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KALYAN-DOMBIVLI BRANCH OF WIRC OF ICAI

NEWSLETTER MAY 2019

First & foremost

Respected Members of the Branch,

I am sure that the first Newsletter of the Branch for the term has reached you either through mail or social media. The Newsletter was inaugurated at the Hands of MP Dr. Shrikant Shinde and Minister of State, Maharashtra Shri Ravindra Chavan on the auspicious occasion of GUDHI PADVA, which is first day of new year. Publishing Newsletter on monthly basis is one of the priority of the Branch. It provides us an opportunity to share with the Members about various initiatives of the Branch, activities conducted and to be conducted. Further the contributories to the Newsletter work hard to share important and recent updates on different topics with the members. This also enables members to keep themselves updated with the continuous changes happening on the front of various Laws and enactments.

This Newsletter brings to you articles comprising of Direct Taxes, Amendments in GST, International taxation. It also comprises glimpses of various programs conducted in the month of April 2019.

April 2019 was a month of Bank audits amongst other professional assignments. I am sure the members practicing in Bank audits had a great time and they all completed the respective audits well in time and in best possible manner. April was also the month of general elections of Lower house of Parliament. I am sure members of the Branch have voted in large numbers and participated in the biggest festival of democracy. May 2019 can be looked upon as the month to get much needed break and rejuvenate with our families. It also is a month to prepare for the 30th June 2019, being the due date of audit and annual return under GST.

Branch is committed to conduct quality and timely programs for the benefit of the members and students. With this moto we conducted a session on GST for real estate sector by CA Jayesh Gogri on 15th April 19, which was well received by 120 members. It was very useful for the members practicing in the real estate segment.

Branch also conducted Mock test for IPC and Final students according to the BOS schedule. Branch also conducted special sessions for students appearing for the exams in May-June 2019 on topics which are very crucial, such as Customs, GST etc. response from the students to these programs was excellent.

Brand building and PR are very important aspects of the functioning of the Branch. Branch participated in the GUDHI PADVA yatra organized at Dombivli and Kalyan and spread the awareness about the activities of the branch to the public at large and various dignitaries participating in the procession.

Continued...

In coming month Branch will organize a full day program on GST audit and annual return. Members are requested to stay tuned for the same. Also Branch is proposing a batch of DISA at Kalyan. The batch will be hosted on ICAI portal soon, members are requested to take benefit of the same and register soon. Branch is also coming up with creative but very important sessions for the members in coming days.

Branch is soon starting the Orientation Batch at Ulhasnagar. This will benefit the students of the Ulhasnagar, Ambernath, Badlapur to complete the Orientation Program at their doorstep.

Students of the Branch will appear for the CA Exams in the month of May 2019. Due to Loksabha elections the exams were rescheduled from 27th May 19. I wish each and every student of the Branch appearing for the exams, best of the luck. Every students takes a lot of efforst for preparation for the exams. Now its the time to take a step further and give your best effort in the exams. At the same time its also very important to stay relaxed and also keep yourselves mentally and physically fit for the exams. I am sure in this exam also the students of the Branch will shine brightly as we will keep the trend of high number of chartered accountants qualifying in this attempt.

Branch has formulated various sub committees. These sub committees are aimed at strengthening the branch working. I sincerely request those members who are interested in contributing to the Branch in any manner such as paper assessors, contributions to Newsletter, contributing to the exposure drafts, updates on direct and indirect taxes etc to contact the managing committee members soon. I also request the members to share their recent accolades and achievements to the Branch, so that the same can be shared with members at large.

It gives me great pleasure to share with you that the membership of the Branch has crossed 3700 as on date, which makes our Branch one of the largest branches of the ICAI.

I wish each one of you a happy times ahead.
With Best Regards,

CA Saurabh S. Marathe

Chairman

Kalyan Dombivli Branch of WIRC of ICAI

Circular No. 97/16/2019-GST dated 05/04/2019

CBIC clarifies on 3% GST Rate option under notification No. 2/2019 -CT(R):-

(i) a registered person who wants to opt for payment of central tax @ 3% by availing the benefit of the said notification, may do so by filing intimation in the manner specified in sub-rule 3 of rule 3 of the said rules in **FORM GST CMP-02** by selecting the category of registered person as "Any other supplier eligible for composition levy" as listed at Sl. No. 5(iii) of the said form, latest by 30th April, 2019. Such person shall also furnish a statement in **FORM GST ITC-03** in accordance with the provisions of sub-rule (3) of rule 3 of the said rules.

(ii) Any person who applies for registration and who wants to opt for composition scheme by availing the benefit of the notification no. 02/2019-CT(R) dated 7th March, 2019, if eligible, may do so by indicating the option at serial no. 5 and 6.1(iii) of FORM GST REG-01 at the time of filing of application for registration.

(iii) the option of payment of tax by availing the benefit of the said notification in respect of any place of business in any State or Union territory shall be deemed to be applicable in respect of all other places of business registered on the same Permanent Account Number.

(iv) the option to pay tax by availing the benefit of the said notification would be effective from the beginning of the financial year or from the date of registration in cases where new registration has been obtained during the financial year.

Notification No. 20/2019–Central Tax [G.S.R. 321(E)] dated 23/04/2019

Central Goods and Services Tax (Third Amendment) Rules, 2019

In exercise of the powers conferred by section 164 of the **Central Goods and Services Tax Act, 2017** (12 of 2017), the Central Government hereby makes the following rules further to amend the :- **Central Goods and Services Tax Rules, 2017**, namely

1. (1) These rules may be called the **Central Goods and Services Tax (Third Amendment) Rules, 2019**.
(2) They shall come into force on the date of their publication in the Official Gazette.
2. In the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the said rules), in rule 23, in sub-rule (1), after the first proviso, the following provisos shall be inserted, namely:-
"Provided further that all returns due for the period from the date of the order of cancellation of registration till the date of the order of revocation of cancellation of registration shall be furnished by the said person within a period of thirty days from the date of order of revocation of cancellation of registration:
Provided also that where the registration has been cancelled with retrospective effect, the registered person shall furnish all returns relating to period from the effective date of cancellation of registration till the date of order of revocation of cancellation of registration within a period of thirty days from the date of order of revocation of cancellation of registration."

Notification No. 21/2019–Central Tax [G.S.R. 322(E)] dated 23/04/2019

Tax payment & GST Return Filing by 6% Composition Scheme dealers
Seeks to notify procedure for quarterly tax payment and annual filing of return for taxpayers availing the benefit of Notification No. 02/2019– Central Tax (Rate), dated the 7th March, 2019 i.e. for dealers who opted 6% Composition Scheme vide **Notification No. 21/2019 – Central Tax Dated 23rd April, 2019.**
From the FY-2019-2020 and onward all taxpayers under composition scheme (Traders, Manufacturers, Restaurant Owners, Service Providers etc) need to file two GST returns as below:-

GST Return	Frequency	Due date	Late Fees
CMP-8-Payment of self assessed tax	Quarterly	Within 18th of next month ending the quarter	Rs.20.00 per day (10+10) for Nil return Rs.50.00 per day (25+25) for taxable
GSTR-4	Annually	Within 30 April after ending the FY	

Notification No. 22/2019–Central Tax [G.S.R. 323(E)] dated 23/04/2019.

Restriction on furnishing of info in PART A of GST EWB-01 WEF 21.06.2019

Seeks to notify the provisions of rule 138E of the CGST Rules w.e.f 21st June, 2019 vide Notification No. 22/2019 – Central Tax Dated 23rd April, 2019. Rule 138E prescribes Restriction on furnishing of information in PART A of FORM GST EWB-01 in certain circumstances.

Circular No. 98/17/2019-GST dated 23/04/2019

CBIC clarifies manner of utilization of GST input tax credit

Section 49 was amended and Section 49A and Section 49B were inserted vide Central Goods and Services Tax (Amendment) Act, 2018 [hereinafter referred to as the CGST (Amendment) Act]. The amended provisions came into effect from 1st February 2019.

1. The newly inserted Section 49A of the CGST Act provides that the input tax credit of Integrated tax has to be utilized completely before input tax credit of Central tax / State tax can be utilized for discharge of any tax liability. Further, as per the provisions of section 49 of the then Central tax and then State tax in that order mandatorily. This led to a situation, in certain cases, where a taxpayer has to discharge his tax liability on account of one type of tax (say State tax) through electronic cash ledger, while the input tax credit on account of other type of tax (say Central tax) remains un-utilized in electronic credit ledger.

2. The newly inserted rule 88A in the CGST Rules allows utilization of input tax credit of Integrated tax towards the payment of Central tax and State tax, or as the case may be, Union territory tax, in any order subject to the condition that the entire input tax credit on account of Integrated tax is completely exhausted first before the input tax credit on account of Central tax or State / Union territory tax can be utilized. It is clarified that after the insertion of the said rule, the order of utilization of input tax credit will be as per the order given Below.

Input tax Credit on account of	Output liability on account of Integrated tax	Output liability on account of Central tax	Output liability on account of State tax / Union Territory tax
Integrated tax	(I)	(II) – In any order and in any proportion	
(III) Input tax Credit on account of Integrated tax to be completely exhausted mandatorily			
Central tax	(V)	(IV)	Not permitted
State tax / Union Territory tax	(VII)	Not permitted	(VI)

The following illustration would further amplify the impact of newly inserted rule 88A of the CGST Rules:

Illustration:

Amount of Input tax Credit available and output liability under different tax heads Head.

Head	Output Liability	Input tax Credit
Integrated tax	**1000**	1300
Central tax	300	200
State tax / Union Territory tax	300	200
Total	**1600**	**1700**

Option 1:

Input tax Credit on account of	Discharge of output liability on account of Integrated tax	Discharge of output liability on account of Central tax	Discharge of output liability on account of State tax / Union Territory tax	Balance of Input Tax Credit
Integrated tax	1000	200	100	0
Input tax Credit on account of Integrated tax has been completely exhausted				
Central tax	0	100	-	100
State tax / Union territory tax	0	-	200	0
Total	1000	300	300	100

Option 2:

Input tax Credit on account of	Discharge of output liability on account of Integrated tax	Discharge of output liability on account of Central tax	Discharge of output liability on account of State tax / Union Territory tax	Balance of Input Tax Credit
Integrated tax	1000	100	200	0
Input tax Credit on account of Integrated tax has been completely exhausted				
Central tax	0	200	-	0
State tax / Union territory tax	0	-	100	100
Total	1000	300	300	100

Presently, the common portal supports the order of utilization of input tax credit in accordance with the provisions before implementation of the provisions of the CGST (Amendment) Act i.e. pre-insertion of Section 49A and Section 49B of the CGST Act. Therefore, till the new order of utilization as per newly inserted Rule 88A of the CGST Rules is implemented on the common portal, taxpayers may continue to utilize their input tax credit as per the functionality available on the common portal.

Circular No. 99/18/2019-GST dated 23/04/2019

Opportunity to apply for revocation of cancellation of GST registration

Seeks to clarify the extension in time under sub-section (1) of section 30 of the Act to provide a one time opportunity to apply for revocation of cancellation of GST registration on or before the 22nd July, 2019 for the specified class of persons for whom cancellation order has been passed up to 31st March, 2019.

Return not furnished from	Date of order of cancellation of registration	Cancellation of registration effective from	Date of filing of application for revocation of cancellation of registration as per RoD (to be filed on or before the 22nd July, 2019)	Returns to be furnished before filing the application for revocation of cancellation of registration	Date of order of revocation of cancellation of registration	Date of furnishing returns for period b/w date of order of cancellation of registration and date of revocation of cancellation of registration (to be filed within thirty days from the date of order of revocation of cancellation of registration)	Returns to be furnished within thirty days from date of order of revocation of cancellation of registration
July, 18	01st March, 19	01st March, 19	30th May, 19	**Returns due till 01st March, 19** (i.e. July, 18 to January, 19)	01st June, 19	01st July, 19	**Returns due till 01st June, 19** (i.e. February, 19 to April, 19)
July, 18	22nd March, 19	22nd March, 19	20th June, 19	**Returns due till 22nd March, 19** (i.e. July, 18 to February, 19)	22nd June,19	22nd July, 19	**Returns due till 21st June, 19** (i.e. March, 19 to May, 19)
July, 18	01st March, 19	01st July, 18	30th May, 19	**NA**	01st June,19	01st July, 19	**Returns due till 01st June, 19** (i.e. July, 18 to April, 19)

Circular No. 101/20/2019-GST dated 30/04/2019

GST exemption on upfront amount payable in instalments for long term lease of plots

GST exemption on the upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease (of thirty years, or more) of industrial plots or plots for development of infrastructure for financial business under Entry No. 41 of Exemption **Notification 12/2017 – Central Tax (R) dated 28.06.2017** is admissible irrespective of whether such upfront amount is payable or paid in one or more instalments, provided the amount is determined upfront.

Supreme Court

PCIT Vs Chain House International Pvt Ltd - Date of Publication 9th April 2019 (Section 68)

No reason to interfere. SLP dismissed. High Court held there is no limitation on the amount of premium that can be charged. The AO cannot question the transaction merely because he thinks the investor could have managed by paying a lesser amount as share premium. It is the prerogative of the Board of Directors to decide the premium and it is the wisdom of the shareholder whether they want to subscribe to shares at such a premium or not. Section 68 does not apply as the funds were received through banking channels and the identity, creditworthiness and genuineness of the investors was established.

PCIT VS Oil Industry Development Board - Date of Publication 6th April 2019 (Section 14A, Rule 8D)

In the absence of any exempt income, disallowance u/s 14A & Rule 8D of the Act of any amount is not permissible (Essar Teleholdings 401 ITR 445 (SC) followed, Cheminvest 378 ITR 33 (Del) approved)

Bombay High Court

The Chamber of Tax Consultants Vs CBDT

Writ Petition 3343 of 2018 - Date of Publication 23rd April 2019 (Section 119/250)

Final Order

The CBDT is empowered to lay down broad guidelines for disposal of appeals by CsIT(A). However, it cannot offer 'incentives' to CsIT(A) for making enhancement and levying penalty. Such policy transgresses the exercise of quasi-judicial powers & is wholly impermissible and invalid u/s 119. The 'Incentives' have the propensity to influence the CsIT(A) and they will be tempted to pass an order in a particular manner so as to achieve a greater target of disposal

All these contingencies necessarily point to circumstances where the order passed by the Commissioner (Appeals) is in favour of the revenue. For example this policy refers to the enhancement made by the Commissioner or a case where the Commissioner has levied penalty under section 271(1) of the Act. This necessarily refers to enlargement of the assessee's liability before the Commissioner as compared to what may have been determined by the Assessing Officer. In our opinion, such policy is wholly impermissible and invalid. Any directives by the CBDT which gives additional incentive for an order that the Commissioner (Appeals) may pass having regard to its implication, necessarily transgresses in the Commissioner's exercise of discretionary quasi judicial powers.

PCIT VS Mohamad Haji Adam

Appeal No 1004 of 2016 - Date of Publication 23rd April 2019, Sections 68,69

Bogus Purchases: Even if the purchases are bogus, the entire purchase amount cannot be added. As the department had not disputed the assessee's sales & there was no discrepancy between the purchases and the sales, the purchases cannot be rejected without disturbing the sales in case of a trader. The addition has to be restricted to the extent of the G.P. rate on purchases at the same rate of other genuine purchases (N.K .Industries 292 CTR 354 (Guj), N. K. Proteins 250 TM 22 (SC) distinguished)

In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases.

DCIT vs Rajbhushan Omprakash Dixit

Writ Petition No 3546 of 2018 - Date of Publication 20th April 2019 (Sections 147, 148)

The fact that the assessee did not disclose the material is not relevant if the AO was otherwise aware of it. If the AO had the information during the assessment proceeding, irrespective of the source, but chooses not to utilize it, he cannot allege that the assessee failed to disclose truly and fully all material facts & reopen the assessment

Undisputed fact is that all the necessary documents were before the Assessing Officer when the original scrutiny under assessment under Section 153A read with 143(3) was made. It was in this background that the Assessee had, in his objections, asserted that the documents relied upon in the reasons were very much available with the Assessing Officer earlier. It was in the context of these objections that the Assessing Officer, while disposing of the objections, as noted above, had remarked that he had not formed any opinion on such documents in the assessment order. The stand taken by the Assessing Officer may save him from the allegation of change of opinion, however, in the present case when we are examining the validity of the notice of reopening issued beyond the period of four years from the end of relevant assessment year, the question of lack of true and full disclosure by the Assessee would become relevant. In this context, once the Department i.e. the Assessing Officer had certain information, material, or document before him during the assessment proceeding, irrespective of the source of such information, material, or document, the Assessee cannot be blamed for non disclosure thereof.

ACIT vs Rupa Shyamsunder Dhumatkar

Writ Petition No 404 of 2019 - Date of Publication 20thApril 2019 (Sections 148)

As per settled law, notice for reopening of assessment against a dead person is invalid. The fact that the AO was not informed of the death before issue of notice is irrelevant. Consequently, section 148 notice is set aside and order of assessment stands annulled (Alamelu Veerappan 257 TM 72 (Mad) followed)

There are several judgments of different High Courts holding that the notice or reopening of assessment is invalid in law. It is not necessary to refer to all the judgments on the point. Suffice it to say, as per the settled law, notice for reopening of assessment against a dead person is invalid.

ITO vs Jagdish C Dhabalia

Appeal No 981 of 2016 - Date of Publication 13thApril 2019 (Sections 50 C , 54 EC)

The assessee cannot avoid the impact of s. 50C by claiming that his section.54EC investment is large enough to cover the deemed consideration based on stamp duty valuation. Such interpretation renders s. 50C redundant.

The Assessee received a sum of Rs 25 Lacs towards Sale Consideration for the sale of plot . He invested the entire capital gains in Rural Electrification Bonds. However, the stamp duty valuation for the same came to Rs 76 Lacs. The Assessee contended that since the entire sale consideration of Rs.25 lakhs was invested in the specified bond, the assessee must get full exemption from capital gain, irrespective of the computation of the deemed sale consideration under section 50C of the Act. The deeming fiction under section 50C of the Act, must be given its full effect and the Court should not allow to boggle the mind while giving full effect to such fiction. We are not opposing the proposition canvassed by the Counsel of the Assessee that deeming fiction must be applied in relation to the situation for which it is created. However, while giving full effect to the deeming fiction contained under section 50C of the Act for the purpose of computation of the capital gain under section 48, for which section 50C is specifically enacted, the automatic fallout thereof would be that the computation of the assessee's capital gain and consequently the computation of exemption under section 54EC, shall have to be worked out on the basis of substituted deemed sale consideration of transfer of capital asset in terms of section 50C of the Act.

PCIT Vs Electroplast Engineers

Date of Publication 3rdApril 2019 (Section 45(4))

If new partners come into the partnership and bring cash by way of capital contribution and the retiring partners take cash and retire, the retiring partners are not relinquishing their interest in the immovable property. What they relinquish is their share in the partnership. As there is no transfer of a capital asset, no capital gains or profit can arise & s. 45(4) has no application (A. N. Naik 265 ITR 346 (Bom) distinguished, Dynamic Enterprises 359 ITR 83 (Karn) followed)

The property belongs to the partnership firm. It did not belong to the partners. The partners only had a share in the partnership asset. When the five partners came into the partnership and brought cash by way of capital contribution to the extent of their contribution, they were entitled to the proportionate share in the interest in the partnership firm. When the retiring partners took cash and retired, they were not relinquishing their interest in the immovable property. What they relinquished is their share in the partnership. Therefore, there is no transfer of a capital asset, as such, no capital gains or profit arises in the facts of this case. In that view of the matter, Section 45(4) has no application to the facts of this case.

Residence under the Act as well as DTAA – Selected issues

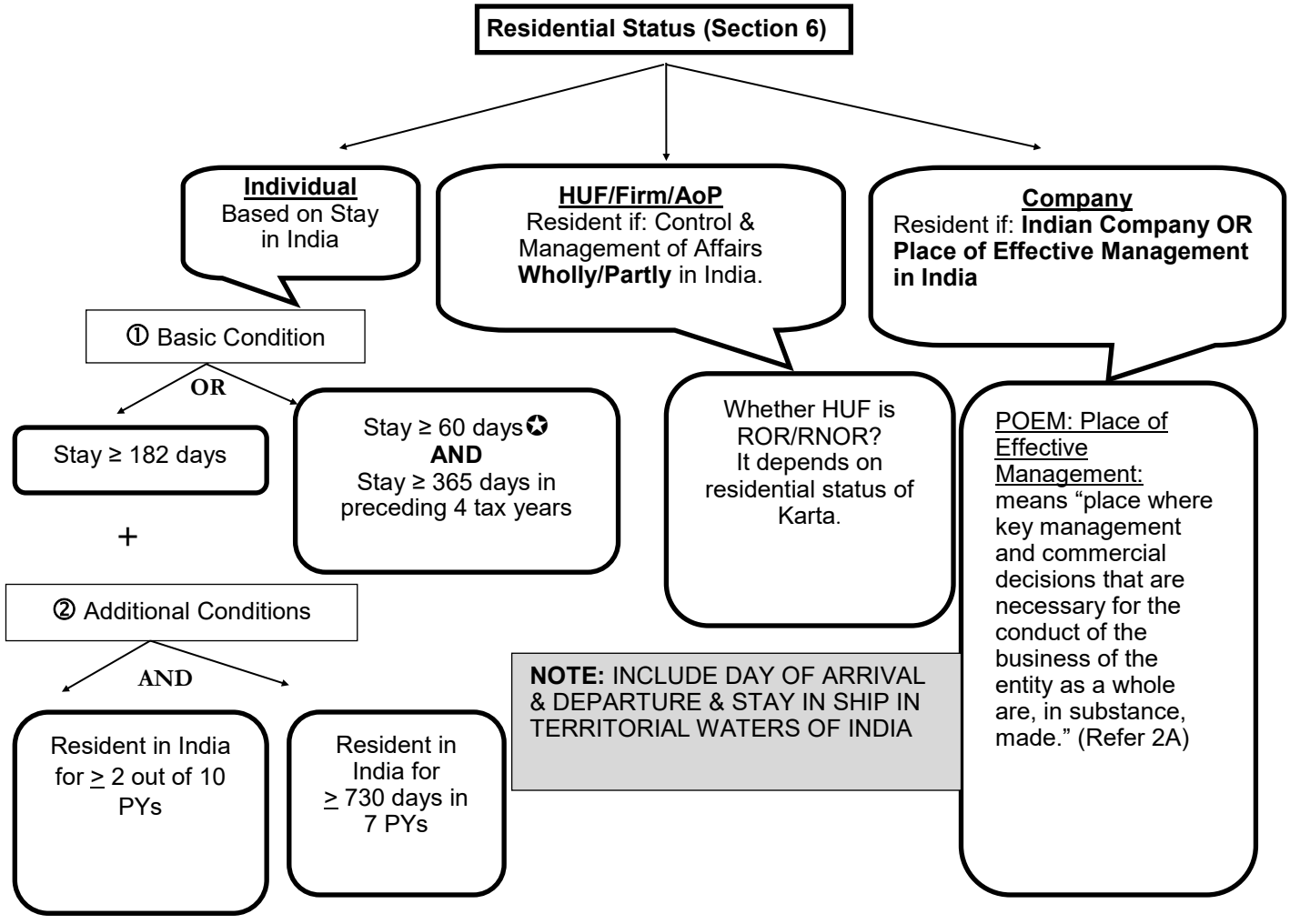
The concept of residence assumes importance under the Income-tax Act ('the Act') as well as Double Taxation Avoidance Agreement ('DTAA'). Under the Act, the scope of income chargeable to tax u/s 5 depends upon the residential status.

1. Residence under the Act

The scope of total income u/s 5 depends upon the residential status. In order to decide, the chargeability of the income under the Act, the residential status needs to be determined first.

Scope of total income

Particulars	ROR	R & NOR	NR
1. Income received or deemed to be received in India	Taxable Section 5(1)(a)	Taxable Section 5(1)(a)	Taxable Section 5(2)(a)
2. Income accruing or arising or deemed to accrue or arise in India	Taxable Section 5(1)(b)	Taxable Section 5(1)(b)	Taxable Section 5(2)(b)
3. Income accruing or arising outside India from—			
(a) Business controlled in India or Profession set up in India	Taxable Section 5(1)(c)	Taxable Section 5(1)(c)	Not taxable
(b) Any other source	Taxable Section 5(1)(c)	Not taxable Proviso. to Section 5(1)	Not taxable



✪**Exceptions: Replace 60 days with 182 days:**

a) Indian citizen leaving India in the previous year, as a **MEMBER OF A CREW OF AN INDIAN SHIP** or for the purpose of employment outside India.

b) Indian citizen or Person of Indian Origin engaged in employment/B&P/Vocation outside India comes on visit to India.

CONDITIONS	RESIDENT & ORDINARY RESIDENT (ROR)	RESIDENT BUT NOT ORDINARY RESIDENT (RNOR)	NON-RESIDENT(NR)
Basic Conditions	Yes	Yes	No
Additional Conditions	Yes	No	No

The detailed discussion on the various issues surrounding the residence under the Act and the concept of POEM would be dealt in the subsequent articles.

2. Residence under DTAA

2.1 The concept of residence assumes importance under the DTAA for the following reasons:

a) To determine the applicability of the treaty

Article 1 provides that Convention shall apply to **persons** who are **residents of one or both** of the Contracting States. Therefore, in order to be eligible to claim treaty benefit 2 conditions needs to be fulfilled:

i) One should be qualified as person as per Article 3 and
ii) The person should be liable to tax by virtue of it being resident of the Contracting State as per Article 4.

b) To determine in which jurisdiction the residency lies in case of dual residency/ prevent double taxation arising out of dual residency

Elucidating through an example say, an individual is a green card holder of US and thus, by virtue of that becomes US Resident and he comes down to India for some professional work for more than 182 days. Therefore, he becomes resident in India as well. Therefore, US as well as India would tax that individual on the global income. To resolve this deadlock, Article 4(2) provides tie-breaker rules to determine which country can be considered as ultimate resident country.

The text of OECD/UN Model Convention is covered as under:

2.2 Article 4(1)

OECD Model Convention	UN Model Convention
For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.	For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of incorporation, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

2.3 The term resident under DTAA is defined as:

- Person
- Who is liable to tax
- By reason of his domicile, residence, place of management or any other criterion of a similar nature
- Includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State.
- Does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

2.4 The term person is defined under Article 3 of DTAA to include an individual, an estate, a trust, a partnership, a company, any other body of persons, or other taxable entity.

2.5 If we notice, while defining the term 'resident' under Article 4, the term 'residence' is used.

*"For the purposes of this Convention, the term "**resident of a Contracting State**" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, **residence**, place of management…"*

So the first term 'resident of contracting state' is meant for the purpose of DTAA i.e. who qualifies as resident as per DTAA. The second term 'residence' means resident as per domestic tax law of the Contracting State. Therefore, DTAA provides that resident as per DTAA would mean a person who is liable to tax as a resident under the domestic law of any or both of the Contracting States. Therefore, the residency is to be determined by the domestic tax law which could be based on number of days of stay or by the citizenship, place of management, place of incorporation or any other similar criteria.

2.6 Liable to tax

Generally, under the domestic tax law, global income of the residents is liable to taxation i.e. to say that 'full tax liability' is imposed on the residents based on the taxpayers' personal attachment to the state of Residence. Paragraph 1 refers to persons 'liable to tax' in a contracting state by reason of their global income being taxable since they are resident of that state.

However, there are certain issues which needs to be addressed as to when do we say that person is 'liable to tax'. Does it mean he should be paying taxes in the country?

- What if the person is taxable, but his income is exempt?/ What if the person is taxable, but due to losses, he is not paying taxes?
- What if the entity is exempt entity in that country?
- What if the profits of the entity are taxable in the hands of the partners/beneficiaries?

These issues have been a matter of debate in the Indian Courts and Authority for Advance Ruling. These issues would be dealt in the ensuing article.

What if the person is taxable, but his income is exempt?/ What if the person is taxable, but due to losses, he is not paying taxes?

Consider two illustrations: (i) An Indian resident (present in India for more than 182 days) has income below Rs. 2,00,000. (ii) Another Indian resident as per ITA has income of Rs. 5,00,000. However, entire income is from agricultural activities and hence exempt under section 10 of the ITA. Both are Residents under the ITA. However, under the DTA, will they be treated as Residents of India? They are not liable to pay any tax in India. Assume that they have some foreign income, will they get the benefit of DTA between India & the COS? Both these persons are liable to tax in India- if they had taxable income. The fact that - they do not have taxable income results into their 'Nil' liability to tax. There are two pillars of Income-tax: "Assessee" and "Income" and when both factors are covered within the ITA, there will be a tax liability. Therefore, if such a person has a foreign income, he should get the DTA benefit. The term 'liable to tax' is different from term 'subject to tax' and does not mean actual payment of tax. Therefore, if the income is below taxable limits, or if it is exempt from tax, it does not mean that the person is not resident of India. He is liable to tax if he has a taxable income.

What if the entity is exempt entity in that country?

In Dubai, the Government collects Income tax only from foreign banks & oil companies. The Income-tax decree is not applied to all other persons. Hence other residents of Dubai are not liable to tax in Dubai. However, they hold valid tax residency certificate of Dubai. Therefore, in that case, can it be said, that they are not residents as per DTAA and hence, not entitled to treaty relief.

There were many judgments for and against the assessee.

AAR in Cyril Pereira's elaborated on the issue of "liable to tax" in the matter of India-UAE DTA. The Authority held that there was no Income-tax Act in Dubai applicable to individuals. Only certain kinds of companies were paying taxes. Therefore as there was no double tax, there was no question of application of DTA. This principle has been followed in Abdul Razak Meman's Advance Ruling by holding that Article 4(1) postulates existence of the tax liability in praesenti by reason of domicile etc. on the date of making the claim. However, Mumbai ITAT in the case of Green Emirate Shipping and Travels held that the India – UAE DTA will apply by concluding that though Dubai Government was not imposing tax on its residents but it could do so in future. ITAT held that term 'liable to tax' could include potential liability to tax and held that the assessee was entitled to DTA relief.

Finally, to avoid all controversies India signed a protocol with UAE and provided for a different definition. Now, if an individual is physically present in the UAE for more than 182 days, he will be considered to be a resident of UAE irrespective of whether he is liable to any tax in the UAE or not. It also accepts the broad proposition that taxability in one of the Contracting States is not a sine qua non to avail treaty benefits in the other contracting state.

Further, SC in Azadi Bachao Andolan's case, held that if the Mauritian authority has issued a Tax Residency Certificate, the person is a resident of Mauritius, though the person may not be taxable in Mauritius.
As per Sec.90 a tax payer can claim a treaty benefit only if he provides a Tax Residency Certificate (TRC) of that country and Form 10F.

What if the profits of the entity are taxable in the hands of the partners/beneficiaries?

In India, the partnership firm are taxable on the profits and the partners are exempt. However, under laws of many countries, partnership firms are treated as fiscally transparent entity i.e. the profits of the firm are taxable in the hands of the partner.

Therefore, in that particular case, can it be said that entity is not liable to tax. If the treaty benefits are denied to the entity then the situation would arise is that tax is deducted on payments made to partnership firm (incorporated in UK) at higher rate than DTAA and in the resident country, since, the profits are taxable in the hands of the partner, tax credit of taxes paid in India would be denied since the tax was not as per DTAA and taxes were deducted in the name of the firm. Therefore, it result in unintended consequences.

Mumbai ITAT in Linklaters LLP case and recently Calcutta HC in P&O Nedloyld & Ors. allowed the treaty relied under India-UK DTAA to fiscally transparent firm. Mumbai ITAT in Linklaters LLP held that partnership firm is eligible to claim treaty benefits in source country if : i) its worldwide income is subjected to tax in the resident country, whether in the hands of the partnership firm (though the taxable income is determined on the personal characteristics of the partners) or directly in the hands of the partners, ii) Resident state has the right to tax the entire income of partnership firm irrespective of whether such right is exercised.

Further, the technical explanation with reference to the India-USA DTAA states that to the extent the partners of the US partnership are subject to tax in USA as US residents, the income received by such US partnership will be eligible for India-USA DTAA.

Further, issues on the fiscally transparent entity and residency would be covered in the ensuing articles.

Company Law Updates—By Newsletter Team

Extension for Last Date of Filing E-Form INC-22A

MCA vide its Notification dated February 21, 2019 amended Companies (Incorporation) Rules, 2014 whereby a new rule 25A was inserted namely Active Company Tagging Identities and Verification (ACTIVE).

As per newly inserted rule 25A to the Companies (Incorporation) Rules, 2014, companies incorporated on or before December 31, 2017 were required to file the particulars of the company and its registered office, in e Form INC-22A on or before 25th April, 2019. The said date has been extended to 15th June 2019 wide notification dated 25th April, 2019.

Extension for Last Date of Filing one time return in form DPT-3

Due to pendency of Deployment of Form DPT-3 on MCA 21 portal and in order to avoid inconvenience to stakeholders on account of various factors, MCA vide its Circular 05/2019 dated April 12, 2019 extended the last date of filling of one time return in form DPT-3 within 30 days from the date of Deployment of E-form DPT-3 on MCA portal. Similarly the data on deposits should be filed upto 31st March, 2019 as opposed to 22nd January, 2019 which was originally indicated in rule 16A(3). Further wide notification dated 30th April, 2019, rule 16A(3) was amended to file the form within 90 days from 31st March, 2019.

Extension for Last Date of Filing form CRA-2

The last date for filing form CRA-2 for intimation of appointment of cost auditor where the company has been mandated to get its cost records audited for the first time has been extended upto 31st May 2019 wide Circular 04/2019 dated 4th April, 2019.

Filing of Directors KYC

Wide rule 12A to Companies (Appointment and Qualification of Directors) Rules, 2014, every individual who has been allotted DIN as on 31st March of a financial year shall submit e-form DIR-3-KYC on or before 30th April of immediate next financial year. Rule 12A has been amended wide notification dated 30th April, 2019 to submit e-form on or before 30th June of immediate next financial year.

Manufacturing Activities in LLP

Manufacturing and allied activities were restricted in LLPs wide Office Memorandum dated 6th March, 2019. The same has been withdrawn with immediate effect on 17th April, 2019.

Gallery

Gudhi Padwa Swagat Yaatra

Gallery


Seminar on GST on Real Estate


Installation of Water Cooler at Bhiwandi Reading Room



Seminar on Customs for Final Students