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RAIPUR BRANCH OF CENTRAL INDIA REGIONAL COUNCIL OF ICAI

Newsletter

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Editorial Message

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Wishing all the Members A Very Happy New Year and A Significant Republic Day on behalf of our Entire Editorial Team..

And With a new change we are all set for Our Union Budget because After demonetization in November 2016, it is expected that the Budget will throw light on Government's thought process on how it intends to steer the economy forward.as it is going to be unique and historic as this year the Budget will be presented on February 1, apart from the preceding year's custom to be in last week of February.

BHARAT MATA KI JAI

With Regards,
CA DHAWAL SHAH

Article

BENAMI PROPERTY

1. PROPERTY – WHAT IT MEANS

As the name clarifies its meaning- Benami property means a property without a name.
In such kind of a transaction, the person who pays for the property does not buy it under his/her own name and motive behind such a transactions of this nature is to evade payment of tax. Any asset movable or immovable, any security, legal document, gold etc which are held or transferred in any other name are covered under Benami property.
If the buyer cannot disclose his income at the time of purchase the transaction is considered as Benami Transaction and the property becomes a Benami Property. Lease of immovable property in the name of another for a fictitious consideration also comes under Benami transaction.
For Example, if a businessman, named A, purchase a flat in the name of B, his driver and the source of income is not disclosed by Mr.A then the flat becomes the Benami property and the Mr.B becomes the Benamidar. Hence Benamidar is the person whose name is appeared on the paper i.e. the person on whose name the Benami property is bought, held or transferred.
According to the amendment made on 1st Nov.2016 in Benami Transactions Prohibition Act, 1988 there will be seven years imprisonment and fine and/or confiscation of property without any compensation whatsoever.
If I relate this amendment with above example it is clear that benamidar, Mr. B is held liable for seven years imprisonment, fine and/or confiscation of property if he fails to explain the source of income for purchasing such a flat. Now if Mr.B revealed that the actual owner was Mr. A then the same punishment is applicable on Mr. A without any compensation.
Now there are certain myths in the mind of people regarding properties which are in the name of their wife, daughter or any other relative. Any property, be it in the name of your relatives or joint, if you are able to produce the source of income to the relevant authority, it cannot be called Benami Property. Hence if the source of income is disclosed then those properties are outside the purview of Benami Property.

Under GST

Selection of Registrations for issuance of Provisional IDs

Overview:

CBEC has started the process of migrating the existing Central Excise (CE) and Service Tax (ST) registrations to GST and issue Provisional IDs to them. As a mandatory requirement, only PAN based registrations would be issued Provisional ID. It is therefore, advised that all Assessees having non-PAN based registrations, get their registrations converted to PAN-based to obtain Provisional IDs.

Since GST registration will be based on PAN and State, only one Provisional ID will be issued to a given PAN for a given state, irrespective of the number of registration on that PAN in that state. In case the assessee wishes to enroll in GST for the other 9 registrations as well, the details regarding the other registrations (address of premise) may be included as 'Additional Place of Business' (same applies to ST registrations also).

In the approach, wherever the combination of 'State' and 'PAN' is mentioned, it means a 12 character string where the first two characters are numeric and represent the 'State' and the last 10 characters are the 'PAN' associated with the registration.

Specific details on the issuance of Provisional IDs for CE & ST are provided below:

CE Registrations:

Basis the '11' and '12' character in the Registrations number, CE registration have been classified under the codes – 'XM', 'EM', 'XD', 'ED' and 'EI'. Provisional IDs are also being issued in the same preference. For Ex – In Step 1, all registrations belonging to the 'XM' category are selected for issuance of Provisional IDs. All registrations having a unique combination of 'State' and 'PAN' would be issued a Provisional ID. In case there are multiple registrations for the same 'State' and 'PAN' combination, then the first registration in the alphabetical order would be granted the Provisional ID.

In Step 2, all registrations belonging to 'EM' category would be selected for issuance of Provisional IDs. In this step, only those registrations would be issued a provisional ID where the combination of 'State' and 'PAN' is not already occurring in Provisional IDs issued in Step 1. Similarly, for step 3 'XD' registrations would be selected and Provisional ID issued to only those registrations where the combination of 'State' and 'PAN' is not already occurring in Step 1 and Step 2. Similarly, step 4 and 5 would be executed.

Additionally, Each CE registration contains 2 addresses – one for the Head Office and another for the Business Premise. For a given CE registration, if the 'State' for the 'Head Office' and 'Business Premise' is different, then the registration will be eligible for issuance of 2 provisional IDs whereas in case where the 'State' for 'Head Office' and 'Business Premise' is same, only one Provisional ID would be issued.

ST Registrations:

ST registrations have 2 categories – Centralised and Non-Centralized. Under Non-Centralized registrations, there are 3 categories – 'SD'. 'ST' and 'SE'. The registrations for the issuance of Provisional IDs have selected in the same order. With the process being same as for CE i.e. only one Provisional ID for a combination of 'State' and 'PAN', in Step1 registrations belonging to the category 'SD' have been chosen followed by 'ST' and 'SE' in Step 2 and 3 respectively. Post selection of registrations from Non-Centralized category, Centralised registrations are selected provided the 'State' and 'PAN' combination is not already occurring in the Non – Centralised category. For Ex – a centralised registration has 15 premises in 15 different states, and out of these 15 premises, 5 are such where the combination of 'State' and 'PAN' is already occurring in Non-Centralized registrations. In this case, 10 (15 – 5) provisional IDs would be issued.
Once the list of registrations in ST to be issued Provisional IDs is selected (including both Centralised and Non-Centralized), this would be checked with the list of registrations selected for Provisional IDs for CE. All ST registrations where the combination of 'State' and 'PAN' is same as that used in any of the CE registrations already selected would be removed from the list and would not be issued any Provisional ID.

Summary:

1. Provisional IDs would be issued only for PAN-based registrations.

2. Only one Provisional ID would be issued for multiple registrations where the combination of 'State' and 'PAN' is same and it would be for the first registration selected in the alphabetical order.

3. For CE registrations, the order of selection is 'XM', 'EM', 'XD', 'ED' and 'EI'

4. For ST registrations, the order for Non-Centralized is 'SD', 'ST' and 'SE'.

5. Only those ST registrations would be issued Provisional ID where the 'State' and 'PAN' combination is not occurring in selected CE registrations.

Company Registration through SPICe forms

Company Incorporation in India witnesses another bold and big initiative in the form of SPICE. SPICE or Simplified Proforma for Incorporating Company Electronically is an initiative by the Government. The Ministry of Corporate Affairs (MCA) unveiled this initiative on Gandhi Jayanti, with the objective of providing speedy incorporation related services within stipulated timelines. This initiative is expected to bring the current company registration norms in line with best international practices.

The MCA has notified Companies (Incorporation) Fourth Amendment Rules, 2016 with SPICE as one of the biggest introductions. Through this notification, MCA has notified simplified integrated process for incorporating a company in E-form INC-32 along with Memorandum of Association in E-form INC-33 and Article of Association in E-form INC-34. This form is an improvement of Form INC-29. This form is available on MCA w.e.f. 03.10.2016.

29 FAQs on new Company Incorporation Form SPICe (INC-32)

1. How many names can be applied for in SPICe (INC-32)?
Only one. However, for reservation of a name prior to filing SPICe (INC-32), you may use INC-1 (in which up to 6 names can be proposed) and then input the SRN of approved INC-1 into SPICe.

2. What is the mode of grievance redressal?
In the case of technical problems i.e., form upload, pre-scrutiny errors, DSC related, payment related queries, please raise a ticket on www.mca.gov.in/myservices..... and await a resolution. You may also call up Corporate Seva Kendra at 01244832500 after 48 hours if the ticket is not resolved.
In the case of resubmission/rejection remarks, please contact 01244832500 and select option 1 for CRC. For escalation, you may send a mail to crc.escalation@mca.gov.in.

3. Is INC-22 still required to be filed with SPICe?
It is not required to be filed with SPICe (INC-32) if a company is registered with the address for correspondence only (in INC-32). INC-22 is required to be filed within 30 days of its incorporation, for intimating the registered office address.

4. What is the process for obtaining approved e-MOA (INC-33) and e- AOA (INC-34)?
The users may obtain approved e-MOA (INC-33) and e- AOA (INC-34) through certified copies facility available on MCA.

5. Is, PAN and AADHAAR mandatory?
Yes. The companies (incorporation) rules notified has liberalised many requirements in respect of Proof of Identity and Proof of residence in respect of Subscribers and Directors. The Companies (Incorporation) third Amendment Rules dated 27th July 2016 has relaxed the mandatory attachment of proof of identity and residence in respect of a subscriber having a valid DIN.

6. Which attachments are removed in SPICe form?
Attachment no. 7 (Proof of relation) and 9 (NOC from any other person) are deleted.

7. Is it mandatory to use eMoA and eAoA? Can physical copies of MoA/AoA be signed and attached with SPICe forms?
Yes. It is mandatory in all cases of Indian subscribers, foreign individual subscribers (having a valid DIN) and where the number of such subscribers is not more than seven. No physical copies of MoA/AoA are required to be attached.

8. Can SPICe be used for incorporation of producer companies?
No. For incorporation of producer companies, unregistered companies and companies being formed with more than 7 subscribers, a new version of INC-7 shall be used.

9. If a body corporate is one of the subscribers/promoters, can DSC of an authorised Director be affixed?
Yes.

10. Can, foreign subscribers file SPICe (INC-32) or are they required to file in INC-7?
Yes, foreign subscribers having valid DIN can file SPICe(INC-32) with eMoA(INC-33) and eAoA(INC-34) as linked forms. However, in the case of foreign individual subscribers without a valid DIN, form INC-7 shall be used with physical MoA and AoA.

11. In SPICe AoA (INC-34) if additional Article is required, how to enter the same?
SPICe AoA (INC-34) has a facility for adding, modifying, deleting and entrenching Articles.

12. Can we enter the conditions of the private company as required under Section 5 of the Companies, Act, 2013 in SPICe AoA (INC-34)?
Yes, SPICe AoA (INC-34) has a facility for adding, modifying, deleting and entrenching Articles.

13. Can we enter the names of first directors as required under Companies Act, 2013, in SPICe AoA (INC-34)?
Yes, SPICe AoA has facility for adding, modifying, deleting and entrenching Articles.

14. What if there are more than seven subscribers to MoA and AoA?
INC-7 shall be used.

15. In case of subscriber to the memorandum is a foreign national residing outside India, his signatures and address etc. shall be witnessed by a Notary Public/Embassy/Consulate offices of Embassies as per the Rule 13 of the Companies (Incorporation) Rules, 2014. In such cases, how the DSC of such a witness be affixed?
In such cases, SPICe (INC-32) shall be filed with manually signed and duly attested MoA and AoA.

16. Is DSC mandatory for Subscribers?
Yes, DSC is mandatory for all subscribers and witnesses in eMoA(INC-33) and eAoA(INC-34). eMoA and eAoA shall be used only where the maximum number of subscribers do not exceed 7. In case the number of subscribers are more than 7, INC-7 shall be used and DSC is not mandatory in such cases.

17. Can we use SPICe form now for resubmitting incorporation applications filed in form INC-2 /7 earlier?
No. SPICe cannot be used in such cases. However, form INC-2/7 shall be available for resubmission cases only for a period of 15 days from the date the form was sent for resubmission by CRC.

18. Whether subscribers' photo is required in SPICe forms?
No. Subscribers' photo is not required.

19. How many resubmissions are permitted for SPICe forms?
Two.

20. Can OPCs be incorporated using SPICe forms?
Yes. Form INC-2 will no longer be available for filing.

21. Can LLPs be incorporated using SPICe forms?
No.

22. What is the word limit for writing objects in eMoA?
For main Objects (Field 3(a)), character limit is 20,000 and for furtherance of objects (Field 3(b)), it is 1,00,000 characters.

23. Please clarify on attestation requirements in respect of foreign companies wanting to form a subsidiary in India?
Attestation requirements will be as per Rule 13 of the Companies (Incorporation) Rules, 2014.
Yes.

24. Is SPICe eMoA (INC-33) and SPICe eAoA (INC-34) to be uploaded separately?

25. What if the subscribers to eMoA and eAOA are at different places as only one witness is provided?
eMoA and eAOA would be witnessed after all subscribers have signed as is happening presently.

26. Is refund applicable if SPICe forms get rejected?

27. What is
the maximum upload size of SPICe forms?
6 MB.

28. Can NIDHI Company be incorporated using SPICe forms?
Yes.

29. Is filing of SPICe forms optional or mandatory for the incorporation of companies?
Presently it is optional. However in the next few weeks, SPICe form would be the only form available for incorporation of any company except for a Producer Public Company or a Part I Company or in cases where there are more than seven subscribers
SPICe eMoA and eAoA have to be uploaded as 'Linked Forms' to SPICe (INC-32).

NOTIFICATIONS

1. Prescribed Income-tax Authority notified for the purposes of Section 143(2) vide new Rule 12E-Notification No. 105/2016, dated 16-11-2016

Section 143(2) of the Income-tax Act, 1961 provides that where a return has been furnished under Section 139, or in response to a notice under Section 142(1), the Assessing Officer or the prescribed Income-tax authority, as the case may be, if, considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return. Accordingly, Rule 12E has been inserted vide this notification which provides that the prescribed authority under Section 143(2) shall be an Incometax Authority not below the rank of an Income-tax Officer who has been authorised by the CBDT to act as Income-tax Authority for the purposes of Section 143(2).

2. Procedure for the purposes of furnishing and verification of Form 26A for removing of default of Short Deduction and/or Non Deduction of Tax at Source-Notification No. 11/2016, dated 02-12-2016

First proviso to Section 201(1) of Income-tax Act, 1961, provides that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident— (i) has furnished his return of income under Section 139; (ii) has taken into account such sum for computing income in such return of income; and (iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed. As per Rule 31ACB(1), the certificate from an accountant under the first proviso to Section 201(1) has to be furnished in Form 26A to the Principal Director General of Income-tax (Systems) or the person authorised by the Director General of Income-tax (Systems) in accordance with the procedures, formats and standards specified in Rule 31ACB(2), and verified in accordance with the procedures, formats and standards specified under the said Rule. In exercise of the powers delegated by the CBDT under Rule 31ACB(2), the Principal Director General of Income-tax (Systems) has, vide this notification, authorised: (i) Field Assessing Officer (TDS) to receive Form 26A to be filed in the paper mode for the assessment years upto and including A.Y. 2016- 17 and pertinent to defaults specified under Section 201(1) and/or Section 40(a)(ia) of the Act. (ii) CPC (TDS) to receive Form 26A to be filed in electronic mode for the assessment years: (a) Upto and including A.Y. 2016-17 and pertinent to defaults under Section 200A. (b) Including and from A.Y. 2017-18 and pertinent to defaults under Section 200A, Section 201(1) and/or Section 40(a)(ia). This Notification has also specified the procedure for electronic filing of Form 26A clearly specifying the Role of Deductor, Role of Accountant at E-filing, Role of E-filing and Role of TRACES website.

1. Admissibility of expenditure incurred by a Firm on Keyman Insurance Policy in the case of a PartnerCircular No. 38/2016, Dated 22-11-2016

The issue relating to admissibility of expenditure incurred by a firm on Keyman Insurance Policy premium in the case of a partner has been a contentious one. CBDT Circular no. 762/1998 dated 18.02.1998 clarifies that the premium paid on the Keyman Insurance Policy is allowable as business expenditure. However, in case of such expenditure incurred on a partner of a firm, the general approach of the Assessing Officers was to treat the expenditure as not incurred for the purpose of business and disallow the same. The High Courts have upheld the admissibility of the expenditure incurred by the firm in the case of the partners. Taking into account the Explanation to Section 10(10D) and the CBDT Circular no. 762 dated 18.02.1998, Courts have held that a Keyman Insurance Policy is not confined to a policy taken for an employee but also extends to an insurance policy taken with respect to the life of another person who is connected in any manner whatsoever with the business of the subscriber (assessee). The High Court of Punjab and Haryana in the case of M/s. Ramesh Steels, ITA No. 437 of 2015, vide judgment dated 2.2.2016 (NJRS citation 2016- LL-0505-68), reiterating the above view held that, "the said policy when obtained to secure the life of a partner to safeguard the firm against a disruption of the business is equally for the benefit of the partnership business which may be effected as a result of premature death of a partner. Thus, the premium on the Keyman Insurance Policy of partner of the firm is wholly and exclusively for the purpose of business and is allowable as business expenditure". The above view has been accepted by the CBDT and the judgment has not been further contested. In view of this, it is a settled position that in case of a firm, premium paid by the firm on the Keyman Insurance Policy of a partner, to safeguard the firm against a disruption of the business, is an admissible expenditure under Section 37 of the Act.

2. Filing of Revised Income Tax Returns by the Tax Payers Post De-Monetisation of Currency–Press Release, dated 14-12-2016

Under the existing provisions of Section 139(5) of the Income-tax Act, 1961, Revised Return can only be filed if any person, who has filed a return under Section 139(1) of the Act or in response to notice u/s 142(1), discovers any omission or any wrong statement therein. Post demonetisation of the currency on 8th November, 2016, there is a possibility that some taxpayers may misuse this provision to revise the return-of-income filed by them for the earlier assessment year, for manipulating the figures of income, cash-in-hand, profits etc. with an intention to show the current year's undisclosed income (including the unaccounted income held in the form of demonetised currency in current year) in the earlier return. The CBDT has clarified that the provision to file a revised return of income u/s 139(5) of the Act has been stipulated for revising any omission or wrong statement made in the original return of income and not for resorting to make changes in the income initially declared so as to drastically alter the form, substance and quantum of the earlier disclosed income. Any instance coming to the notice of Incometax Department which reflects manipulation in the amount of income, cash-in-hand, profits etc. and fudging of accounts may necessitate scrutiny of such cases so as to ascertain the correct income of the year and may also attract penalty/prosecution in appropriate cases as per provision of law.

CASE LAWS

I. DIRECT TAXES

1. LD/65/73 Paras Organics P. Ltd. vs. Union of India 18th November, 2016

Where the documents being relied upon by assessee in the rectification application were not brought to the notice of the Tribunal during the hearing of appeal, and the order was concluded without any objection, then such rectification application does not deserve to be entertained.

The assessee's grievance in the instant case is that the impugned order of the ITAT did not deal with the assessee's application for rectification. The application for rectification before the Tribunal made a grievance that one order dated 26.10.2015 incorrectly records that the assessee was unable to substantiate its claim with documentary evidence. The ITAT rejected assessee's application for rectification by its order dated 17.06.2016. HC observed that order dated 26.10.2015 states that it was pronounced in open Court in the presence of the learned representative from both sides at the conclusion of hearing on 26.10.2015. The above fact is not disputed in the rectification application. Therefore, if any facts were being incorrectly recorded, the objection to the same could have been raised for consideration of the Tribunal at the time i.e. when the order was dictated. HC observed that further the portion of the order with which the petitioners have made a grievance and which was reproduced in the rectification application clearly records that the assessee was unable to substantiate its claim with documentary evidence. It does not state that no documentary evidence was filed before the Tribunal after negativing the submission of the assessee petitioner that no sufficient opportunity to lead its evidence was given by the lower authorities to the petitioner. It only concludes that the documentary evidence relied upon before it does not substantiate the claim of the petitioner. One more fact which is to be noted is that from the order on record, it is not at all clear whether or not any emphasis was placed during the course of the hearing on the document which formed a part of the paper book which the petitioner now seeks to rely upon. This is evident from the fact that the person who appeared on the hearing leading to the order dated 26.10.2015 is not the person who appeared at the time of the hearing of the rectification application on 17.06.2016. Further the rectification application itself deposes to certain facts which allegedly transpired during the hearing of the appeal and those facts have been deposed by the Managing Director of the petitioner company even without indicating that he was present at the hearing. HC further observed that attention of ITAT was not invited on concerned page nos. 33 and 34 to the paper book submitted during the hearing of the appeal. HC remarked that assessee was only attempting a review of the order by ITAT so as to ensure that the ITAT takes a look at the documents which were part of the record and may not have been emphasised by the petitioner during the course of the hearing. All this must be considered in the context of the Tribunal recording in its order that the primary submissions of the petitioner were inadequate opportunity to present its case before the lower authorities. This fact has not in terms been disputed in the rectification application. Thus, the HC decided not to interfere with the impugned order of ITAT dated 17.06.2016 which rejected the assessee's application for rectificatione.

taxable as income from other source, and allowed the appeal of the company.

II. LD/65/75 Steelco Gujarat Ltd. vs. Income Tax Officer 10th November, 2016

Interest earned on fixed deposits directly linked for opening of Letter of Credit (LC) towards import of plant and machinery is a capital receipt, which would go to reduce cost of asset; any income earned on such deposit is incidental to the acquisition of the plant and machinery.

The company has a foreign currency account with State Bank of India, Tokyo with the approval of Reserve Bank, in which, the contribution from NRI promoters were credited for the payments required towards import of major plant and machinery from Japan. The company opened LC for import of plant and machinery, for which a lien was created for the equivalent amount of LC deposited in this account. The company earned interest on the said fixed deposit, which was placed for opening of LC for import of plant and machinery, in foreign currency, which was converted into rupees, either at the time of settlement of import transactions or on the date of balance sheet, whichever is earlier. The company claimed that such interest earned was not at all taxable as the same cannot be included as income from other source. The company had earned the interest on the deposit which was required to be placed for opening of LC for import of plant and machinery, without which the LC could not have been opened. The AO did not accept the contention of the company, and added the interest as income from other sources. For the issue in hand, the Tribunal considered the Hon'ble Supreme Court's decisions in the cases of Commissioner of Income Tax vs. Karnal Cooperative Sugar Mills Ltd. and Commissioner of Income Tax vs. Autokast Ltd. The Tribunal opined that the decision of Commissioner of Income Tax vs. Autokast Ltd. shall be applicable in the current case as it is a three Judge Bench Judgement as against the decision in the case of Commissioner of Income Tax vs. Karnal Cooperative Sugar Mills Ltd, which is by two Judge Bench judgment, and thus, confirmed the decision of the AO. However, the High Court took cognisance of the fact that the interest earned by the assessee was on the fixed deposit which was required for obtaining LC for purchase of plant and machinery, and opined that the decision of the Hon'ble Supreme Court in the case of Karnal Cooperative Sugar Mills Ltd (supra) shall be squarely applicable to the facts of the case on hand. In the case of Karnal Cooperative Sugar Mills Ltd. (supra), the assessee earned the interest on deposit made to open the Letter of Credit for purchase of machinery required for setting up of its plant, where the Hon'ble Supreme Court held that such interest was a capital receipt which would go capital shifted, which would go to reduce cost of asset and that deposit of money was directly linked with purchase of plant and machinery and therefore, any income earned on such deposit is incidental to the acquisition of the assets for setting up of plant and machinery. The High Court distinguished the Hon'ble Supreme Court's three bench judgment in the case of Autokast Ltd (supra) on facts of the case, as in that case the assessee had borrowed certain amount from IDBI and had deposited the same in the banks till it was used either in purchase of plant and machinery and/or installing them or in running establishment. The High Court held that the learned Tribunal had committed error in holding that the interest income earned on the amount of deposit kept with the bank for the purpose of opening letter of credit used for the purpose of plant and machinery would be taxable as income from other source, and allowed the appeal of the company.

I. LD/65/74 Commissioner of Income Tax, Chennai vs. Shriram City Union Finance Ltd. 15th November, 2016

Interest charged by a public company in relation to bad debts, which are not regulated by the guidelines framed by National Housing Bank, cannot be taxed u/s 43D

The Revenue had preferred the present appeal challenging the order, whereby the ITAT had held that additional finance charges could be shown for Income Tax purposes on receipt basis, though the assessee has accounted for the same in the regular accounts on accrual basis and therefore were not includible in the taxable business income, ignoring the special provisions contained in Section 43D. HC observed that Section 43D of the Income-tax Act is attracted to cases of Public Financial Institutions, Scheduled Banks, State Financial Corporations, State Industrial Investment Corporations or Public Companies, which charge interest in relation to bad or doubtful debts. HC perused Section 4A of the Indian Companies Act 1956 to note that the assessee was not a Schedule Bank or the State Financial Corporation or State Industrial Investment Corporation nor a Public Financial Institution, and thus Section 43D(a) did not apply to the assessee. As per clause (b) to Section 43D, in case of a public company, the income by way of interest in relation to bad or doubtful debts, having regard to the guidelines issued by the National Housing Bank in relation to such debts shall be chargeable to tax. However, HC observed that though the assessee is a Public Company, the debts or doubtful debts are not of those types which have been considered to be regulated by the guidelines framed by the National Housing Bank and that there is agreement on both sides on this factual count. As a result, even clause 934 Legal Update www.icai.org THE CHARTERED ACCOUNTANT JANUARY 2017 47 (b) of Section 43D of the Income-tax Act, 1961, is not attracted. HC accordingly dismissed the appeal.

1. LD/65/82

M/s Bhoruka Aluminium Ltd. vs. CCE&ST Bangalore CESTAT

Where entire demand along with interest is paid in the course of inquiry or audit, in the absence of any material on record to prove that there was a suppression and concealment, show cause notice cannot be issued and penalty cannot be imposed.

The appellant manufacturer had availed the services of foreign company for maintenance and repair of capital goods installed in his factory in India but no payment of service tax was made under reverse charge mechanism. After visit at appellant's factory, the department issued letter to the appellant for making payment of service tax, which amount was paid by it. The appellant availed CENVAT credit of the said amount which was not disputed by the department. However, subsequently, a show cause notice was issued to the appellant for levy of penalty u/s 76, 77 and 78 of the Finance Act. All the penalties were confirmed in order in original and order in appeal before Commissioner (Appeals). Appellant disputed the same relying upon provisions of Section 73(3). After perusing the provisions of Sections 73, 76 and 78, the Hon'ble Tribunal held that, provisions of Section 73(3) are very clear as it says that if tax is paid along with interest before issuance of the show cause notice, then in that case, show cause notice shall not be issued. The Tribunal held that the appellant was under bona-fide belief that he is not liable to pay service tax but during the audit, when the audit party informed him that he is liable to pay service tax, he immediately paid the entire service tax along with interest. Further, except mere allegation of suppression, the Department did not bring any material on record to prove that there was suppression and concealment of facts to evade payment of tax. Accordingly, penalty u/s 78 was held as unjustifiable and penalty order was set aside

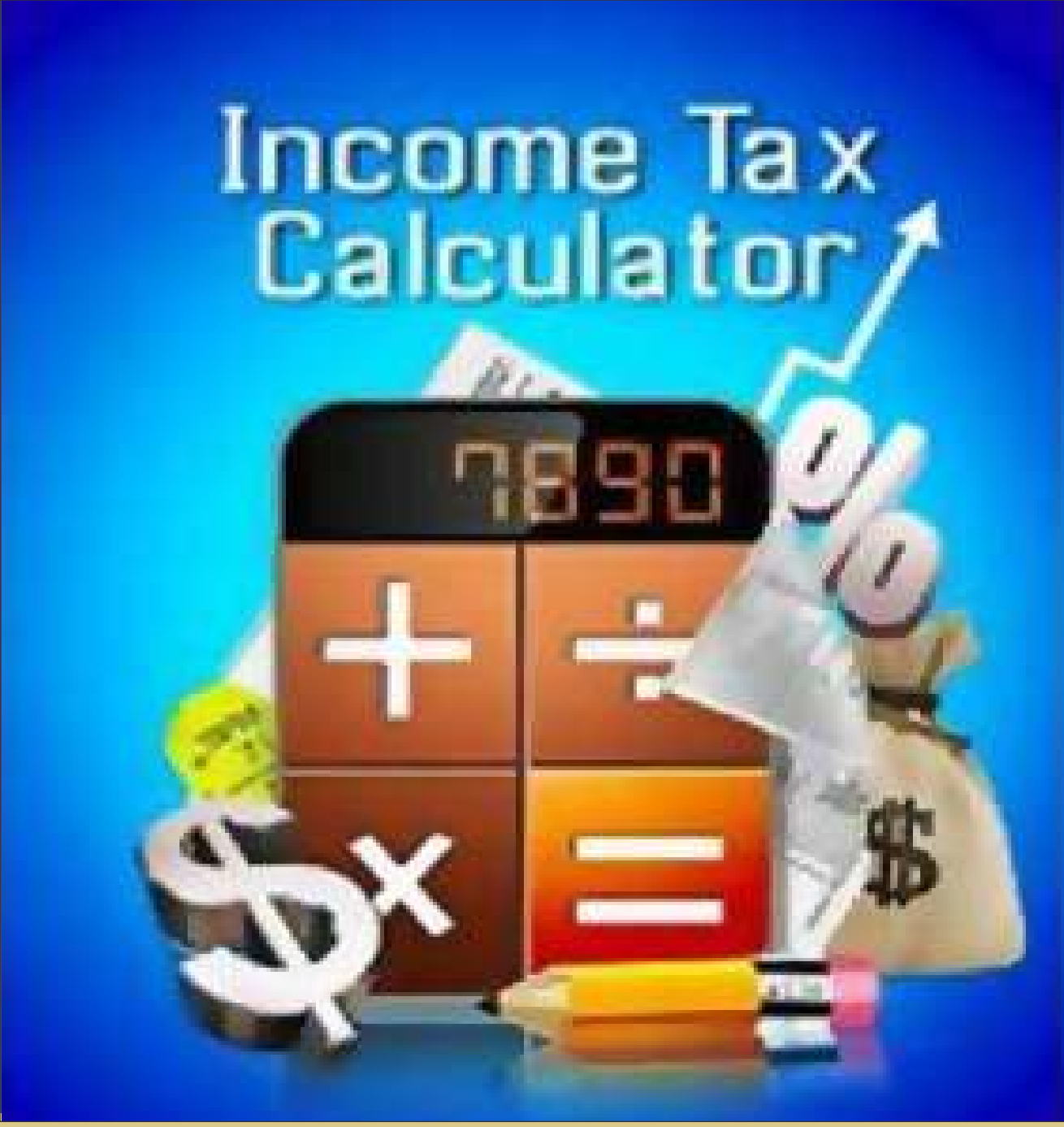
1. LD/65/85

Commissioner of Central Excise vs. Kanpur Plastic Pack Ltd. Kanpur 27th September, 2016

Assessee's claim of excise duty refund on intermediate products (captively consumed) cannot be rejected on ground of 'unjust enrichment' and 'time bar' u/s 11B of Central Excise Act.

Assessee is engaged in manufacture of HDPE/ Polypropylene Tapes, fabrics and sacks–both laminated and unlaminated. The starting raw material HDPE/LDPE/PP Granules are extruded in the extrusion machines to make films and are slated to form tapes of required width. The tapes are further woven into fabrics and the fabrics thereafter, are stitched to make sacks and bags. The basic raw material for manufacture of HDPE/sacks and bags is plastic granules falling under Chapter 39 of Central Excise Tariff. Assessee filed a classification list in August 1996, classifying the finished product under Chapter 54, 59 and 63 under protest. Later, on a judgment of Tribunal in some other matters, assessee sought revision of classification to Chapter 39 and accordingly, filed a revised classification list from July 1989, under various Chapter 39 headings. Revised classification was not approved by Assistant Collector who ordered to continue the classification of finished goods under various headings of Chapter 54, 59 and 63. The Appellate Authority also ruled in favor of Revenue. CESTAT set aside the appellate order and consequential relief was granted. Based on CESTAT's order, assessee submitted an application before the Asst. Commissioner claiming refund of excise duty worth R1.85 crore (approx.) paid on tapes during 1986 and 1990. Assessee stated that CESTAT had held these tapes were classifiable under Chapter 39 and since the tapes were consumed for the manufacture of fabrics, which were again Chapter 39 products, the same were exempted from duty. Since the application was unattended by Revenue, assessee filed writ petition before HC. HC disposed off the same with the direction to concerned authority to take a final decision within stipulated period. Pursuant thereto, Asst. Collector rejected the refund claim on the ground of being barred by 'time' as also 'unjust enrichment'. Assessee then approached the Appellate Authority and the matter was remanded back with following observations: "a) the ground of rejection of refund claim i.e undue enrichment is not sustainable, as the duty was paid on intermediate products and the question of passing on of incidence of duty to the customers does not arise; and (b) in the instance case, duty has been under protest and hence limitation of six months does not apply as per the provisions of Section 11B of Excise Act."

Thereafter, the Asst. Commissioner dropped the limitation aspect but w.r.t. 'unjust enrichment', it was held that "excise duty" u/s 12B of the Act includes duty paid on intermediate product and hence, the burden to prove that incidence of duty was not passed on to the customer, was on assessee. Once again, assessee approached the Appellate Authority who directed refund of R1.16 crore. Aggrieved, the Revenue appealed before CESTAT. CESTAT ruled against the revenue observing that refund of credit of duty is admissible in terms of proviso (c) to Section 11B of the Act according to which, the bar of unjust enrichment does not apply to the refund of credit of duty paid on inputs. Revenue thereafter filed reference application u/s 35H(1) of the Act before the High Court. HC observed that Appellate Authority's order which allowed refund holding that 'unjust enrichment' principle was inapplicable to intermediate products, had attained finality since Revenue did not challenge it in appeal. According to HC, once Appellate Commissioner had held so, Asst. Commissioner had no jurisdiction to reiterate and follow his overruled view of "unjust enrichment". Such approach of Asst. Commissioner despite having been answered by CCE(A) otherwise, which order had attained finality, was wholly unauthorised, beyond jurisdiction and illegal. It stated, Assistant Commissioner was wholly unjustified in denying refund on the ground of "unjust enrichment" since that was beyond his powers. HC analysed provisions of Section 11B of Central Excise Act 1944. HC stated that so far as Section 11B(2) proviso (c) is concerned, we find that it stressed on the question of refund to be paid to Assessee instead of credit to the fund if amount is relatable to (a), (b) and (c). For the purpose of unjust enrichment, reliance placed by the Tribunal to Section 11B(2) proviso (c), in our view is not correct but Assessee in the case in hand could not have been denied refund on the ground of "unjust enrichment" since that was already decided in favour of Assessee by the appellate authority. HC thus held that the ultimate order of CESTAT was justified and warranted no interference. HC thus ruled in favour of the assessee.



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