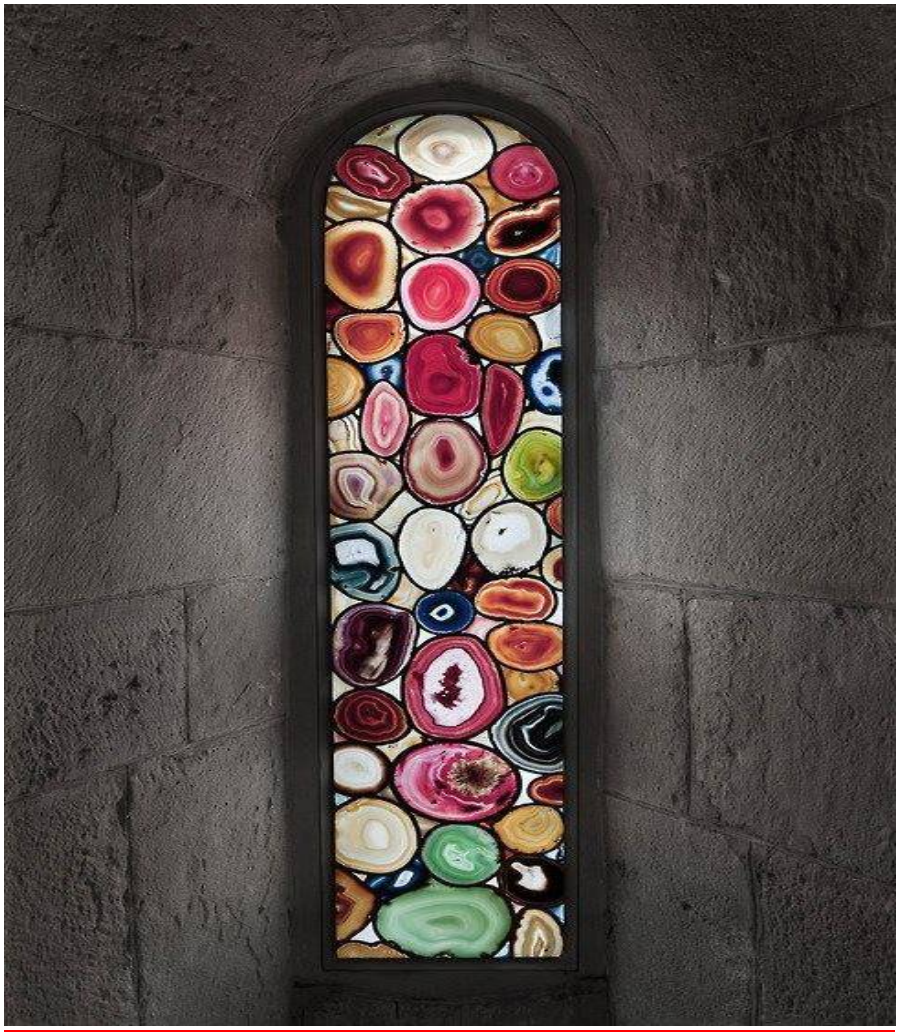
H A R B I N G E R™

Updates on regulatory changes affecting your business

APRIL 2014



B D Jokhakar & Co.

Chartered Accountants

www.bdjokhakar.com

INDEX

COMPANY LAW

COMPANIES ACT, 2013 – 183 NEW SECTIONS NOTIFIED:

The Ministry of Corporate Affairs has notified 183 new sections of the Companies Act 2013 and some sub-sections of 13 sections which were already notified by notification dated 12th September 2013 and remaining schedule, in the fourth phase, by way of notification dated 26th March 2014. These sections have been notified to come into effect from 1st April 2014. With the notification of these sections, now a total of 283 sections of the new Act stand notified.

Besides the notification of aforesaid sections, following rules have also been notified:

1. Chapter I - The Companies (Specification of definitions details) Rules, 2014
2. Chapter II - The Companies (Incorporation) Rules, 2014
3. Chapter III - The Companies (Prospectus and Allotment of Securities) Rules, 2014
4. Chapter IV - The Companies (Share Capital and Debentures) Rules, 2014
5. Chapter V - The Companies (Acceptance of Deposit) Rules, 2014
6. Chapter VI - The Companies (Registration of Charges) Rules, 2014
7. Chapter VII - The Companies (Management and Administration) Rules, 2014
8. Chapter VIII - The Companies (Declaration and Payment of Dividend) Rules, 2014
9. Chapter IX - The Companies (Accounts) Rules, 2014
10. Chapter X - The Companies (Audit and Auditors) Rules, 2014.
11. Chapter XI - The Companies (Appointment and Qualification of Directors) Rules, 2014
12. Chapter XII - The Companies (Meetings of Board and its Powers) Rules, 2014
13. Chapter XIII- The Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.
14. Chapter XIV- The Companies (Inspection, Investigation and Inquiry) Rules, 2014.
15. Chapter XXI -The Companies (Authorised to Registered)Rules, 2014.
16. Chapter XXVI - Nidhi Rules, 2014.
17. Chapter XXIX - The Companies (Adjudication of Penalties) Rules, 2014.
18. Chapter XXIX - The Companies (Miscellaneous) Rules, 2014.

19. Chapter XXII- The Companies (Registration of Foreign Companies) Rules, 2014.
20. Chapter XXIV - The Companies (Registration Offices and Fees) Rules, 2014

The sections remaining to be notified are related to National Financial Reporting Authority, Investor and Education Protection Fund, Compromise and arrangement, Oppression and Mismanagement, Winding up, Sick companies, special courts, National Company Law Tribunal. Majority of these sections are not notified due to pending case in Supreme Court with respect to the National Company Law Tribunal.

Status as on date:

Total number of Section	Total sections notified till date	Number of sections pending
470	283	187

(Refer MCA Notification dated 26th March, 2014)

CLARIFICATION WITH REGARD TO SECTION 180 OF THE COMPANIES ACT, 2013:

The MCA has received many representations regarding various difficulties arising out of implementation of section 180 of the Companies Act, 2013. The MCA has clarified that the resolution passed under section 293 of the Companies Act, 1956 prior to 12 September 2013 with reference to borrowings (subject to the limits prescribed) and / or creation of security on assets of the company will be regarded as sufficient compliance of the requirements of section 180 of the Companies Act, 2013 for a period of one year from the date of notification of section 180 of the Act.

(Refer General Circular No.04/2014 dated 25.03.2014)

INCOME TAX

CBDT CLARIFIES ON TAX WITHHOLDING OBLIGATION IN RESPECT OF PAYMENTS MADE TO NON-RESIDENT:

CBDT has issued Instruction No. 2/2014 to the Indian Tax Authority. This Instruction clarifies that withholding tax liability of the payer is with reference to the sum chargeable to tax under the provisions of the Income Tax Law (ITL). Furthermore, the consequences of default proceedings for non-withholding under the ITL would be limited only to such tax liability. Accordingly, a payer cannot be treated as an assessee-in-default for non-

withholding from payments which are not chargeable to tax under the ITL. This clarification is in line with the SC decision in the case of GE. Furthermore, in respect of remittances where only a portion may be chargeable to tax in India (for e.g., a portion of composite contract or capital gains income), payer may determine its withholding tax liability with reference to the chargeable portion of the remittance, if the payer is fairly certain about such determination. However, considering the consequences of tax withholding default, the payer may prefer to be cautious and may continue to approach the Tax Authority where determination of chargeability or portion of the chargeable sum is not fairly certain.

ECONOMY

INDIA IN 2014-15:

India is likely to grow by 5.6 per cent in 2014-15 against a projected growth of less than 5 per cent in the current fiscal, a report by India Ratings and Research has said.

"The global economy in 2014 appears to be in a better shape than what it was in 2012 and 2013. India Ratings forecasts India's GDP to grow at 5.6 per cent in 2014-15," the rating agency said.

"The economic growth in FY15 is likely to be contributed majorly by the industrial sector, which is estimated to grow by 4.1 per cent. This is good news for Centre as well state government finances," it added.

The rating agency also expects merchandise exports to grow by 8-10 per cent in the next fiscal year.

(Business India Today: 6th March, 2014)

SERVICE TAX

Cenvat Credit Rules for Input Service Distributors, Amended

Rule 7 of Cenvat Credit Rules, 2004 which entails distribution of CENVAT credit by Input Service Distributor has been amended as under:

a. For the units that are exclusively engaged in manufacture of exempted goods or providing of exempted services, service tax paid on input services used by one or more units will not be allowed to be distributed as Cenvat Credit.

b. Credit of service tax paid on input services will be distributed only to the unit by which the service is wholly used.

c. Pro Rata distribution of service tax credit shall be based on turnover of units using said input service during relevant period to total turnover of all its units operational in current year, during said relevant period.

d. Relevant Period:

(i) If the assessee has turnover in the year preceding to the month/quarter

during which credit is to be distributed: Relevant period will be the preceding financial year if Input Service Distributors turnover is available for that year

(ii) If details of turnover are not available for some or all of the units: Relevant period will be the last quarter, previous to the month/quarter for which credit is distributed, for which turnover details of all units is available will be the relevant period.

This amendment will be effective from 1st April, 2014

(Refer Notification No. 05/2014 – Central Excise (N.T.) dated 24th February, 2014)

SUMMARY OF IMPORTANT TAX JUDGEMENTS:

Unless otherwise stated, the sections mentioned hereunder relate to the Income Tax Act, 1961.

Sr. No	Tribunal / Court	Area/ Section covered	Nature	Case Law
1	ITAT - Agra	Section 5(2) and 6(5) of the Income Tax Act	Salary received by NRI from foreign company for rendering services outside India as crew on merchant vessels and tankers plying on international routes, is not taxable in India merely because said salary was remitted to India from foreign bank account to NRE bank account of assessee in India	*Arvind Singh Chauhan Vs Income-tax Officer, Ward 1(2), Gwalior*
2	Supreme Court	Section 13(1) of the Income Tax Act	Charitable and religious trust which does not benefit any specific religious community is not hit by section 13(1)(b) & is eligible to claim exemption u/s 11 of Income Tax Act, 1961	*CIT Vs M/S Dawoodi Bohara Jamat*
3	ITAT-Delhi	Section 37(1) of the Income Tax Act	Transfer Pricing: After TPO determines the AMP expenditure incurred for benefit of AE, balance is deemed to be incurred for assessee's business & is automatically allowable u/s 37(1)	*Whirlpool of India Ltd Vs DCIT*

4	ITAT- Mumbai	Section 56(2)(vii) of the Income Tax Act	Section 56(2)(vii) does not apply to bonus & rights shares offered on a proportionate basis even if the offer price is less than the FMV of the shares	*Sudhir Menon HUF Vs ACIT*
5	ITAT- Delhi	Section 92B(1) of the Income Tax Act	Transfer Pricing: A transaction (such as a corporate guarantee) which has no bearing on profits, incomes, losses or assets of the enterprise is not an 'international transaction' u/s 92B(1) and not subject to transfer pricing.	*Bharti Airtel Ltd Vs ACIT*
6	Delhi High Court	Section 147 of the Income Tax Act	Court can examine existence but not adequacy of reasons. AO is only required to provide material on which he relies to reopen the assessment	*Acrous unitech Wireless Pvt Ltd Vs ACIT*
7	Supreme Court	Sec. 244A of the Income Tax Act	Deductor entitled to interest on refund of excess TDS from date of payment.	*UOI Vs TATA Chemicals Ltd (Supreme Court)*

1) Salary received by NRI from foreign company for rendering services outside India as crew on merchant vessels and tankers plying on international routes, is not taxable in India merely because said salary was remitted to India from foreign bank account to NRE bank account of assessee in India

Arvind Singh Chauhan Vs Income-tax Officer, Ward 1(2), Gwalior (ITAT – Agra)

FACTS OF THE CASE:

The assessee was in Employment of a Singapore Company and worked on merchant vessels and tankers plying on international routes. In addition to this salary income, the assessee also derived income from bank interest and received pension from Indian Army, his former employer. The assessee's stay in India in the relevant previous year, was less than 182 days, and that the residential status of the assessee is 'non-resident'. In the income tax return filed by the assessee, the salary received by the assessee from ESM-S was not liable to tax as it was accruing and arising outside India.
The Assessing Officer was of the view that the assessee's explanation could not be accepted because section 6(5) provides that where a person's status is resident for one of the sources of his income, his status for all the sources of income is to be taken as resident, and since he was 'resident' for pension and bank interest, he would be considered 'resident for this purpose as well. The Assessing Officer was also of the view that since appointment letter was issued by foreign employer's agent in India, it is to be deemed that the salary income accrued in India.

HELD:

The Assessing officer's contentions was considered wrong since taxability does not require recipient of income to have 'resident' status under section 6 at all, as even a non-resident, by virtue of section 5(2), is taxable in India in respect of
(a) income received or is deemed to be received in India, by or on behalf of such person; and
(b) income which accrues or arises, or is deemed to accrue or arise to him, in India.

Therefore the pension income and bank interest is taxable in India irrespective of the residential status of the assessee since it has accrued in India.

The mere fact that an income has been remitted to India even though it was received outside would not be decisive on the question as to income is to be treated as having been received in India. The salary amount is received in India in this case but the salary income is received outside India hence the same is not taxable in India.

---

2) Section 13(1)(b) charitable and religious trust which does not benefit any specific religious community is not hit by section 13(1)(b) & is eligible to claim exemption u/s 11 of Income Tax Act, 1961:

CIT Vs M/S Dawoodi Bohara Jamat (Supreme Court)

Facts of the Case:

The assessee filed an application for registration before the CIT for registration u/s 12A/12AA of Income Tax Act, 1961 to avail exemption u/s 11 of Income Tax Act, 1961. It was refused by Income Tax department since its object and purpose was confined only to a particular religious community (Dawoodi Bohra), the bar in section 13(1)(b) was attracted. On appeal, the assessee was held entitled to claim registration u/s 12A & 12AA. On further appeal by the department the Supreme Court had to consider

(i) whether the issue as to whether the assessee was a charitable/ religious trust was a finding of fact &

(ii) whether the assessee was hit by the bar in section 13(1)(b).

HELD by the Supreme Court:

i. On facts, the objects of the assessee are not indicative of a wholly religious purpose but are collectively indicative of both charitable and religious purposes.

ii. The fact that the said objects trace their source to the Holy Quran and resolve to abide by the path of godliness shown by Allah would not be sufficient to conclude that the entire purpose and activities of the trust would be purely religious in color.

iii. The objects reflect the intent of the trust as observance of the tenets of Islam, but do not restrict the activities of the trust to religious obligations only and for the benefit of the members of the community. In judging whether a certain purpose is of public benefit or not, the Courts must in general apply the standards of customary law and common opinion amongst the community to which the parties interested belong to. Customary law does not restrict the charitable disposition of the intended activities in the objects. Neither the religious tenets nor the objects as expressed limit the service of food on religious occasions only to the members of the specific community.

iv. The activity of Nyaz performed by the assessee does not delineate a separate class but extends the benefit of free service of food to public at large irrespective of their religion, caste or sect and thereby qualifies as a charitable purpose which would entail general public utility.

v. Even the establishment of Madarsa or institutions to impart religious education to the masses would qualify as a charitable purpose

qualifying under the head of education u/s 2(15).

vi. The institutions established to spread religious awareness by means of education though established to promote and further religious thought could not be restricted to religious purposes. The assessee is consequently a public charitable and religious trust eligible for claiming exemption u/s 11;

The interpretation of the Tribunal & High Court that section 13(1)(b) would only be applicable in case of income of a trust for charitable (& not religious) purpose established for benefit of a particular religious community is not correct. Section 13(1)(b) applies also to composite trusts set up for both religious and charitable purposes if it is established for the benefit of any particular religious community or caste.

Observations:

If on perusal of the objects and purposes of the assessee it clearly demonstrates that the activities of the trust are both charitable and religious and are not exclusively meant for a particular religious community trust would not fall under the provisions of section 13(1)(b).

3) Section 37(1) Transfer Pricing: After TPO (Transfer Pricing Officer) determines the AMP (Advertising, Marketing and Promotion) expenditure incurred for benefit of AE (Associated Enterprise), balance is deemed to be incurred for assessee's business & is automatically allowable u/s 37(1)

Whirlpool of India Ltd Vs DCIT (ITAT Delhi)

Facts of the Case:

The TPO determined the qualifying amount spent on creation of marketing intangible at Rs.180.73 crore. By applying 12.5% mark-up, he worked out the TP adjustment of Rs.203 crore. The AO made the adjustment but also held that without prejudice to the TPO's AMP adjustment, the principal amount of Rs.180.73 crore was not allowable u/s 37(1). Since the TPO had already proposed adjustment of Rs.203 crore, which the AO made in the final order, he did not specifically make the separate addition of Rs.180.73 crore. On appeal by the assessee, the AMP adjustment was remanded to the TPO to apply the principles laid down in L.G. Electronics 140 ITD 41 (SB).

As regards the alternative section 37(1) disallowance HELD by the Tribunal:

i. Both sections i.e. 37(1) and 92 operate in different fields. As held in **L.G**

Electronics, the overall amount of AMP expenses should be processed to find out the amount spent on the brand building for the foreign AE and then disallowance should be made for such amount with the appropriate mark-up by way of TP adjustment. The remaining amount has to be considered as incurred by the assessee for its own business purpose eligible for deduction subject to the regular provisions of the Act;

ii. The avowed object of the TP adjustment on account of AMP expenses is to first find out and attribute the amount spent by the assessee towards promotion of its foreign AE's brand / logo etc and then make addition for such amount with appropriate mark-up.

iii. By this exercise, the total AMP expenses get segregated into two classes, viz., one benefiting the assessee's business and two, benefiting the foreign AE by way of promotion of the brand. Whereas the first amount is deductible in full subject to the regular provisions, the second amount is added to the total income with suitable mark-up by way of the TP adjustment. Once the total amount of AMP expenses is processed through the provisions of Chapter X of the Act with the aim of making TP adjustment towards AMP expenses incurred for the foreign AE, or in other words such expenses as are not incurred for the assessee's business, there can be no scope for again reverting to s. 37(1) qua such amount to make addition by considering the same expenditure as having not been incurred `wholly and exclusively' for the purposes of assessee's business.

iv. If the amount of AMP expenses is disallowed by processing under both the sections, that is 37 and 92, it will result in double addition to the extent of the original amount incurred for the promotion of the brand of the foreign AE de hors the mark-up.

---

4) S. 56(2)(vii) does not apply to bonus & rights shares offered on a proportionate basis even if the offer price is less than the FMV of the shares

Sudhir Menon HUF Vs ACIT (ITAT Mumbai)

Facts of the Case:

The assessee held 15,000 shares in Dorf Ketal Chemicals Pvt. Ltd representing 4.98% of the share capital. Pursuant to a further issue, it was allotted 1,94,000 shares at the face value rate of Rs.100 each, on a proportionate basis. The AO held that as the book value of the shares was Rs.1,538 per share, computed under

Rules 11U & 11UA, the difference of Rs.1,438 per share (aggregating Rs. 27.89 crore) was "inadequate consideration" and assessable to tax u/s 56(2)(vii)(c). This was upheld by the CIT(A).

On appeal by the assessee to the Tribunal HELD allowing the appeal:

i. Section 56(2)(vii)(c) (ii) provides that where an individual or a HUF receives any property for a consideration which is less than the FMV of the property, the difference shall be assessed as income of the recipient.

ii. Section 56(2)(vii) does not apply to the issue of bonus shares because there is a mere capitalization of profit by the issuing-company and there is neither any increase nor decrease in the wealth of the shareholder as his percentage holding remains constant.

iii. The same argument applies *pari materia* to the issue of additional shares to the extent it is proportional to the existing share-holding because to the extent the value of the property in the additional shares is derived from that of the existing shareholding, on the basis of which the same are allotted, no additional property can be said to have been received by the shareholder. The fall in the value of the existing holding has to be taken into account. As long as there is no disproportionate allotment, i.e., shares are allotted pro-rata to the shareholders, based on their existing holdings, there is no scope for any property being received by them on the said allotment of shares; there being only an apportionment of the value of their existing holding over a larger number of shares.

iv. There is, accordingly, no question of s. 56(2)(vii)(c) getting attracted in such a case. A higher than proportionate or a non-uniform allotment though would attract the rigor of the provision to the extent of the disproportionate allotment and by suitably factoring in the decline in the value of the existing holding.

Observations:
If there is proportionate or uniform allotment of shares then provisions of section 56(2)(vii)(c) cannot be invoked.

---

5) Section 92B(1): Transfer Pricing: A transaction (such as a corporate guarantee) which has no bearing on profits, incomes, losses or assets of the enterprise is not an 'international transaction' u/s 92B(1) and not subject to transfer pricing

Bharti Airtel Limited Vs ACIT (ITAT Delhi)

Facts of the Case:

The assessee issued a corporate guarantee to Deutsche Bank on behalf of its associated enterprise, Bharti Airtel (Lanka), whereby it guaranteed repayment for working capital facility. The assessee claimed that since it had not incurred any cost on account of issue of such guarantee, and the guarantee was issued as a part of the shareholder activity, no transfer pricing adjustment could be made. However, the Transfer Pricing Officer held that as the Associated Enterprise had benefited, the Arms Length Price (ALP) had to be computed on Comparable Uncontrolled Price (CUP) method at a commission income of 2.68% plus a mark-up of 200 bp. This was upheld by the Dispute Resolution Panel (DRP) by relying on the retrospective amendment to section 92B which specifically included guarantees in the definition of "international transaction**".**

On appeal by the assessee to the Tribunal HELD allowing the appeal:

i. A transaction between two enterprises constitutes an "international transaction" u/s 92B only if it has a bearing on profits, incomes, losses, or assets of such enterprises". Even the transactions referred to in the Explanation to section 92 B, which was inserted with retrospective effect (which includes giving of guarantees under clauses (c)), should also be such as to have a bearing on profits, incomes, losses or assets of such enterprise;

ii. The onus is on the revenue to demonstrate that the transaction has a bearing on profits, income, losses or assets of the enterprise. The said impact has to be on real basis, even if in present or in future, and not on contingent or hypothetical basis. There has to be some material on record to indicate, even if not to establish it to hilt, that an intra AE international transaction has some impact on profits, income, losses or assets.

Observations:

When an assessee extends assistance to the AE, which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction u/s 92B (1)

---

6) Section 147: Court can examine existence but not adequacy of reasons. AO is only required to provide material on which he relies to reopen the assessment

Acrous Unitech Wireless Pvt. Ltd Vs ACIT

i. It is important to restate an accepted, but often neglected, principle that in its writ jurisdiction, the scope of proceedings before the Court while considering a notice under Section 147 /148 is limited. The Court cannot enter into the merits of the subjective satisfaction of the AO, or judge the sufficiency of the reasons recorded, but rather, determine whether such opinion is based on tangible, concrete and new information that is capable of supporting such a conclusion. This was recognized by the Supreme Court in **Phool Chand Bajrang Lal v. ITO** 203 ITR 456 (SC);

ii. The law only requires that the information or material on which the AO records his or her satisfaction is communicated to the assessee, without mandating the disclosure of any specific document.

iii. While the 2G Spectrum Report has not been supplied in this case on grounds of confidentiality, the reasons recorded have been communicated and do provide – independent of the 2G Report – details of the new and tangible information that support the AO's opinion. These facts are capable of justifying the satisfaction recorded on their own terms, as discussed above. In this context, there is no legal proposition that mandates the disclosure of any additional document. This is not the say that the AO may in all cases refuse to disclose documents relied upon by him on account of confidentiality, but rather, that fact must be judged on the basis of whether other tangible and specific information is available so as to justify the conclusion irrespective of the contents of the document sought to be kept confidential.

iv. In cases such as the present, however, where the information and facts communicated by the AO are themselves in accordance with the minimum requirement under Section 147/148, the petitioner cannot compel the disclosure of other documents that the assessee may have also relied upon.

---

7) Section 244A: Deductor entitled to interest on refund of excess TDS from date of payment

UOI Vs Tata Chemicals Ltd.

Facts of the Case:

The assessee made an application u/s 195(2) for permission to remit technical service charges and reimbursement of expenses to a foreign company without

deduction of tax at source. The AO passed an order directing the assessee to deduct TDS at the rate of 20% before making remittance. The assessee effected the deduction and filed an appeal before the CIT(A) in which it claimed that the said remittance was not subject to TDS. The CIT(A) upheld the claim with regard to the reimbursement of expenses with the result that the TDS thereon was refunded to the assessee. However, the AO declined to grant interest u/s 244A on the said interest by relying on Circular Nos 769 dated 06.08.1998 and 790 dated 20.4.2000 issued by the CBDT. The CIT(A) upheld the AO's stand though the Tribunal and High Court upheld the assessee's stand.

On appeal by the department to the Supreme Court HELD dismissing the appeal:

i. A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorizedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/ foreign company;

ii. Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing Statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors' lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained

and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which ex ae quo et bono ought to be refunded, the right to interest follows, as a matter of course.

iii. The said interest has to be calculated from the date of payment of such tax.

DUE DATES CHART FOR THE MONTH April 2014 (Various Acts):

Date	Particulars
6th	Payment of Excise Duty for the previous month (other than SSI units)
10th	Monthly Excise return by all assessees (except SSIs & EOUs) coming under CEA in Form ER-1
10th	Quarterly Excise return by EOU assessees coming under CEA in Form ER-2
10th	Quarterly Excise return by SSI Units availing small scale exemption in Form ER-3
10th	Quarterly Excise return by Units paying 2% duty in Form ER-8
10th	Monthly Excise Return by specified class of Assessees regarding principal units in Form ER-6
20th	Payment of contribution under Employee EPF & MP Act, 1952 (including 5 days of grace)
20th	Filing quarterly Central Excise return (Annexure 75) by units availing area-based exemptions
21st	Payment of contribution under Employees State Insurance Act, 1948
21st	Payment and filing of Monthly MVAT return under MVAT Act, 2002
30th	TDS remittance for the previous month
30th	Payment of Profession Tax for the employees

------- XXXXX--------