

# HARBINGER<sup>TM</sup>

*Updates on regulatory changes affecting your business*

**March 2017**



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## INDEX

Sr. No	Topics covered	Page No.
1.	<a href="#"><u>Securities Exchange Board of India (SEBI)</u></a>	3
2.	<a href="#"><u>Service Tax</u></a>	3
3.	<a href="#"><u>Income Tax</u></a>	4
4.	<a href="#"><u>Economics</u></a>	5
5.	<a href="#"><u>Summary of Judgments- Income Tax</u></a>	6
6.	<a href="#"><u>Discussion on Judgments – Income Tax</u></a>	8
7.	<a href="#"><u>Due date chart for the month of March, 2017</u></a>	15

## SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

### Review of Investor's Grievance Redressal Mechanism

Market regulator, Securities and Exchange Board of India (SEBI) has decided to replace the Grievance Redressal Mechanism at stock exchanges and depositories.

IT has also decided to increase the professional fee of Arbitrators to Rs 18,000 and also decided on a new fee structure for filling arbitration reference in order to have faster implementation of award and to discourage delayed filing of arbitrations by members.

There shall be separate panels for arbitration and appellate arbitration. Further, for appellate arbitration, at least one member of the panel should be a retired judge and stock exchanges/depositories will have to obtain prior approval of the SEBI before empanelment of arbitrators/appellate arbitrators.

*Circular* *no*  
*SEBI/HO/DMS/CIR/P/2017/15* *dated 23*  
*February, 2017*

[Index](#)

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## SERVICE TAX

### Levy of Service Tax on the Service provided by Operators of Common Effluent Plant.

Earlier services provided by the operators of Common Effluent Treatment Plant were not liable to Service Tax.

Now the Central Government has decided to levy service tax on this service for the period commencing from 1st July, 2012 and ending with 31st March 2015.

*Notification no 08/2017-Service Tax dated  
20 February, 2017*

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### Services by way of transportation of goods by vessel from a place outside India to the custom station in India, w.r.t. goods intended for transshipment to any country outside India.

Goods landing at Indian ports which are destined to any other country are allowed to be transhipped through

Indian Territory without payment of Custom Duty in India on the condition that the customs station is mentioned on the import manifest.

The Department of Revenue has clarified that with respect to such

goods, services by way of transportation of goods by a vessel from a place outside India to the custom station in India are not taxable in India as the destination of such goods is a country other than India.

*Notification no 07/2017-Service Tax dated 02 February, 2017*

[Index](#)

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## **INCOME TAX**

### **The Income-tax (2nd Amendment) Rules, 2017**

The Central Board of Direct Taxes has amended Income Tax Rules. These shall be called as The Income-tax (2nd Amendment) Rules, 2017.

Pursuant to such amendment now an applicant may apply for allotment of a tax deduction and collection account number through a common application form as notified by the Central Government in the official gazette.

The Principal Director General of Income tax shall specify the classes of persons, applicable formats and forms along with the procedure for safe and secure transmission.

These shall come into force from the date of its publication in the Official Gazette.

*Notification no 9/2017/F.No. 370142/40/2016-TPL dated 09 February, 2017*

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### **Determination of Place Of Effective Management (POEM) for company other than Indian Company.**

The concept of Place of Effective Management for deciding residential status of the company other than an India Company was introduced in Finance Act 2015 which shall come into effect from 1st April 2017 and accordingly apply from A.Y. 2017-18

The Central Board of Direct Taxes has further clarified that POEM guidelines shall not apply to a company having turnover or the gross receipt of Rs. 50 crores or less in financial year.

*Circular no 08/2017 dated 23rd February, 2017*

[Index](#)

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## ECONOMICS

### Government extends deadlines for registering on GST Portal

About 1.85 lakh dealers out of the 3.53 lakh registered with the VAT department have enrolled on the GST portal from December 16 till date.

The earlier deadline for registration was 31st December, 2016. The Delhi government is now preparing to bring out an advertisement to announce extension of the deadline for enrolment till 15th March, 2017.

The state government is clear that those who do not register by the extended deadline will not be considered for any of the tax payment related benefits given to dealers by the VAT department from thereon.

The dealers who choose not to get enrolled on the GST portal will come under the scanner of the VAT department which plans to begin the exercise of pruning the list of registered dealers for weeding out any possibility of bogus dealers or those whose registration may have been cancelled.

*economictimes.indiatimes.com dated 21st February, 2017*

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### India should cut Corporate Tax and go for Inheritance Levy: OECD

The Organization for Economic Cooperation and Development (OECD) is a global policy forum that promotes policies to improve economic and social well-being of people around the world.

In its Economic Survey of India it recommended that India should bring down the corporate tax rates from 30% to 25%, introduce inheritance tax and provide certainty regarding tax rules and their implementation.

Observing that poverty is still high despite growing prosperity the survey suggested that living conditions across the states could be improved by focusing on farm output, urban infrastructure, liberalized product and labor market.

It also suggested that eliminating tax expenditure that benefits the rich most and freezing of the income thresholds for levying taxes.

*NDTV profit dated 28th February, 2017*

[Index](#)

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## **SUMMARY OF IMPORTANT TAX JUDGEMENTS:**

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

<b>Sr. No</b>	<b>Tribunal/Court</b>	<b>Section / Area</b>	<b>Nature</b>	<b>Case Law</b>
1.	Kolkata Tribunal	Section 10(38), Section 28, Section 45 and Section 48	If the AO has accepted the claim for exemption for long-term capital gains and conceded that the assessee is an "investor", he cannot change his stand and treat the assessee as a "trader" in respect of the claim of short-term capital gains alone	ITO V. Dilip B. Desai HUF
2.	Bombay High Court	Section 28, Section 29 and Section 37(1)	There is a distinction between "setting up of business" and "commencement of business". All expenditure after "setting up" is deductible business expenditure even if the business has not commenced. A business is "set up" when steps are taken to recruit employees and take premises etc	CIT V. Axis Pvt. Equity Ltd
3.	Bombay High Court	Section 28, Section 56 and Section 68	Even if the premium at which the shares are issued defies commercial prudence, the receipt cannot be assessed as "unexplained credit" if the identity of the payer, genuineness of the transaction and capacity of the subscriber are not disputed and Interest earned on short-term fixed deposits is assessable as "profits and gains of business" and not as "income from other sources"	CIT V. Green Infra Limited
4.	Bombay High Court	Section 68 and Section 69C	A statement by the alleged vendor that the transactions with the assessee are only accommodation entries and that there are no sales or purchases cannot be relied upon by the AO unless the assessee is given the opportunity to cross-examine the vendor	CIT V Ashish International

5.	Mumbai Tribunal	Section 69C	Purchases cannot be treated as bogus merely on the basis of the statements and affidavits filed by the alleged vendors before the sales-tax department. The said statements cannot be relied upon without cross-examination of the parties	ACIT V Mahesh K. Shah
6.	Bombay High Court	Section 143(2) and Section 292BB	The issue of a notice u/s 143(2) bearing the wrong (old) address of the assessee does not amount to a valid service of the notice u/s 282 r.w.s. 27 of the General Clauses Act.	CIT V Abacus Distribution Systems(India) Pvt. Ltd.
7.	Bombay High Court	Section 271(1)(c) and Section 274	Failure by the AO to specify in the s. 274 notice whether the penalty is being initiated for 'furnishing of inaccurate particulars of income' or for 'concealment of income' is fatal. It reflects non-application of mind and renders the levy of penalty invalid	CIT vs. Samson Perinchery

[Index](#)

## DISCUSSION ON JUDGEMENTS - INCOME TAX



**1. If the AO has accepted the claim for exemption for long-term capital gains and conceded that the assessee is an "investor", he cannot change his stand and treat the assessee as a "trader" in respect of the claim of short-term capital gains alone**

The AO had accepted the claim of exemption of the assessee for long term capital gains and conceded the assessee to be an investor. However for the purpose of short term capital gains alone the AO took a different stand by considering the assessee as a trader.

**On this the Tribunal held that:**

- The assessee had earned dividend income of Rs. 2, 33, 98,095/- which is very substantial indicating the assessee's intention to always

remain as an investor and not to exit the scrip with a short term profit motive.

- The assessee had been consistently showing the amount invested in shares and mutual funds under the head 'investments' in its books of accounts and there were no borrowings in the balance sheet filed by the assessee for the earlier years. The revenue had also accepted the assessee to be an investor in the earlier years even in the scrutiny assessments framed u/s 143(3) of the Act for the A.Y. 2004-05 and 2005-06.

Thus in view of above the Tribunal dismissed the appeal of the department stating that though the principle of resjudicata is not applicable in income tax proceedings, the principle of consistency cannot be ignored in the absence of any changed circumstances.

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**2. There is a distinction between "setting up of business" and "commencement of business". All expenditure after "setting up" is deductible business expenditure even if the business has not commenced. A business is "set up" when steps are**

## **taken to recruit employees and take premises etc**

In the instant case the CIT (A) had disallowed the expenditure as business loss on the ground that it had not commenced business. Subsequently the Tribunal allowed the claim of the assessee.

The issue in the instant case was regarding the distinction between "setting up of business" and "commencement of business".

## **On an appeal made to the High Court it held that:**

- A similar issue viz. distinction between "setting up of business" and "commencement of business" had come up for consideration in *Western India Vegetable Products Ltd. vs. Commissioner of Income Tax* 1954 Vol. 26 ITR Page 151. In that case the court had held that that business is said to have been set up when it is established and ready to be commence.
- However, there may be an interval between a business which is set up and a business which is commenced. However, all expenses incurred during the interregnum between setting up

of business and commencement of business would be permissible deductions.

- In this case the CIT (A) had disallowed the expenditure as business loss on the ground that it had not commenced business. However, the impugned order of the Tribunal on examination of facts found that the business of the respondent – assessee had been set up in the subject assessment year and consequently, the business loss arising on account of expenditure as claimed by the respondent – assessee was allowable.
- The impugned order of the Tribunal had placed reliance upon the order of its Co-ordinate bench in *HSBC Securities India Holdings Pvt. Ltd* wherein it had held that when executives are employed and the infrastructure is ready to commence business, it can be said that the business has been set up for carrying on business as share brokers.

Thus based on the test laid down by this court in *Western India Vegetable Products Ltd.* and the Tribunal in *HSBC Securities India Holdings Pvt. Ltd.* the High Court dismissed the appeal.

**3. Even if the premium at which the shares are issued defies commercial prudence, the receipt cannot be assessed as "unexplained credit" if the identity of the payer, genuineness of the transaction and capacity of the subscriber are not disputed and Interest earned on short-term fixed deposits is assessable as "profits and gains of business" and not as "income from other sources"**

**The Bombay High Court held that:**

- The Tribunal had examined the applicability of section 68 of the Act on parameters of the identity of the subscriber to the share capital, genuineness of the transaction and the capacity of the subscriber to the share capital. The identity of the subscribers was confirmed by virtue of notices issued u/s 133(6) of the Act.
- The genuineness of the transaction was concluded as the entire transaction was recorded in the books of accounts and reflected in the financial statements of the assessee also the subscription was done through the banking channels as evidenced by bank statements.
- With respect to the capacity of the subscribers the impugned order records the finding that the 98% of the shares is held by IDFC Private Equity Fund which is a Fund Manager of IDFC Ltd. Moreover, the contributions in IDFC Private Equity Fund are all by public sector undertakings.
- The share premium of Rs. 490/- per share defies all commercial prudence and hence has to be considered as "cash credit". Also the Tribunal had examined the case on the parameters of section 68 of the Act and found on facts that it is not so hit. The Revenue was not able in any manner to show that the order of the Tribunal was perverse.
- The Tribunal recorded the facts that the three fixed deposits were made for a period of 1 day, 28 days and 90 days respectively. Considering the nature of business of the assessee, the Tribunal, was of the view that the interest earned would be taxable under the head 'business income'. In support, reliance was placed by the impugned order upon the decision of this Court in CIT v/s. Indo Swiss Jewels Ltd. & another 284 ITR 389. In that

case it was held that interest earned on short term deposits on the money kept apart for the purposes of business had to be treated as income earned from business and could not be treated as income from other sources.

Thus in view of above the Bombay High Court held that, considering the short duration in which the amounts were kept in fixed deposit awaiting use in its business operations would necessarily mean income earned on account of business and hence it has to be taxed under "profits and gains of business" and not as "income from other sources"

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**4. A statement by the alleged vendor that the transactions with the assessee are only accommodation entries and that there are no sales or purchases cannot be relied upon by the AO unless the assessee is given the opportunity to cross-examine the vendor**

The assessee had made purchases from M/s. Thakkar Agro Industrial Chem. Supplies P. Ltd. The Tribunal had deleted the additions made on account of bogus purchases allegedly made by the assessee. On this the CIT made an appeal to the High Court.

**The Bombay High Court held that:**

- The CIT had made additions on account of bogus purchases on the fact that the Director of M/s. Thakkar Agro Industrial Chem. Supplies P. Ltd. had stated that there were no real sales or purchases and the transactions were only accommodation bills not involving any transactions.
- The Tribunal had deleted the addition made on account of bogus purchases. It had also placed on record a fact that the assessee had disputed the correctness of the statement given by the director. Also the assessee was not given an opportunity to cross examine the concerned Director.
- The appellate authority had sought remand report and also at that stage the genuineness of the statement by the director, was not established.

Thus in view of above the High Court held that the decision of the Tribunal being based on the fact, no substantial question of law can arise and hence dismissed the appeal.

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**5. Purchases cannot be treated as bogus merely on the basis of the statements and affidavits filed by the alleged vendors before the sales-tax department. The said statements cannot be relied upon without cross-examination of the parties**

The AO had issued the show cause notice to the assessee to explain the purchases made and had issued notices under section 133(6) of the Act to the said 12 parties. There was no response to these notices. The AO, primarily relying on the information obtained from the sales tax department i.e. the statements/affidavits given by the parties held that the purchases amounting to Rs. 96, 45,645/- as bogus purchases.

**The Tribunal held that:**

- The assessee had filed before the AO copies of purchase invoices, extracts of stock ledger showing entry/exit of materials, copies of bank statements showing the payments made for the purchases made to establish genuineness of these purchases.
- Also it was evident from the record that the AO has not doubted the sales affected by the assessee and therefore it was logical to conclude that without corresponding purchases being

made, the assessee could not have affected sales.

- The AO had not brought on record any material evidence as to prove that the said purchases were bogus. Mere reliance on the information obtained by from the sales tax department, affidavits filed by the 12 parties before the sales tax department and that the parties did not respond to notice u/s 133(6) of the Act is not sufficient to treat the purchases as bogus and make an addition u/s 69C of the Act.
- If the AO doubted the genuineness of the said purchases, it was necessary on his part to make further inquiries in the matter in order to ascertain the genuineness of these transactions. Without these further enquiries in respect of the said purchases, the AO cannot make the addition under section 69C of the Act.

Thus in view of above the Tribunal upheld the order of the CIT(A) deleting the addition of Rs. 96,45,645/- made u/s 69C of the Act as unexplained expenditure in respect of the aforesaid purchases.

**6. The issue of a notice u/s 143(2) bearing the wrong (old) address of the assessee does not amount to a valid service of the notice u/s 282**

**The facts of the case are:**

- A notice u/s 143(2) of the Act was handed over to the post office on 30th November, 2007 having a wrong address of the assessee. It was addressed to the old office of the assessee at Nariman Point.
- In terms of section 282 of the Act as existing in 2007 a notice may be served on the person named therein either by post or as if it were a summons issued by the Court under the Code of Civil Procedure.
- Section 27 of the General Clauses Act provides that where any Central Act requires a document to be served by post where the expression “serve” or “given” or “sent” shall be deemed to have been effected by properly addressing, prepaying and posting.
- In the instant case the envelope containing the notice was wrongly addressed. Thus the presumption u/s 27 of the

General Clauses Act cannot be invoked.

- Subsequently on 11th December 2007 the AO served the notice upon the correct address. This was done on the basis of a record already available with the AO by virtue of a letter dated 23rd November 2006 addressed by the assessee to the AO. There was no fresh intimation received by the AO after 23rd November 2006 and before 11th December 2007 giving the new address.
- Also the objection on the assessment proceedings was taken much before the assessment proceedings were completed on the basis of no service of notice before the expiry of period. Hence the assessment order will not be saved by section 292BB of the Act.
- The order of the Tribunal renders a finding of the fact that notice u/s 143(2) has not been served at the correct address on or before 30th November 2007 which is not shown to be incorrect.

Thus in view of above the High Court held that the assessment proceedings concluded on the basis of such invalid notice is void.

**7. Failure by the AO to specify in the S. 274 notice whether the penalty is being initiated for 'furnishing of inaccurate particulars of income' or for 'concealment of income' is fatal. It reflects non-application of mind and renders the levy of penalty invalid**

The Assessing officer had issued notice u/s 274 of the Act. It stated *"have concealed the particulars of your income or \_\_\_\_\_ Furnished inaccurate particulars of such income"*. The Tribunal held that, knowingly or otherwise the AO has not bothered to fill the blanks with appropriate limb of the provisions of section 271(1)(c) of the Act and that it revealed that the AO has not applied his mind to the fact for which reason of the penalty, the notices were issued.

**The department made an appeal to the High Court. It held that:**

- The grievance of the Revenue before us is that there is no difference between furnishing of inaccurate particulars of income and concealment of income.
- In decision of the Supreme Court in Ashok Pai v/s. CIT 292 ITR 11 it was observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1) (c) of the Act,

carry different meanings/ connotations.

- Therefore, the satisfaction of the AO with regard to only one of the two breaches mentioned under Section 271(1) (c) of the Act, for initiation of penalty proceedings will not permit penalty being imposed for the other breach. The order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the Assessee had no notice.

Thus in view of above the High Court dismissed the appeal of the department stating that the question as framed does not give rise to any substantial question of law.

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**NOTE: The Judgments should not be followed without studying the complete facts of the case law.**

[Index](#)

## DUE DATES CHART FOR THE MONTH OF MARCH 2017 (VARIOUS ACTS):

March 2017						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
			1	2	3	4
5 Service Tax Payments by Companies	6 Service Tax Payments by Companies (if paid electronically), Excise Duty Payment	7 Income Tax – TDS payment	8	9	10 Monthly Excise Return (ER-1)/ ER-2 monthly return by 100% EOU, Quarterly Excise Return by EOU, SSI Units and paying 2% in Form ER-8	11
12	13	14	15 Provident fund payment,	16	17	18
19	20	21 MVAT Payment, ESIC Payment, Payment and filing of quarterly/monthly MVAT Return	22	23	24	25
26	27	28 ,	29	30	31 Profession Tax Payment, Last date for declaration of Undisclosed Income under PMGKY 2016, Due date for payment of 2 <sup>nd</sup> instalment under IDS 2016	

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[Back](#)