset	A residential house property	Any LTC asset	Any LTC asset (other than a residential house property) provided on the date of transfer the tax payer do not own more than one residential house property from the A.Y. 2001-02 (except the new house as stated in 4 infra)
Type of asset should be acquire to get the benefit of exemption	Residential house property	Bonds of national highway authority of India or Rural Electrification Corporation.	A residential Property
Time limit for acquiring the asset	*Purchase:* 1 yr backward or 2 yrs forward. *Construction*: 3yrs forward	6 months forward	*Purchase:*1 yr backward or 2 yrs forward. *Construction:* 3yrs forward

Relevant date for acquiring the new asset	From the date of transfer of house property but in case of compulsory acquisition from the date of compensation.	From the date of transfer of long term capital asset but in the case of compulsory acquisition from the date of receipt of compensation.	From the date of transfer of capital asset but in case of compulsory acquisition from the date of receipt of compensation.
Amount exempted	Investment in the new asset or capital gain, whichever is lower.	Investment in the new asset or capital gain, whichever is lower.	Investment in the new asset/ net sale consideration capital gain
Exemption revoke in a subsequent year	If the new asset is transferred within 3 yrs of its acquisition.	If the new asset is transferred or it is converted in to money or a loan is taken on security of the new asset within 3 yrs of its acquisition.	If the new asset is transferred within 3 yrs of its acquisition. If another residential house is purchased within 2 yrs of transfer of original asset, or If another residential house is constructed within 3 yrs of the transfer of original asset.

Different questions	**Sec. 54**	**Sec. 54EC**	**Sec. 54F**
When the exemption is revoked it is taxable as LTCG/STCG in the year in which the default is committed.	STCG	LTCG	LTCG
Scheme of deposit is applicable	Yes	No	Yes

Some Practical Issues

Q. What is Capital Gain Account Scheme?

- If the new asset is not acquired up to the date of submission of return of income, then the tax payers will have to deposit money in "Capital Gain Deposit scheme" with a nationalized bank. The proof of deposit should be submitted along with return of income. On the basis of actual investment and the amount deposited in the deposit account, exemption will be given to the tax payer.

Q. Is the relief under section 54 is available to multiple sales & purchases of residential houses?

- In case of multiple sale and purchase of residential houses, the exemption cannot be calculated considering the aggregate of capital gain and aggregate of investment in the residential houses. The exemption will be available in relation to each set of sale and corresponding investment in the residential house and the combination which is beneficial to the assessee has to be allowed. **[Rajesh Keshav Pillai v. ITO 7 Taxmann.com 11 (Mum.) (2010)]**

Q. Whether deduction u/s 54 is available for capital gains arising from sale of more than one house, however the sale proceeds are invested in one house?

- There is no restriction placed in section 54 which restricts exemption only in respect of sale of one residential house. Even if assessee sells more than one house in the same year and the capital gains is invested in a new residential house, the claim of exemption cannot be denied if other conditions are fulfilled. **[DCIT v. Ranjit Vithaldas [2012] 23 taxmann. com 226 (ITAT-Mum)]**

Q. Can assessee claim exemption under section 54 for acquisition of more than one house?

- Where more than one residential house is purchased out of the sale proceeds of one residential house, exemption u/s 54 can be claimed only in respect of one house, provided the other conditions of Sec 54 are satisfied.**[K.C. Kaushik v ITO 185 ITR 499 (Bom.)(1990)].**

  In **Gulshanbanoo R. Mukhi v. JCIT 83 ITD 649 (ITAT- Mum) (2002),**it was held that exemption is allowed only for one flat.

  However, two or more residential houses purchased can be classified as one single residential house, the exemption under section 54 can be allowed. Some of the relevant judicial pronouncements are:

  - Two adjacent residential units but used as one single residential house, exemption allowed. **[D. Anand Basappa v. ITO 309 ITR 329 (Kar.) (2009)]**

  - Fact that residential house consists of several independent units cannot be a hindrance to allowance of exemption u/s 54 - Held, yes **[Prem Prakash Bhutani Vs. CIT 110 TTJ (Del) 440 (2007)]**

- Two adjoining flats converted into single residence, exemption allowed. **[ACIT v Mrs. Leela P. Nanda 286 ITR (AT) 113 (Mum) (2006)]**

- Four flats purchased in same building but on different floors because of large size of family, which maintained a common kitchen and a common ration card, exemption allowed. **[Vyas (K.G.) v ITO 16 ITD 195 (Bom.)(1986)]**

- Allowable in the case of adjacent & contiguous flats.**[ITO v. Mrs. Sushila M. Jhaveri 107 ITD 327 (ITAT- Mum. SB)(2007)]**

- Several self occupied dwelling units which were contiguous and situated in the same compound and within the common boundary having unity of structure should be regarded as one residential house. **[Shiv NarainChoudhary v. CWT 108 ITR 104 (All)(1997)]**

- More than one units converted into one single house allowed for the purpose of sec. 54F as well. **[Neville J. Pereira v. ITO 8 Taxmann. com 68 (Mum. ITAT) (2010)]**

- Two flats which were not adjacent to each other and were separated from each other by common passage, lobby, staircase, etc., they could not be regarded as a single unit and, therefore, assessee was entitled to benefit of deduction under section 54F in respect of one of those two units. **[ACIT vs Sudhakar Ram [2011] 16 taxmann.com 175 (Mum.-ITAT)]**

- However, the claim for exemption u/s 54 is not admissible in respect of two independent residential houses situated at different locations. **[PawanArya v. CIT 11 taxmann.com 312 (P&H) [2011]]**

Q. Whether the property purchased in the joint name with wife is eligible for exemption u/s 54/54F?

- Section 54F mandates that house should be purchased by assessee and it does not stipulate that house should be purchased in name of assessee. Property purchased by assessee in joint name with his wife for 'shagun' purpose because of fact that assessee was physically handicapped and the whole consideration was paid by assessee, assessee entitled to exemption u/s 54F. **[CIT Vs Ravinder Kumar Arora 15 taxmann.com 307 (Delhi) [2011])]**

Other relevant judicial pronouncements

- ❖ Merely because sale deed is in joint name, assessee could not be denied benefit of deduction u/s 54. **[DIT v. Mrs. Jennifer Bhide 15 taxmann.com 82 (Kar.) [2011]]**
- ❖ House property in the name of HUF sold but new house purchased in the name of Karta and his mother to claim the benefit of sec. 54F. The residential house which is purchased or constructed has to be of the same assessee. **[Vipin Malik (HUF) Vs CIT 183 Taxman 296 (Delhi) (2009)]**
- ❖ Exemption u/s 54F is allowed only when the new residential property is purchased by the assessee in his own name and not in name of his adopted son. **[Prakash v. ITO 173 Taxman 311 (Bom.) [2008]]**
- ❖ Sec. 54 clearly says that if the assessee is owner of the property, he is entitled to exemption even if the new property purchased is in the name of his wife but the same is assessed in the hands of the assessee. **[CIT v. V. Natarajan 154 Taxman 399 (Mad.) [2006]]**

Q. Whether the nexus between capital gain and amount of investment u/s 54 is necessary?

- Assessee is not required under the provision for section 54 to establish the nexus between the amount of capital gain and the cost of new asset.

  Held that the assessee had initially utilized the sale proceeds on sale of its residential flat in commercial properties and, later on, he purchased two residential flats within a period specified in sub-section (2) of section 54. The Revenue's main dispute was that the sale proceeds were utilized for purchase of a commercial property and residential house was purchased out of the funds obtained from different sources, as such, the identity of heads has been changed. **[Ishar Singh Chawla Vs. CIT 130 TTJ (Mum) (UO) 108 (2010) and Ajit Naswanit Vs. CIT 1127 Taxman 123 (Delhi) (Mag.) (2001)]**

Q. To avail exemption u/s 54F, the residential property should be acquired out of personal funds or sale proceeds?

- If the assessee constructs or purchases a residential house out of the borrowed funds, he is not eligible for deduction u/s 54F of the Act. If it is not construed in such a manner the object of introduction of the beneficial provisions would be frustrated. The fiscal provisions are to be

construed in such a manner, so that its objects of introduction can be achieved. **[Milan Sharad Ruparel 005 ITR 0570 (ITAT – Mum) [2010]**.

However a different view was taken in **Bombay Housing Corporation v. Asst. CIT 81 ITD 545 (Bom.-ITAT) (2002)**, Where assessee utilized the sale consideration for other purposes and borrowed the money for the purpose of purchasing the residential house property to claim exemption under section 54,it was held that the contention that the same amount should have been utilized for the acquisition of new asset could not be accepted.

Other relevant judicial pronouncement:

There is no requirement for claiming exemption under section 54 that same amount of sale consideration should be utilized for acquisition of property, even borrowed funds can be utilized for that purpose. **[Prema P. Shah Vs ITO 101 TTJ 849 (Mum-ITAT)(2006)].** Also see **J.V. Krishna Raovs DCIT [2012] 24 taxmann.com 104 (Hyd.-ITAT).**

Q. Whether exemption under section 54 is allowable if residential units of a house property are purchased from different persons?

- Execution of four different sale deeds in respect of four different portions of property did not materially effect nature of transaction or nature of property acquired since property in question was being used by assessee for her own purposes and investment made in purchase of same was, therefore, eligible for deduction under section 54.**[CIT V. Sunita Aggarwal (2006) 284 ITR 20(Del)]**

In **CIT vs Smt. Jyothi K. Mehta [2011] 12 taxmann.com 440 (Kar.),** it was also held that the fact that the assessee could not have purchased both the flats in one single sale deed or could not have narrated the purchase of two premises as one unit in the sale deed could not make any difference. The two flats purchased were situated side by side. Builder also stated that he had effected modifications to the flats to make them one unit by opening the door in between the two apartments.

Q Whether exemption u/s 54 can be claimed on the basis of a mud structure?

Exemption u/s 54 cannot be allowed for sale of a mud structure whereupon there was never any structure fitting to be described as

"habitable residential house". **[M.B. Ramesh vs ITO 320 ITR 451 (Kar.) [2010]]**

Q Whether benefit u/s 54(1) is available in case of sale of land adjoining to the building?

The land appurtenant to the building means that the ownership of building and land appurtenant should be of same person. If building is owned by one person and land is owned by another, it will be the case of land adjoining to the building and by no stretch of imagination it can be called land appurtenant to the said building and therefore, benefit of section 54(1) would not be available to such land adjoining to a building. **[P.K. Lahri v. CIT 146 Taxman 349 (ALL.)(2005)]**

Q Is it necessary that a person should reside in the house to call it a residential house.

The popular meaning of words 'residential house' is a place or building used for habitation of people. It is not necessary that a person should reside in a house to call it a residential house. If it is capable of being used for the purpose of residence than the requirement of the section 54F is satisfied and benefit could not be denied. **[Amit Gupta v. DCIT 6 SOT 403 (Delhi)(2006) & Mahavir Prasad Gupta 5 SOT 353 (Del)(2006)]**

Q Can the assessee claim exemption under section 54 in respect of investment in modification or renovation of the existing house?

Exemption is available only when the investment is in the consideration of a house and not for investment in modification or renovation. Admitted facts are that the assessee had a fairly big house to which the assessee made addition of 140 sq. meters of plinth area. However, it is the conceded position that the assessee has not constructed any separate apartment or house. Section 54F does not provide for exemption on investment in renovation or modification of an existing house. On the other hand, construction of a house only qualifies for exemption on the investment. Even addition of a floor of a self contained type to the existing house would have qualified for exemption. However, since the assessee has only made addition to the plinth area, which is in the form of modification of an existing house, she is not entitled to deduction claimed

u/s 54F of the Act. **[Mrs. Meera Jacob vs ITO 313 ITR 411 (Kerala) (date of order 9/06/2008)]**

Q Whether exemption under section 54 is allowable for addition of floor to the existing house from the sale proceeds of residential house sold?

Assessee owned two residential houses. He sold one house and utilized its sale proceeds to construct first floor on his second house after demolishing old structure, in this case exemption will be allowable under section 54. **[CIT vs P.V. Narsimhan [1989] 47 Taxman 89 (Mad.)**

However, in **CIT v. V. Pradeep Kumar [2007] 290 ITR 90/ [2006] 153 Taxman 138 (Mad.)**, it was held that a mere extension of existing building would not give benefit to assessee under section 54F. Section 54F emphasizes construction of residential house and such construction must be real one and should not be a symbolic construction. Followed by **ACIT vs T.N. Gopal [2009] 121 ITD 352 (Chennai-ITAT) (TM)**

Q Whether the expenditure to make a residential house habitable will be included in the cost of new asset?

The words used about the amount spent on purchase of new asset are '**cost thereto'** and not '**price thereto'**. The cost includes purchase as well. Consequently, the words used signify that the amount of purchase will include other necessary expenditure in this behalf to make a residential house habitable and taken together that will be the cost of the new asset. The Tribunal had perused the items of the report of the architect. The residential house was in a state of general disrepair and was inhabitable. Consequently, the necessary repairs carried out to make the same habitable would constitute part of the cost of new house. **[Gulshanbanoo R. Mukhi v. JCIT 83 ITD 649 (ITAT- Mum) (2002)]**

Q Whether exemption under section 54F would be allowable where assessee is already a co-owner of another flat?

The word 'own' appearing in section 54F includes only such residential house which is fully and wholly owned by one person and not a residential house owned by more than one person. The assessee was already a co-owner of another flat. Being a co-owner, assessee was not the absolute owner of another residential flat, and exemption under section 54F could be denied on this ground. **[ITO vs Rasiklal N. Satra [2006] 98 ITD 335 (Mum.-ITAT)]**

Q Whether determination of title to the property would commence from the first date of allotment or the subsequent date of allotment of the actual flat number and delivery of possession for the purpose of assessing long term capital gains.

Title to the property is transferred with the issuance of the allotment letter and payment of installments is only a follow up action and taking of the delivery of possession is only a formality. **[Vinod Kumar Jain Vs CIT TIOL-706-P&H (2010)]**

Q Whether exemption under section 54 would be allowable where residential house property is purchased within time limit specified under section 139(4)?

The due date for furnishing return of income as per section 139(1) is subject to extended period provided under sub-section (4) of section 139 and, if a person had not furnished return of previous year within time allowed under sub-section (1), assessee could file return under sub-section (4) before expiry of one year from end of relevant assessment year. Therefore, section 54 deduction could not be denied to assessee on this count. **[CIT v. Ms. Jagriti Aggarwal 15 taxmann.com 146 (P & H) (2011)].** Also see **ITO vs Smt. Sapana Dimri [2012] 19 taxmann.com 15 (Delhi), Kishore H. Galaiyavs ITO [2012] 24 taxmann.com 11 (Mum.)**

Q Is there any requirement that the assessee should file the return before the due date under section 139(1) to claim exemption under section 54/54F?

Where the assessee had fulfilled the condition for depositing the amount of capital gain in a specified bank account before the due date prescribed for furnishing the return of income under section 139(1),there is no requirement that the assessee should file her return of income before the due date prescribed under section 139(1). **[Esther Christopher Mascarenhas v. ITO 9 Taxmann.com 99 (Mum.-ITAT) (2011)]**

Merely because investment is made after due date of filing of return, section 54F exemption cannot be denied where investment is made prior to filing of return under section 139(4). **[R.K.P. Elayarajan vs DCIT [2012] 23 taxmann.com 206 (Chennai-ITAT)]**

Q Whether property purchased in foreign country is also eligible for exemption u/s 54?

Section 54 does not exclude the right of the assessee to claim property purchased in a foreign country, if all other conditions laid down in the section are satisfied. Merely because the property acquired was in a foreign country, the exemption under section 54 cannot be denied.The new house may be in India or outside India. **[Prema P. Shah Vs. ITO 101 TTJ 849 (Mum-ITAT)(2006)]**

However, in **Leena J. Shah vs ACIT [2006] 6 SOT 721 (Ahd.-ITAT)**, it was held that the benefit under section 54F is not allowable for a residential house purchased/ constructed outside India.

Q Whether cost of residential house includes the cost of plot?

The cost of the plot together with cost of the building will be considered as cost of new asset provided the acquisition of the plot and also the construction thereon are completed within the period specified in these sections. **[Circular no. 667, dated 18-10-1993]**

Q Whether the deemed cost of new asset means the amount which has already been utilized by assessee for purchase or construction of new asset or it also includes the amount deposited as per requirements of sub-section (4) of section 54F?

For purposes of sec 54F, deemed cost of new asset is amount which has already been utilized by assessee for purchase or construction of new asset plus amount deposited as per Capital gain account scheme, 1988. **[ACIT v. Vikas Singh 16 taxmann.com 127 (Delhi) [2011]]**

Q Whether booking of flat with a builder amounts to construction or purchase?

Booking of flat with a builder is a case of construction and not purchase of residential flat and therefore, time period 3 years is applicable. **[Kishore H. Galaiyavs ITO [2012] 24 taxmann.com 11 (Mum.)]**

Q Is allotment of flat under self-financing scheme treated as construction or purchase of a house?

Under Government schedules confining to two years' period for construction and handing over possession thereof is impossible and unworkable under section 54 and, thus, if substantial investment is made

in construction of house, it should be deemed that sufficient steps have been taken satisfying requirement of section 54 **[Smt. Shashi Varma vs CIT [1997] 224 ITR 106 (MP)]**

Q Whether deduction under section 54 be available where builder have not even allotted the plot within 3 years?

The main thrust of the section 54F is construction of a residential house; the Legislation in its wisdom has specifically provided the period of three years, it cannot be enlarged to indefinite period for the reason that no construction activity could be started within a period of 3 years by the builder because of which no plot was ever handed over to the assessee. **[Pankaj Wadhwani *vs* CIT 18 Taxmann.com 33 (Indore- ITAT)[2012]]**

Q Whether for purpose of claiming exemption under section 54, possession of flat booked with builder had to be taken within the time period specified?

If the assessee had made investment within period of three years, exemption under section 54 could not be denied for the reason that possession had not been taken. There may be delay in taking of possession because of many factors not under control of assessee, merely because of this exemption could not be denied. **[Kishore H. Galaiyavs ITO [2012] 24 taxmann.com 11 (Mum.)]**

In **CIT vs R.L Sood [2000] 108 Taxman 227 (Delhi),** it was held that on payment of substantial amount in terms of purchase agreement within four days of sale of his old house, assessee acquired substantial domain over new residential flat within specified period, it could be said that assessee complied with requirements of section 54. Merely because builder failed to hand over possession of flat within specified period, assessee could be denied benefit of benevolent provision of section 54.

Q Does exchange of old flat with a new flat under a development agreement amounts to construction of new flat for purpose of claiming deduction under section 54?

Exchange of old flat with a new flat to be constructed by the builder under development agreement amounts to transfer under section 2(47) of the Income Tax Act, 1961. The acquisition of a new flat under a development agreement in exchange of the old flat amounts to construction of new flat. The provisions of section 54 are applicable and assessee is entitled

to exemption if the new flat had been constructed within a period of 3 years from the date of transfer. **[Jatinder Kumar Madan vs ITO [2012] 21 taxmann.com 316 (Mum.)]**

Q Can deduction u/s 54 be claimed for purchase of a share in the residential house property where the assessee presently resides?

Section 54 nowhere states that a residential house which is purchased by an assessee so as to enable the assessee to get exemption under the provisions of section 54 should not be the one in which the assessee was residing. Merely because the assessee was residing in a residential house which was purchased by her, exemption under section 54 could not be denied. **[CIT vs Chandan Ben Magan Lal 245 ITR 182 (Guj) (2000)].** Also see **CIT vs TN Arvinda Reddy 120 ITR 46 (SC) (1979), ITO vs RasikLal N Satra 98 ITD 335 (Mum) (2006)]**

Q Whether transfer of only interest in flats under construction could be treated as transfer of residential house?

Where the assessee transferred only his interests in two flats under construction of which possession was not taken and was not fit for human habitation, such transfer could not be treated as transfer of residential house. Hence, the capital gain derived by the assessee related to a capital asset held by him for a period of more than 36 months and, therefore, the gain arising from the transfer of his rights in the said flats constituted long-term capital gains. The assessee would, therefore, be entitled to grant of exemption under section 54F. **[Jagdish Chander Malhotra v ITO (1998) 64 ITD 251 (Del)]**

Q Whether the assessee is entitled to deduction under section 54F for purchase of flat under construction before the expiry of statutory period of two years from the date of the capital gain?

Where assessee invested amount of capital gain on sale of shares in purchase of flat before expiry of statutory period, benefit of deduction under section 54F could not be denied to assessee on ground that building was under construction stage and assessee had chosen to pay entire advance. **[ACIT vs Sudhakar Ram [2011] 16 taxmann.com 175 (Mum.-ITAT)]**

Section 54F does not prescribe completion of construction of residential house and thrust of said section is on investment of net consideration

received on sale of original asset and start of construction of a new residential house. **[Smt. Rajneet Sandhu vs DCIT [2011] 16 taxmann.com 210 (Chd.-ITAT)]**

Q Can construction of house property start before the date of transfer.

Exemption on capital gains under section 54 cannot be refused merely on ground that construction of new house had begun before sale of old house.**[CIT v. HK Kapoor 150 CTR 128 (All) (1998)]**

Q Can the assessee simultaneously take benefit of both purchase and construction of residential house property?

If an assessee is entitled to relief on fulfillment of either of the two conditions specified under section 54, i.e., either purchasing a house property within one year or constructing the house within two years, it would be improper to read that on fulfillment of both the conditions, he would be disentitled to that relief. Section 54 does not contemplate two kinds of relief; it only contemplates fulfillment of two alternative conditions. If both the conditions are satisfied within the time stipulated, the assessee does not become disentitled to the relief if the other conditions are fulfilled. If a floor is constructed to the new house or if it is renovated it remains as one house only, especially when there is no evidence that two different houses bearing two different municipal numbers were constructed. Therefore, benefit can be availed jointly. **[BB Sarkar v. CIT 132 ITR 150 (Cal)(1981)].**

Q Where the minor has transferred an asset, will the exemption under section 54F/54EC be allowed to the minor or the parent.

Provisions of section 64(1A) i.e. clubbing of income of the minor with the income of the parent have to applied in the end after computing income of minor under Income Tax Act.

Where proceedings under Act for assessment of income of a minor child are required to be taken, minor child can be treated as an assessee under section 2(7) for purposes of section 54F. Benefit under section 54F cannot be denied to minor child on ground that father of minor child has a residential house at time of transfer of capital asset. **[ACIT vs Madan Lal Bassi [2004] 88 ITD 557 (CHD.)]**

In case of clubbing of income of minor child, deduction under section

54EC is to be allowed on minors' income from LTCG separately and only net income is to be clubbed **[DCIT vs Rajeev Goyal [2012] 22 taxmann. com 34 (Kol.-ITAT)]**

Q What is the date of investment in respect of section 54EC?

For the purposes of the provisions of Section 54EC, the date of investment by assessee must be regarded as date on which payment was made and received by the National Housing Bank. **[Hindustan Unilever Ltd. v. DCIT 191 Taxman 119 (Bom) [2010]]**

Q Whether the benefit under section 54EC could be availed where bonds are purchased in joint name?

Merely because bonds are in joint name, assessee could not be denied benefit of deduction u/s 54EC. As far as it is established that the complete consideration has flown from the assesse, the benefit could not be denied on this ground. **[DIT vs Mrs. Jennifer Bhide 15 taxmann.com 82 (Kar.) [2011]]**

Q Can exemption under section 54EC be claimed where REC Bond were purchased prior to date of sale of property?

Section 54EC clearly states that the investment in specified bonds is to be made "*within a period 6 months* ***after the date of such transfer***", the intention of the legislature is clear. Had the legislature wanted to give liberty to the assessee to invest before or after the date of transfer, they would have explicitly said so, as has been provided in section 54 & 54F of the Act. Since such specific words are not used in section 54EC, deduction cannot be allowed to the assessee. **[Smt. Dakshaben R. Patel vs ACIT [2012] 22 taxmann.com 237 (Ahd.-ITAT)]**

Q Is exemption u/s 54EC is available from capital gains on deemed transfer u/s 46(2) of the Income Tax Act 1961?

Capital Gains in the hands of shareholder on distribution of assets by company in liquidation u/s 46(2) is a deemed transfer not an actual transfer which has specifically been taxed under that section. Exemption u/s 54EC is available from gains on actual transfer and not from gains u/s 46(2).**[CIT V. Ruby Trading Co.Ltd. 32 Taxman 500 (Raj) [1987]]**

Q Whether the benefit under section 54EC and 54F can be taken simultaneously?

Deduction under section 54EC cannot be denied on ground that assessee has availed exemption under section 54F also in respect of a part of capital gains. **[ACIT vs Deepak S. Bheda[2012] 23 taxmann.com 159 (Mum.)]**

Q Whether the benefits u/s 54, 54F & 54EC are available from gains of depreciable capital asset?

In **CIT V. Assam Petroleum Industries Pvt. Ltd. 131 Taxman 699 (GAU.) [2003],** it was held that, where a depreciable asset is held for more than 36 months before its transfer, then such depreciable capital asset is Long Term Capital Asset. However, according to section 50(1)&50(2), the gains or loss on DCA shall always be short term.

It was further held that benefit u/s 54,54F & 54EC which are available from gains of a LTCA shall be available from gains of Depreciable capital asset.

PART -III OTHER EXEMPTIONS AVAILABLE FROM CAPITAL GAIN U/S 54B, 54D, 54G, 54GA & SECTION 54GB

SECTION	54B	54D	54G	54GA
Which Capital asset is eligible for exemption -LT/ST	ST/LT	ST/LT	ST/LT	ST/LT
When available	Transfer of Land used for Agricultural purposes by assessee/his parents for atleast 2 years	On compulsory acquisition of land and building forming part of an industrial undertaking	On shifting of industrial undertaking from urban area to rural area	On shifting of industrial undertaking from urban area to SEZ

Asset	Any Agriculture Land	Land/building Land/building	Land/building/ P&M Land/building/ P&M	Land/building/ P&M Land/building/ P&M
Person	IND/HUF*	Any person	Any person	Any person
Period within which to purchase	2 years after	3years after the date of transfer	1year before or 3years after the date of transfer	1year before or 3years after the date of transfer
Deposit money before due date of return is compulsory	Yes	Yes	Yes	Yes

<u>Exemption under Section 54GB [Inserted w.e.f. 1st April, 2013]</u>- Capital gain on transfer of residential property not to be charged in certain cases

- Relief from long-term capital gains tax on transfer of residential property
- If sale consideration invested in a manufacturing small or medium enterprise.

Exemption of **Long term Capital Gain Tax** to an **Individual or HUF** on **transfer of residential property** (a house or a plot of land) **on or before 31st March, 2017** upon **reinvestment** of sale consideration **before the due date of furnishing the return of income as specified section 139 (1)** in the **Equity of ELIGIBLE BUSINESS** (a new start up SME company in the manufacturing sector which is utilized by the company for the purchase of new plant & machinery as specified in the section in which it holds more than 50% share capital or voting rights) and The share cannot be transferred within a period of 5 years . The relief is available for any transfer of property made on or before 31.03.2017.

Some Practical Issues

ISSUE on Section 54B

Q. Whether the assessee would be entitled to get exemption under section 54B for purchase of land in name of his son and daughter-in-law?

The word "assessee" used in the Income Tax Act needs to be given a 'legal interpretation' and not a 'liberal interpretation', if the word 'assessee' is given a liberal interpretation, it would tantamount to give a free hand to the assessee and his legal heirs and it shall curtail the revenue of the Government, which the law does not permit. Consequently, an assessee would not be entitled to get exemption under section 54B for land purchased by him in name of his son and daughter-in-law. **[Kalyavs CIT [2012] 22 taxmann.com 67 (Raj.)]**

Q. Whether the assessee would be entitled to get exemption under section 54B for purchase of land in his name and in name of his only son?

When the purchased land was being used by assessee only for agricultural purpose, merely because in sale deed his only son was also shown as co-owner, assessee could not be denied deduction under section 54B. **[CIT vs Gurnam Singh [2008] 170 Taxman 160 (Punj. & Har.)]**

Q. If no agricultural activities are performed on land in past two years preceeding date of sale of land, the claim for exemption under section 54B allowable?

When as per revenue records no agricultural activity was undertaken on land owned by assessee in past two years preceding date of sale and the assessee failed to prove that land in question was agricultural land, assessee's claim for exemption under section 54B cannot be accepted.**[G. Ramkumar vs DCIT [2012] 20 taxmann.com 522 (Chennai-ITAT)]**

Q Is the assessee eligible for exemption under section 54B, where capital gains from sale of agricultural land was invested in purchasing non-agricultural land?

The land revenue authorities had categorically stated that as per revenue records no crop was cultivated/agricultural activity was undertaken on the land owned by the assessee. No concrete evidence has been brought on record by the assessee to controvert the findings of fact recorded by the lower authorities, except production of statements of neighbours of the assessee. Since the assessee has miserably failed to prove that the land

in question was agricultural land and he had cultivated crops in the land, assessee is not eligible for exemption under section 54B.**[G. Babuvs ITO [2012] 24 taxmann.com 36 (Chennai-ITAT)]**

Q. Whether word 'parent' as appearing in section 54B includes an 'uncle' within its ambit?

The word 'parent' does not stand defined in the Act. Once this is so, the general definition of the word 'parent' is to be taken into consideration and even the general definition does not include an 'uncle'. Thus, the land having not been exploited for agricultural purposes by a parent of the assessee, the exemption under section 54B would not accrue to him. **[Jarnail Singh vs ITO [2009] 31 SOT 8 (Asr.-ITAT)(URO)]**

Chapter -X

MISCELLANEOUS ISSUES

Some Practical Issues

Q. If the sales proceeds realized is utilized for the purpose of repaying the bank loan, then will the assessee get any deduction for repayment of loan out of sale proceed of the property?

The assessee was a partner in a firm which took loan from the bank against mortgage of house property belonging to the assessee. The bank enforced the recovery of loan against the firm by sale of the property mortgaged. The house was auctioned by the assessee and out of the total sale consideration received, he discharged mortgaged debt and received balance amount.

The assessee was not entitled to the deduction as claimed on account of discharge of mortgage debt to the bank. In fact, the entire amount of sale consideration had been received by the assessee and thereafter part of it was applied for discharge of the mortgage debt. It was, thus, a case of application of income received. ***[*CIT v. Sharad Sharma, 169 Taxman 67 (All.) [2008]]**

Q. Whether the amount paid to clear the mortgage can be said to be cost of acquisition of cost of improvement.

In case the mortgage is created by the assessee himself, amount paid to clear the mortgage debt cannot be said to be COA or COI.**[V.S.M.R. Jagadishchandran V. CIT 227 ITR 240 (SC) 1997]**

However, where the assessee has acquired his property from the previous owner and the previous owner had taken a mortgage against the property, which was not settled at the time of transfer of property. Now if assessee pays the mortgagee & acquire a better title to the property, such amount paid will be treated as cost of acquisition in the hands of assessee. **[CIT vs Arunachalam 227 ITR 223(SC) (1997)]**

Q. Whether the exemption under section 54D is allowable in case the amount of compensation is invested into land taken on lease or the purpose of business?

The words 'industrial undertaking' should be understood to have been used in section 54D in a wide sense, taking in their fold any project or business a person may undertake. Since the assessee had set up industrial undertaking by investing certain sum on land acquired by it on lease, the assessee was entitled to exemption under section 54D. **[CIT v Hemsons Industries 118 Taxman 903 (AP)]**

Q. What is the taxability of unutilised deposit under the Capital Gains Accounts Scheme, 1988 in the hands of the legal heirs of the assessee?

The unutilised amount in Capital gain account scheme cannot be taxed in the hands of the deceased. This amount is not taxable in the hands of legal heirs also as the un utilised portion of the deposit does not partake the character of income in their hands but is only a part of the estate devolving upon them. **[CBDT circular No 743 dated 6.5.1996]**

Q. What are the consequences where the amount deposited in capital gain account scheme remains unutilised within the specified period?

Where the assessee had not utilized the amount deposited in capital gain account as required within the prescribed period of three years, the same was taxable in the relevant year irrespective of whether the same amount was withdrawn by the assessee or not and irrespective of as to whether this non-withdrawal from capital gain account was for the fault of the assessee or of the Assessing Officer. Further, the withdrawal of the unutilized amount from the capital gain account is not pre-requisite for taxing the same in the relevant year.

Q. In whose hands capital gain will be taxed in case of transfer of property u/s 64(1)?

Where a property has been transferred to the spouse under section 64(1), any capital gain arising to the spouse from such asset would be includible

in the total income of the transferor.**[Sevantilal Mankelal Sheth vs CIT 68 ITR 503 (SC) [1968)].**

Q. Does the transfer made by way of Family Arrangement attract capital gain tax?

No, transfer by way of Family Arrangement does not attract capital gain tax. **[Ram Charan Das v GirjaNandini Devi AIR 1966 SC 323,** see also **CIT v. A.N. Naik Associates and Anr (2004) 265 ITR 346 (Bom), CIT v AL Ramanathan (2000) 245 ITR 494 (Mad).**

Other Issues

- **Circular No. 471 dated 15/10/1986 and Circular no. 672 dated 16/12/1993,** treating payment towards allotment to housing board as reinvestment to be required for purpose of section 54, period of holding should be reckoned from the date of agreement. It may also be pointed out that it is not the title, but the beneficial right, that is considered to be relevant for the purpose of taxation. **[CIT v. Poddar Cement Pvt. Ltd. 226 ITR 625 (SC)(1997)]**

- Amount received by the society from the builder for permitting him to construct additional floors on existing building of the society utilizing TDR FSI belonging to him is not chargeable to tax since there is no cost of acquisition. **[Om Shanti Co-op Society Ltd. V ITO (ITA No. 2550/ Mum/2008)]**

- The assessee, to avoid the sale by the Court, sold the house himself with the consent of the bank on the assurance that out of the sale proceeds, the bank loan would be paid directly by the purchaser. Therefore, it was to be held that the bank had an overriding title over the property and the real value to which the assessee was entitled was only Rs. 45,000 and not the balance of Rs. 1.50 lakhs which was directly paid to the bank. **[Kanti Swaruoop Sharma v. ITO 41 ITD 246 (All.)[1992]]**

Voice of Chartered Accountants (Regd.) (NGO)
303, Prabhat Kiran Building
17, Rajendra Place, New Delhi - 110 008