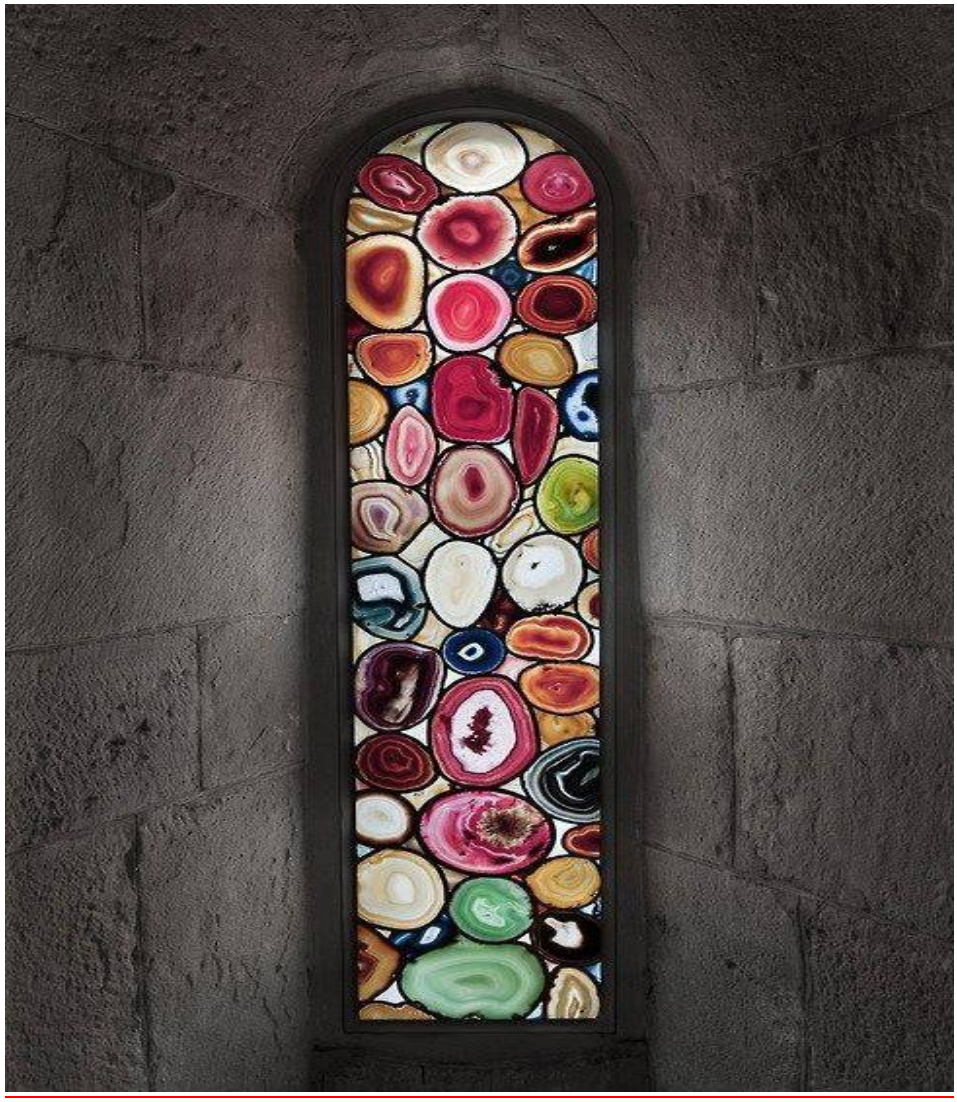
HARBINGER™

Updates on regulatory changes affecting your business

JANUARY 2014



B D Jokhakar & Co.

Chartered Accountants

www.bdjokhakar.com

INDEX

COMPANY LAW

Clarification with regard to applicability of section 182(3) of the Companies Act, 2013.

Companies contributing any amount or amounts to an 'Electoral Trust Company' for contributing to a political party or parties are not required to make disclosures required under section 182(3) of Companies Act 2013. It will suffice if the Accounts of the company disclose the amount released to an Electoral Trust Company.

Companies contributing any amount or amounts directly to a political party or parties will be required to make the disclosures laid down in section 182(3) of the Companies Act, 2013.These provisions are similar to Section 293A of the Companies Act, 1956.

Electoral trust companies will be required to disclose all amounts received by them from other companies/sources in their Books of Accounts and also disclose the amount or amounts contributed by them to a political party or parties as required by section 182(3) of Companies Act, 2013.

Clarification with regard to holding of shares or exercising power in a Fiduciary capacity - Holding and Subsidiary relationship under Section 2(87) of the Companies Act,

The Ministry of corporate affairs has clarified that the shares held by company or power exercisable by it in another company in a 'fiduciary capacity' shall not be counted for the purpose of determining the holding-subsidiary relationship in terms of the provision of section 2(87) of the Companies Act, 2013. These provisions are similar to Section 4(3) of the Companies Act, 1956.

Hindu Undivided Family (HUF) / its Karta can becoming Partner / Designated Partner (DPI in Limited Liability Partnership (LLP).

It has come to the notice of the Ministry that some Hindu Undivided Families (HUFs) / Kartas of such families are applying to become partner/ Designated partner (DP) in LLPs and a question has arisen whether a 'HUF' or a Karta can be allowed to do so. The matter has been examined in consultation with Ministry of Law.

As per section 5 of LLP Act, 2008 only an individual or body corporate may be a partner in a Limited Liability Partnership. A HUF cannot be treated as a body corporate for the purposes of LLP Act, 2008. Therefore, a HUF or its Karta cannot become designated partner in LLP.

FEMA

Borrowing and Lending in Rupees - Investments by persons resident outside India in the tax free, secured, redeemable, non-convertible bonds

Regulation No. 6 (2) of Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000 (Notification No. FEMA 4/2000-RB dated May 03, 2000) imposes restrictions on person resident in India who have borrowed in Rupees from a person resident outside India to the effect that such borrowed funds cannot be used for any investment, whether by way of capital or otherwise, in any company or partnership firm or proprietorship concern or any entity, whether incorporated or not, or for relending.

On a review, it has been decided to permit such resident entities / companies in India, authorised by the Government of India, to issue tax-free, secured, redeemable, non-convertible bonds in Rupees to persons resident outside India to use such borrowed funds for the following purposes:

(a) for keeping in fixed deposits with banks in India pending utilization by them for permissible end-uses.

(b) for on lending / re-lending to the infrastructure sector;

RBI

Amendment to the "Issue of Foreign Currency Convertible Bonds and Ordinary shares (Through Depository Receipt Mechanism) Scheme, 1993"

Presently, unlisted Indian companies that have not yet accessed Global Depository receipt / foreign Currency Convertible Bond route for raising capital in the international market are required to have prior or simultaneous listing in the domestic market.

On a review, it has now been decided to allow unlisted companies incorporated in India to raise capital abroad, without the requirement of prior or subsequent listing in India, initially for a period of ***two years***, subject to conditions mentioned in the circular RBI/2013-14/363 A.P. (DIR Series) Circular No. 69 issued in this regards.

INTERNATIONAL TAXATION

Base Erosion and Profit Shifting

In an increasingly interconnected world, national tax laws have not kept pace with global corporations, fluid capital, and the digital economy, leaving gaps that can be exploited by companies who avoid taxation in their home countries by pushing activities abroad to low or no tax jurisdictions. This undermines the fairness and integrity of tax systems. The project, quickly known as BEPS (Base Erosion and Profit Shifting) is looking at whether the current rules allow for the allocation of taxable profits to locations different from those where the actual business

activity takes place and if not, what could be done to change this.

At the request of G20 Finance Ministers, in July 2013 the OECD launched an Action Plan on Base Erosion and Profit Shifting (BEPS), identifying 15 specific actions needed in order to equip governments with the domestic and international instruments to address this challenge. The plan recognises the importance of addressing the borderless digital economy, and will develop a new set of standards to prevent double non-taxation. This will require closer international co-operation, greater transparency, data and reporting requirements. To ensure that the actions can be implemented quickly, a multilateral instrument to amend bilateral tax treaties will be developed.

The Cyprus jurisdiction is the first to be classified as an NJA in India:

India entered into a tax treaty with Cyprus in 1994, according to which both countries were under obligation to exchange information in order to prevent fraud and tax evasion. As per the GOI, Cyprus has not been providing regular information, and thus the Govt of India decided to specify Cyprus as a Non Jurisdictional Area (NJA).

This means that all payments made to a person in Cyprus (which are chargeable to tax in India) would attract a greater withholding rate of 30%. Further, to claim deduction of payments made to person located in Cyprus, the taxpayer is required to furnish an authorization to Indian tax authorities to collect any requisite information from such financial institution.

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- Kolkata	Sec 2(22)(e) of the Income Tax Act	Inter-corporate deposits ("ICDs") are not "loans and advances" and are not assessable to tax as "deemed dividend."	*IFB Agro industries Ltd Vs JCIT (2013)*
2	ITAT- Delhi	Sec. 11 of the Income Tax Act	Law on taxability of voluntary donations as "anonymous donations" u/s 115BBC or as "cash credit" u/s 68 in hands of charitable trust explained.	*Sunder Deep Educational Society Vs ACIT (2013)*
3	High Court – Gujarat	Sec. 28 of the Income Tax Act	Routing of a legitimate expenditure through P&L Account isn't a precondition to allow such exp.	*CIT Vs Naishad I. Parikh (2013)*
4	ITAT – Mumbai	Sec. 32(1)(i) of the Income Tax Act	No depreciations to owner on assets given on lease if loan transaction was disguised as sale and lease back transaction.	*Hathway Investments (p.) Ltd. Vs ACIT ((2013)*
5	ITAT- Mumbai	Sec. 32(1)(i) of the Income Tax Act	Assessee got depreciation on a mall even if when part of it wasn't commercially exploited.	*E-City Entertainment (India) (P.) Ltd. Vs ACIT*
6	ITAT – Hyderabad	Sec. 32(1)(ii) of the Income Tax Act	Any right (including leasehold rights) which enables carrying on business effectively and profitably is an "intangible asset" & eligible for depreciation.	*Tirumala Music Centre (P) Ltd Vs ACIT)*

7	ITAT- Chennai + Circular	Sec. 40(a)(ia) of the Income Tax Act	Section 40(a)(ia) TDS Disallowance: View in favour of the assessee should be followed.	*ITO Vs M/s Theekathir Press*
8	ITAT- Mumbai	Sec. 41(1) of the Income Tax Act	Liability outstanding for long period of time is assessable as income (despite no write-back in A/cs) if assessee is unable to prove genuineness of liability.	*ITO Vs Shailesh D. Shah/ Yusuf R Tanwar Vs ITO*
9	High Court – Delhi	Explanation to Section 73 of Income Tax Act.	Loss from shares dealing cannot be deemed to be from "speculation" under Explanation to section 73 if company is not engaged in the "business" of shares dealing.	*CIT Vs Orient Instrument Pvt. Ltd.*

1) Inter-corporate deposits ("ICDs") are not "loans and advances" and are not assessable to tax as "deemed dividend."

IFB Agro Industries Ltd Vs JCIT (2013) (ITAT - Kolkata)

In the Instant case, the assessee received an inter-corporate deposit of Rs.11.20 crore from IFB Automotive Pvt. Ltd, a company in which it held 18% of the shares. The AO and CIT(A) held that the said ICD constituted "loans and advances" and was assessable as "deemed dividend" in the assessee's hands u/s 2(22)(e).

i. The Tribunal held that, Section 2(22)(e) refers to 'loans' and 'advances' and does not refer to a 'deposit'. The fact that the term 'deposit' does not mean a 'loan' is evident from the Explanation to Section 269T and Section 269SS of the Act where both the terms are used. Further, the second proviso to Section 269SS recognises the term 'loan' taken or 'deposit' accepted.

ii. Once it is accepted that the terms 'loan' and 'deposit' are two distinct terms which have distinct meaning then if only the term 'loan' is used in a particular section the 'deposit' received by an assessee cannot be treated as a 'loan' for that section.

iii. The distinction between a "loan" and a "deposit" is that in the case of a "loan", the needy person approaches the lender for obtaining the loan. The loan is lent at the terms stated by the lender. In the case of a "deposit", the depositor goes to the depositee for investing his money primarily with the intention of earning interest.

iv. Section 2(22)(e) enacts a deeming fiction and cannot be given a wider meaning than what it purports to cover. It has to be interpreted strictly. Thus, the view of the AO & CIT(A) that an Inter-corporate deposit is similar to a loan is not correct.

Observations:
Loans and deposits are not analogous and exact nature of transaction is to be gathered from facts of the case.

---

2) Law on taxability of voluntary donations as "anonymous donations" u/s 115BBC or as "cash credit" u/s 68 in hands of charitable trust explained.

Sunder Deep Educational Society Vs ACIT (ITAT Delhi)

In the Instant case, the assessee, the charitable institution received donations of Rs. 3.55 crore, of whose Name and Address were maintained. The AO conducted a test check by sending

letters to the donors. To the extent of donations aggregating Rs. 1.96 crore, the letters came back undelivered or were not replied to. The AO held that as the confirmations were not received, the said donations were "anonymous donations" and assessable to tax u/s 115BBC. He held that alternatively, the said sum was assessable as a "cash credit" u/s 68 as the identity, genuineness and credit worthiness of the alleged donors was not proved.

i. The Tribunal held that Section 115BBC which assesses "anonymous donations" does not apply because the assessee has maintained a record of the identity indicating the name and address of the person making the contribution.

ii. Section 68 seeks to assess cash credits as income. However, when the non-corpus voluntary donations are already disclosed as income and applied for charitable purposes, section 68 has no application. The fact that the complete list of donors was not filed and the donors were not produced does not mean that the assessee was seeking to introduce unaccounted money into the trust.

iii. U/s 12(1) voluntary donations received without a direction that they shall form part of the corpus are deemed to be income derived from property held for charitable purposes and have to be applied towards the objects of the trust to the extent of 85%. If that is done, the donations are not assessable as income.

Observations:
Since record of donations received was maintained as prescribed in the section being Name and Address, such donations cannot be treated as Anonymous Donations.

---

3) Routing of a legitimate expenditure through P&L Account isn't a precondition to allow such exp.

CIT Vs Naishad I. Parikh (2013) (High Court – Gujarat)

In the instant case, AO disallowed the assessee's claim of share trading and F&O losses on the ground that these transactions were not routed through the profit and loss accounts;

The High Court held as follows:

i. The transactions would not cast any doubt and there was no dispute over the quantum of loss computed by the assessee and it had substantiated the entire transactions by furnishing otherwise valid and statutorily accepted documents;

ii. The Apex Court in case of Kedarnath Jute Mfg. Co. Ltd. v. CIT (1971) 82 ITR 363 had held that "whether the assessee is

entitled to a particular deduction or not will depend upon the provision of law relating thereto and not on the view which the assessee might take of his rights nor the existence or absence of entries in the books of account be decisive or conclusive in the said matter";

iii. Thus, merely debiting these items directly in capital account instead of in P&L account and thus, not routing share trading account through audited account under section 44AB couldn't be deemed as a valid ground to disregard overwhelming legally acceptable evidences to reject the same.

iv. In the instant case though the item, as rightly pointed out by both the authorities, could not have been debited directly in the capital account but in view of voluminous documents substantiating the claim of the assessee; there was no reason to interfere.

Observations:

Substance of the transaction being in the nature of loss, cannot be ignored merely because the said loss was deducted from Capital Account of the Assessee (Form of the transaction) One needs to note that Assessee in this case was an individual.

4) No depreciations to owner on assets given on lease if loan transaction was disguised as sale and lease back transaction.

Hathway Investments (p.) Ltd. Vs ACIT (2013) (ITAT – Mumbai)

In the Instant case, the assessee had purchased different energy meters for a consideration of Rs. 4.99 crores from Gujarat State Electricity Board (GEB) and these meters (assets) were then immediately leased back to GEB vide a lease agreement. The Assessing Officer ('AO') disallowed the depreciation u/s 32(1) claim of assessee by holding that the alleged lease transaction was in reality a transaction of finance. On appeal, the CIT (A) upheld the order of AO.

i. The assessee's contention that transaction was with a State Government and it would be highly improper to impute any collusiveness or colourable nature of the transaction without any concrete evidence was misconceived;

ii. The facts on the file itself spoke that the transaction in question was a colourable device with the twin purposes of financing the GEB and at the same time making such an arrangement to enable the financer to claim depreciation on the assets and in lieu thereof to pay reduced rate of interest to the financer in proportion to the value of benefit availed by the financer, for

which it otherwise was not entitled to;

iii. A perusal of section 23 of the Indian Contract Act, 1872 reveals beyond doubt that even if the consideration or object of an agreement may not be expressly forbidden by law, but if it is of such a nature that, if permitted, it would defeat the provisions of law, the same will not be lawful;

iv. In the case in hand, only the incidental tax benefits were intended to be transferred without any intention to transfer the asset itself. Thus, whole of the effort had been made to transfer the right to claim depreciation on the assets to the assessee for the purpose of the Income-tax Act, but not the assets itself. Therefore, the Assessing Officer had rightly disallowed depreciation on electric meters.

---

5) Assessee got depreciation on a mall even if when part of it wasn't commercially exploited.

E-City Entertainment (India) (P.) Ltd. Vs ACIT (ITAT - Mumbai)

In the Instant case, AO disallowed the proportional depreciation claim on commercial complex; by holding that it's certain areas couldn't be used by assessee for business purposes.

i. On appeal before the CIT (A), the assessee contended that the entire commercial space was put to use but only a part of it was leased out and it would not mean that the unutilised area was used for non-business purposes or personal purposes.

ii. It further contends that it was owner of the entire building so the depreciation couldn't be disallowed. The CIT (A) allowed the claim of the assessee. Aggrieved-revenue filed the instant appeal.

iii. Tribunal held that after the amendment made w.e.f. April 1, 1988, the individual assets had lost their identity and for the purpose of allowing of depreciation, only the block of assets had to be considered.

iv. Tribunal further added that, if block of assets was owned by the assessee and used for the purpose of business, depreciation had to be allowed. The test of user had to be applied upon the block as a whole instead of upon an individual asset.

v. Once it was proved that block of asset was used for the purposes of assessee's business and there was no finding as to whether the block of assets was used for other business purposes, proportionate disallowances of depreciation was not warranted.

Thus, the addition made by AO was to be deleted.

6) Any right (including leasehold rights) which enables carrying on business effectively and profitably is an "intangible asset" & eligible for depreciation.

Tirumala Music Centre (P) Ltd Vs ACIT (ITAT-Hyderabad)

In the instant case, the assessee paid the sum of Rs. 60 lakhs to acquire leasehold rights to premises. The assessee claimed that the said leasehold rights were an "intangible asset" and eligible for depreciation u/s 32(1)(ii).

The Tribunal held as follows:

i. Section 32(1)(ii) allows depreciation on "business or commercial rights" The expression "business or commercial rights" means rights obtained for effectively carrying on business or commerce;

ii. Commerce is a wider term which encompasses business in its fold. Therefore, any right which is obtained for carrying on business effectively and profitably has to fall within the meaning of the term "intangible asset";

7A) Section 40(a)(ia) TDS Disallowance: View in favour of the assessee should be followed.

ITO Vs M/s Theekathir Press (ITAT Chennai)

In the instant case, assessee paid an amount without deducting TDS. AO held that as there was no TDS, the deduction for the amount could not be allowed u/s 40(a)(ia). However, the CIT(A) reversed the AO on the ground that the word "payable" in section 40(a)(ia) did not apply to amounts that had already been "paid" during the year.

The Tribunal held as follows:

i. There is a judicial controversy on whether section 40(a)(ia) applies to amounts that have already been "paid" or it is confined to amounts that are "payable" as at the end of the year;

ii. The Special Bench in Merilyn Shipping and Transports 16 ITR (Trib) 1 (Vizag) and the Allahabad High Court in Vector Shipping Services have taken the view that section 40(a)(ia) applies only to amounts remaining "payable" at the end of the previous year and does not apply to amounts already "paid" before the close of the relevant previous year;

iii. The Calcutta High Court in Crescent Export Syndicates & Md. Jakir Hossain Mondal and the Gujarat High Court in Sikandarkhan N.Tunvar have taken a contrary view that even amounts already "paid" have to be disallowed u/s 40(a)(ia);

iv. In such circumstances, the rule of Judicial Precedence demands that the view favorable to the assessee must be adopted as held by the Supreme Court in CIT Vs Vegetable Products Ltd 88 ITR 192;

Observations:

This Judgment lays down an important principle that in case of diverse views expressed by High courts, view which is favorable to the assessee has to be considered.

Circular herein below also lays down the same principle. Since circulars are binding on department, atleast on this issue further litigation may get avoided.

7B) Circular on section 40(a)(ia) - TDS Disallowance:

Department clarified by the circular that the amounts payable also includes amounts paid. It is also clarified that if the High Court takes a view contrary to that taken by the CBDT, the CBDT's view would not apply in that jurisdiction though steps should be taken to decide whether a Special Leave Petition (SLP) should be filed or legislative amendments made.
(Circular No. 10/DV/2013 dated 15.12.2013)

---

8) Liability outstanding for long period of time is assessable as income (despite no write-back in A/cs) if assessee is unable to prove genuineness of liability.

ITO Vs Shailesh D. Shah/ Yusuf R Tanwar Vs ITO (ITAT Mumbai)

In the instant case, the assessee, engaged in the business of civil construction and labour contractor, had an amount of Rs. 86.25 lakhs shown as outstanding labour charges in his balance sheet that had remained unpaid for more than three years. The AO held that the fact that the amount was outstanding for so many years was abnormal. On appeal, the CIT(A) reversed the AO on the ground that the fact that the amount was outstanding for a long period and that the assessee was unable to furnish confirmations did not mean that there was a remission or cessation of liability during the assessment year so as to attract section 41(1).

The Tribunal held as follows:

It is very improbable that payments to labour can remain outstanding for more than three years. The assessee has not been able to produce the records relating to the name, addresses and bills

of the labour etc to prove that the liability continues to exist. It is accordingly a case of cessation of liability;

i. The assessee has just continued the entry of the same in his books of account without any intention to pay back the same;

ii. If the facts of the case establish that the liability has been genuinely shown by the assessee and his subsequent conduct shows that he has paid back the said credits and his intention was not to enjoy the amount for unlimited period without any intention to pay back the same, then it cannot be said to be a case of cessation of liability.

iii. On facts, not only is the existence of outstanding liability of labour charges for so many years improbable in the normal course of business but the assessee has also failed to give any evidence regarding the identity & genuineness of the creditors. Accordingly it is a case of cessation of liability and section 41(1) applies.

---

9) Loss from shares dealing cannot be deemed to be from "speculation" under Explanation to section 73 if company is not engaged in the "business" of shares dealing.

CIT Vs Orient Instrument Pvt. Ltd. (Delhi High Court)

In the instant case, the assessee was engaged in the business of trading of crafts paper, installation, job work, consultancy and commission. Assessee claimed the loss arising on account of transaction whereby it purchased and sold shares.

The AO held that under the Explanation to section 73, the said loss was deemed to be arising from a speculation business and could not be set off against other business profits.

CIT(A) and Tribunal allowed the assessee's claim on the basis that the assessee was not engaged in the "business of purchase and sale of shares" so as to fall into the mischief of the Explanation to section 73.

The High Court held as follows:

The transaction whereby it purchased the shares and incurred loss on account of the fall in the value of the share was a solitary one. The findings of the Tribunal that the transaction did not constitute the business carried on by the company, cannot be termed as perverse or unreasonable;

Observations:

Since provisions of Explanation to Section 73 are of deeming nature, same are required to be construed strictly.

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

Date	Particulars
5th	Payment of Excise Duty for the previous month
5th	Service Tax payment for the previous month (6th if paid electronically)
7th	TDS remittance for the previous month
10th	Monthly Excise return by all assessees (except SSIs & EOUs) coming under CEA in Form ER1
10th	Monthly Excise return by EOU assessees coming under CEA in Form ER 2
15th	E-Filing of Vat Audit Report Form 704 for F.Y 2012-13
15th	TDS/ TCS Quarterly Statements (other than Government deductor) – October to December
20th	Payment of contribution under Employee EPF & MP Act, 1952 (including 5 days of grace)
21st	Payment of contribution under Employees State Insurance Act, 1948
21st	Filing of MVAT monthly Return under MVAT Act, 2002
21st	Payment of Monthly MVAT under MVAT Act, 2002
31st	Payment of Profession Tax for the employees
31st	Issue of Form 16A for the quarter ended October to December

*If payment of MVAT is made as per time prescribed, additional 10 days are given for uploading e-return.

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

This communication is intended to provide general information, guidance on various professional subject matter and should not be regarded as a basis for taking decisions on specific matters. In such instances, separate advice should be taken.