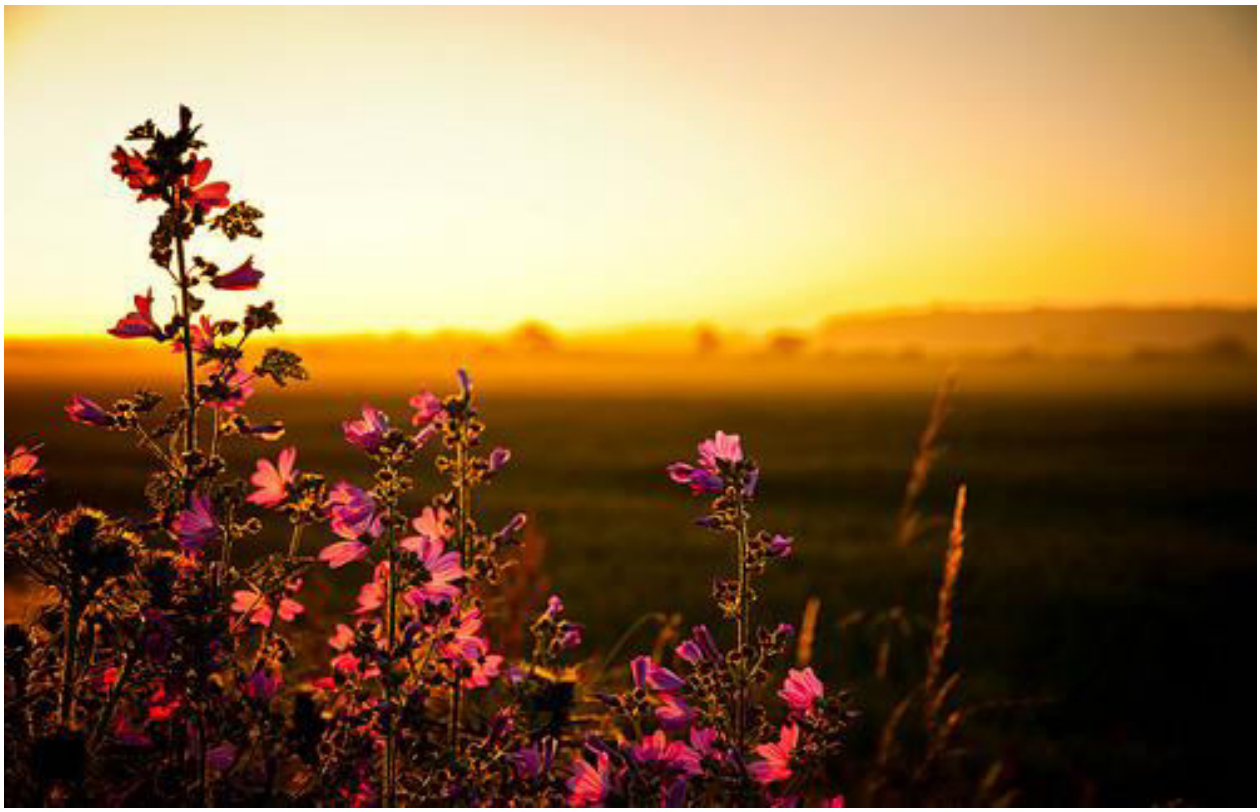
HARBINGER™

Updates on regulatory changes affecting your business

MAY 2017



B D Jokhakar & Co.

Chartered Accountants
www.bdjokhakar.com

Follow us on:
Twitter LinkedIn Facebook

INDEX

SERVICE TAX

Amendment to the Point of Taxation Rules, 2011

The Central Government has made amendment to the Point of Taxation Rules, 2011.

Pursuant to this amendment, the point of taxation in respect of services provided by a person located in a non-taxable territory to a person in a non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India, shall be the date of bill of lading of such goods in the vessel at the port of export.

This shall come into force from 22nd January, 2017.

These rules shall be called the Point of Taxation (Amendment) Rules, 2017.

Notification no 14/2017 dated April 13, 2017

Amendment to notification no 30/2012 so as to specify the person liable to pay service tax in case of services provided or agreed to be provided by a person located in a non taxable territory to a person located in non-taxable territory by way of transportation of such goods by a vessel from a place outside India up to the customs station of clearance in India.

The Central Government has amended notification no 30/2012- service tax by inserting an explanation no V.

As per the explanation, person liable for paying service tax other than the service provider, in respect of services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India shall be the importer as defined under clause (26) of section 2 of the Customs Act, 1962 (52 of 1962) of such goods.

This shall come into effect from 23rd April, 2017.

Notification no 15/2017 dated April 13, 2017

Index

INCOME TAX

Extension of time for filing declaration under the taxation and investment regime for Pradhan Mantri Garib Kalyan Yogana, 2016 (PMGKY)

The Department of Economic Affairs vide notification no S.O.1218(E) dated April 19, 2017, has extended the date of making deposit under the Deposit Scheme till 30th April, 2017 in respect of cases where tax, surcharge and penalty under PMGKY has been paid on or before 31.03.2017.

In view of the above, CBDT has decided that if due tax, surcharge and penalty under PMGKY, has been received on or before the 31st March, 2017, and deposit in the Bond Ledger Account under the Deposit Scheme has been received on or before the 30th April, 2017, the declaration in Form No.1 under PMGKY can be filed by 10th May, 2017

Circular no. 14 of 2017 dated 21st April, 2017.

Mandatory quoting of Aadhar and PAN applications and filing of Income Tax Return only for residents

Section 139AA of the Income-tax Act, 1961 as introduced by the Finance Act, 2017 provides for mandatory quoting of Aadhaar / Enrolment ID of Aadhaar application form, for filing of return of income and for making an application for allotment of Permanent Account Number with effect from 1st July, 2017.

It is clarified that such mandatory quoting of Aadhaar or Enrolment ID shall apply only to a person who is eligible to obtain Aadhaar number. As per the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, only a resident individual is entitled to obtain Aadhaar.

Resident as per the said Act means an individual who has resided in India for a period or periods amounting in all to one hundred and eighty-two days or more in the twelve months immediately preceding the date of application for enrolment. Accordingly, the requirement to quote Aadhaar as per section 139AA of the Income-tax Act shall not apply to an individual who is not a resident as per the Aadhaar Act, 2016.

Press release dated 5th April, 2017

Index

COMPANY LAW

Amendment in Schedule III to the Companies Act, 2013

The Central Government has made an amendment in schedule III, in division I, in Part I under the heading "General Instructions for Preparation of Balance Sheet" and in Division II, in Part I under the heading "General Instructions for Preparation of Balance Sheet"

Pursuant to such an amendment, every company shall disclose the details of Specified Bank Notes (SBN) held and transacted during the period from 8th November, 2016 to 31st December 2016 in the following format,

	SBN's	Other denomination notes	Total
Closing cash in Hand as on 08.11.2016			
+ Permitted receipts			
-Permitted payments			
-Amount deposited in banks			
Closing cash in hand as on 30.12.2016			

This shall come into effect from the date of publication in the official Gazette.

Notification dated 30th March, 2017

Online generation of challans for offline payments to Investors Education and Protection Fund

As per the pre-requisites for filing IEPF 1, the Companies are required to transfer the amounts to IEPF through challans generated on MCA 21 portal. However there were companies which had transferred the amount to IEPF prior to 15.12.2016 through challans not generated on MCA portal and thus these companies were not able to file IEPF 1.

These companies can now file e-form IEPF-1 by submitting the details prescribed to the IEPF Authority upto 20th May, 2017.

The data shall be processed by the IEPF Authority and a front office service shall be made available on IEPF Website from 5th June, 2017 for a period of 30 days to enable companies to submit the data online.

Circular no 02/2017 dated 20th April, 2017

Index

SUMMARY OF IMPORTANT TAX JUDGEMENTS:

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

Sr. No	Tribunal/Court	Section/ Area	Nature	Case Law
1.	Kolkata Tribunal	Section 14A, Rule 8D	A disallowance u/s 14A & Rule 8D has to be made even in respect of securities that are held as stock-in-trade by the assessee. However, the disallowance has to be computed by taking into consideration only those shares which have yielded dividend income in the year under consideration	Kalyani Barter (P) Ltd vs. ITO
2.	Supreme Court	Section 35D	Premium collected by a company on subscribed share capital is not "capital employed in the business of the Company" within the meaning of s. 35D so as to enable the claim of deduction of the said amount as prescribed u/s 35D	Berger Paints India Ltd vs. CIT
3.	Supreme Court	Section 45, Section 48	An amount received from a wholly-owned subsidiary in consideration of transfer of shares of the WOS to a group of shareholders is not taxable as capital gains. The Department cannot subject a transaction under the Gift-tax Act and also levy tax under the Income-tax Act.	CIT vs. Annamalaiar Mills
4.	Supreme Court	Section 147, Section 148	If the AO disagrees with the information/ objection of the audit party and is not personally satisfied that income has escaped assessment but still reopens the assessment on the direction issued by the audit party, the reassessment proceedings are without	Larsen & Toubro Ltd vs. State of Jharkhand

			jurisdiction	
5.	AP&T Tribunal	Section 147, Section 148	Though Explanation 2 of s. 147 authorizes the AO to reopen an assessment wherever there is an "understatement of income", the AO is not entitled to assume that there is "understatement of income" merely because the assessee's income is "shockingly low" and others in the same line of business are returning a higher income. The invocation of the jurisdiction u/s 147 on the basis of suspicions and presumptions cannot be sustained	Rajendra Goud Chepur vs. ITO

Index

Discussion on Judgments – Income Tax

1. A disallowance u/s 14A & Rule 8D has to be made even in respect of securities that are held as stock-in-trade by the assessee. However, the disallowance has to be computed by taking into consideration only those shares which have yielded dividend income in the year under consideration

The assessee-company was engaged in the business of trading in shares and securities. The Assessing Officer while completing assessment under section 143(3) noted that assessee had earned certain dividend income which was offered to tax under the head 'business income' in its computation of income. The assessee did not claim any exemption on such income under section 10(34).

The AO was of the view that assessee should have claimed exemption on such income and accordingly should have disallowed the expenses in pursuance to the provisions of section 14A. He thus invoked the provisions of rule 8D, read with section 14A for the purpose of disallowance.

The Commissioner (Appeals) deleted the disallowance made by the Assessing Officer under the provisions of rules 8D (2)(ii) and (iii) by holding that the assessee was engaged in the business of shares trading and the shares were classified as stock-in-trade in its books of account.

On an appeal made to the Tribunal it held that:

- The assessee is into the business of trading in shares and all the shares have been classified as stock-in-trade. All the expenses either directly or indirectly have been incurred for the business of the assessee. The dividend income earned by the assessee is an incidental income of the assessee. The main income of the assessee is from trading in shares which has already been offered to tax. Apart from this the assessee has earned dividend income which is exempt u/s 10(34) of the Act.
- However on this aspect the provisions of the Act are clear which state that the expenses

incurred by the assessee in relation to exempted income will be disallowed from the income of taxable activities. In the case on hand there is no dispute that the assessee has earned dividend income and hence the expenses relating to such income shall be disallowed.

- However assessee has not disallowed any expenses on the ground that they have not claimed any exemption u/s 10(34) rather has offered such income to tax.
- The contention of the assessee cannot be accepted on the ground that the revenue is not authorized to collect the tax on those activities which are not chargeable to tax in spite of the fact that the assessee has offered the same to tax.
- In the case on hand the controversy whether the disallowance to be made u/s 14A of the Act in relation to those shares which are held as stock in trade has been settled by the Calcutta High Court in the case of Dhanuka & Sons v. CIT. In the aforesaid judgement it has been clarified that provisions of section 14A are very much attracted on shares held as stock in trade.
- However the assessee has raised an alternative contention that even if section 14A read with Rule 8D is held to be applicable in its case, the AO may be directed to compute the disallowance as per Rule 8D by taking into consideration only those shares which have yielded dividend income in the year under consideration. The alternative contention of assessee is accordingly accepted.

Thus in view of above the revenue's appeal was partly allowed.

---

2. Premium collected by a company on subscribed share capital is not "capital employed in the business of the Company" within the meaning of s. 35D so as to enable the claim of deduction of the said amount as prescribed u/s 35D

The assessee was engaged in the business of manufacture and sale of various kinds of paints. It had claimed a deduction u/s 35D under the head 'preliminary expenses' being 2.5% of the

'capital employed in the business of the company'.

The assessing officer issued a notice u/s 143(2), calling for explanation as to on what basis it has claimed this deduction. The assessee claimed that it had issued shares at a premium which according to it was a part of capital employed in business.

The AO was not satisfied with this explanation given by the assessee being of the view that 'capital employed in the business of the company' does not include 'premium' received by the company on share capital.

The Tribunal also held that the premium collected by the assessee-company on the share capital did not tantamount to 'capital employed in the business of the company' within the meaning of section 35D (3).

The High Court also upheld the order of the Tribunal.

On an appeal made to the Supreme Court it held that:

- The expression 'capital employed in the business of the company' is defined in the Explanation appended in clause (b) to section 35D (3).
- The 'premium amount' collected by the company on its subscribed share capital is not and cannot be said to be the part of 'capital employed in the business of the company' for the purpose of section 35D(3)(b). This is because of more than one reason. First, if the intention of the Legislature was to treat the amount of premium as capital employed in business then it would have been specifically said so in the explanation (b) of section 35D(3).
- Secondly non- mentioning of the words does indicate the legislative intent that the Legislature did not intent to extend the benefit of deduction to such sum.
- Also as rightly pointed out by the revenue, the Companies Act provides in its Schedule V - Part II (Section 159) a Form of Annual Return, which is required to be furnished by the company having share capital every year. Column III of this Form, which deals with capital structure of the company, provides the breakup of 'issued shares capital break up'. This column does not include in it the 'premium amount collected by the

company from its shareholders on its issued share capital'. This is indicative of the fact that such amount is not considered a part of the capital unless it is specifically provided in the relevant section.

- Section 78 of the Companies Act which deals with the 'issue of shares at premium and discount' requires a company to transfer the amount so collected as premium from the shareholders and keep the same in a separate account called 'securities premium account.' It does not anywhere say that such amount be treated as part of capital of the company employed in the business for one or other purpose, as the case may be, even under the Companies Act.

Thus in view of above the Supreme Court dismissed the appeal of the assessee.

---

3. An amount received from a wholly-owned subsidiary in consideration of transfer of shares of the WOS to a group of shareholders is not taxable as capital gains. The Department cannot subject a transaction under the Gift-tax Act and also levy tax under the Income-tax Act.

M/s Annamalaiar Mills (P) Ltd. was a holding company of M/s Annamalaiar Textiles (P) Ltd. 100% shares of M/s Annamalaiar Textiles (P) Ltd. were held by the M/s Annamalair Mills. In the assessee company, there were two groups of shareholders, the majority shareholder called Group A was having 61.26 per cent shares whereas the minority shareholders called Group B were holding 38.74 per cent shares.

An agreement was entered into between the two groups on 24.06.1985 by which Group A came to hold all the shares in the holding company i.e. the assessee company and Group B was given 100 per cent shares in the subsidiary company i.e. M/s Annamalaiar Textiles (P) Ltd. However, M/s Annamalaiar Textiles (P) Ltd also paid a sum of Rs.42.45 2 lakhs to the assessee.

The assessing officer treated the amount of Rs.42.45 lakhs paid by the M/s Annamalaiar Textiles (P) Ltd. to the assessee company as capital gain on the

ground that since both the companies are now 100 per cent owned by Group A or Group B, as the case may be, payment of Rs.42.45 lakhs was to off set valuation of the shares of M/s Annamalaiar Textiles (P) Ltd.

The Tribunal in an appeal made by the assessee company, accepted the pleas put forth by the assessee herein, set aside the assessment and restored the matter to the Income Tax Officer so that the assessee may approach the Central Board of Direct Taxes. The Income Tax Officer was further directed to finalise the assessment in accordance with the directions that may be given by the CBDT.

The matter was taken up before the High Court of Madras and the order of the Tribunal was upheld by the Madras High Court.

The High Court held that:

- It is not in dispute that M/s Annamalaiar Textiles (P) Ltd. did not pay any amount to the shareholders who ultimately got the shares transferred in their names. The assessee was holding 100 per cent shares of M/s Annamalaiar Textiles (P) Ltd., before it was transferred to Group B. No payment was made to the shareholders belonging to Group B and, therefore, the question of there being any capital gains at the hands of the respondent herein does not arise.
- The transaction of payment of Rs.42.45 lakhs had been subjected under the Gift Tax Act and the Department cannot claim both under the Gift Tax Act and also levy tax under the Income Tax Act.

Thus in view of above the High Court set aside the view of the Assessing officer.

---

4. If the AO disagrees with the information/ objection of the audit party and is not personally satisfied that income has escaped assessment but still reopens the assessment on the direction issued by the audit party, the reassessment proceedings are without jurisdiction.

The appellant-company, was involved in manufacturing, trading, leasing and construction business throughout the country. At the relevant time, the company was involved in the execution of civil work contracts for its client, TISCO and had been filing its returns under and also under the Central Sales Tax Act, 1956.

For the Assessment year 1991-92, the Company filed returns. However, the assessment proceedings in relation to the above period, was completed in the year 1996 and an assessment order was passed by the assessing authority.

The said assessment order was audited by an audit team of the Auditor General, Bihar and found that the dealer was allowed exemption of Rs. 3.12 Crores being the amount of goods consumed by the dealer company during the course of execution of works contract. The company claimed that such goods were purchased on payment of tax but no declaration in Form IX-C along with other evidence was submitted whereas the production or declaration of Form IX-C was mandatory. Hence, the claim was not allowable and this fact was conveyed to the assessing authority.

After giving an opportunity of hearing to the company, a reassessment order was passed by the Deputy Commissioner, Commercial Taxes, whereby an additional demand of Rs. 35 lakhs was created against the company.

Aggrieved with the reassessment order the Company preferred a writ petition before the High Court. A division bench of the High Court dismissed the petition while upholding the order passed by the Deputy Commissioner.

Aggrieved by the order, the Company had preferred instant appeal by way of special leave.

On this appeal being made it held that:

- The point arises for consideration is as to whether an 'audit objection' can be construed as 'information' within the meaning of section 19 based on which the Assessing Officer was satisfied that reasonable grounds exist to believe that any part of the turnover of the appellant-Company had escaped assessment under section 19.

- Sub-section (1) of section 19 very clearly prescribes that the competent authority if satisfied that reasonable ground exists to believe that any turnover of a registered dealer or a dealer to whom grant of registration certificate has been refused in respect of any period has, for any reason, escaped assessment or any turnover of any such dealer assessed under sub-section (5) of section 17 has been under-assessed or assessed at a rate lower than that which was correctly applicable, may, within

eight years from the date of order of assessment, proceed to assess or reassess the amount of tax in respect of such turnover.

- There are a lot of judgments holding that assessment proceedings can be reopened if the audit objection points out the factual information already available in the records and that it was overlooked or not taken into consideration. Similarly, if audit points out some information or facts available outside the record or any arithmetical mistake, assessment can be reopened.

- In the case of Anandji Haridas & Co. V S.P.Kasture it was held that a fact which was already there in records doesn't by its mere availability becomes an item of "information" till the time it has been brought to the notice of assessing authority. Hence, the audit objections were well within the parameters of being construed as 'information' for the purpose of section 19.

- From a perusal of the report of the audit party, it is clear that the Assessing Officer was of the opinion that as the goods had not been transferred to Company but had been consumed, so it does not come under the purview of taxation. In other words, the AO was not satisfied on the basis of information given by the audit party that any of the turnover of the appellant-Company had escaped assessment so as to invoke section 19. From the above, it also appears that the Assessing Officer had to issue notice on the ground of direction issued by the audit party and not on his personal satisfaction which is not permissible under law.

Thus in view of above the order passed by the Deputy Commissioner, as well as the order passed by the Division Bench of the High Court was set aside.

---

5. Though Explanation 2 of s. 147 authorizes the AO to reopen an assessment wherever there is an "understatement of income", the AO is not entitled to assume that there is "understatement of income" merely because the assessee's income is "shockingly low" and others in the same line of business are returning a higher income.

A notice u/s 148 was issued on the sole ground that the total income admitted by the assessee constituted a very small percentage of the gross receipts for the relevant assessment year and that therefore there was income that escaped assessment. The AO had drawn presumably a comparison to others in the same line of business, as indicated in the reason for reopening.

The reasons for reopening fell short of the reasons that could form the basis for reopening of assessments. There was no indication in the reasons as to who are the assessees with whom any comparison was made. The counsel for the assessee referred to various decisions of the Tribunal wherein the similar reopening of assessments made on the same line of reasons were upheld, wherever books of accounts were not maintained, estimating the income to be 5% of the gross receipts. But it appears that in those cases, the very rationale for reopening of assessment and the very jurisdiction of the Assessing Officer to reopen assessments on the basis of such flimsy reasons, was not considered.

On an appeal made to the Tribunal it held that:

- Under Section 147(1), the Assessing Officer is entitled to reopen assessment, if he has reason to believe that any income chargeable to tax has escaped assessment for the assessment year. Two conditions ought to be satisfied for the invocation of the power under Section 147. They are: (1) the existence of a reason to believe and (2) the escapement of any income chargeable to tax from assessment.
- The reason to believe on the part of the Assessing Officer, should arise out of concrete facts which could at least form the foundation for reopening. Without any concrete facts, reopening cannot be ordered merely on the presumption that the returned income is very shockingly lower than the total gross receipts. . Without even mentioning the comparables, no

initiation of proceedings under Section 147 can be made.

- In the order rejecting the objections, the Assessing Officer has relied upon Clause (b) under Explanation 2 to Section 147. Clause (b) under Explanation 2 to Section 147 deals with cases where a return of income has been furnished by the assessee but no assessment has been made and the Assessing Officer notices that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return. Admittedly, the case of assessee does not fall under the category of claiming excessive loss or deduction or allowance or relief in the return.

- It is not sufficient for the Assessing Officers to just arrive at the percentage of gross receipts that were declared as income, without even referring to other assesses whose admitted income was at a better percentage of the gross receipts than the assessee.

Thus in view of above the Tribunal allowed the writ petitions.

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

Index

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

May 2017

Sun	Mon	Tue	Wed	Thu	Fri	Sat
	1	2	3	4	5 Service Tax payment by Companies	6 Service Tax payment by Company(if paid electronically), Excise duty payment
7 Monthly TDS payment	8	9	10	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, Quarterly TDS certificate			

Back