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GIFT IN CONTEMPLATION OF DEATH : EXEMPTION

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"Gift in contemplation of death", though not very widely prevalent in India, could be an avenue for receiving gift from a person without suffering tax under section 56(2)(x) of the Income-tax Act, 1961 ("the Act"). Of course, the assessee will have to adequately discharge the burden of establishing the genuineness of such gift, if scrutinized by the Income-tax Department.

Section 56(2)(x) of the Act contains a legal fiction to the effect that if any person receives any benefit in terms of money or money's worth, without consideration or for inadequate consideration, such benefit is taxable as income in his hands under the head "Income from other sources". In effect, a gift or deemed gift is subjected to tax as income in the hands of the recipient.[2] This provision encompasses within its fold three types of gifts : (i) sum of money (b) immovable property and (iii) property[3] other than an immovable property.

There are of course some exemptions from this charge, contained in the proviso to section 56(2)(x), such as gift received from a relative[4] or gift received on the occasion of the marriage, etc.

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2. As is known, gift-tax, hitherto levied under the Gift-tax Act, 1958, is abolished from October 1, 1998.
3. The term "property" is defined to mean nine specific items enumerated therein (which includes an immovable property). See the *Explanation* below clause (x) of sub-section (2) of section 56 with clause (d) of the *Explanation* to clause (vii) of sub-section (2) of section 56.
4. The term "relative" is defined to mean certain specified persons. See the *Explanation* below clause (x) of sub-section (2) of section 56 with clause (e) of the *Explanation* to clause (vii) of sub-section (2) of section 56.

One such exemption from the purview of taxability under section 56(2)(x) is "gift in contemplation of death of the payer or donor"[1]—even if received from a person not falling in the definition of the term "relative" given in section 56(2)(x). This is the practical significance of this exemption that gift received from a non-relative is exempt under this provision.

Now, what is this concept of "gift in contemplation of death"? What is the meaning and import of this expression ? This constitutes the subject-matter of this article. This expression is not defined or explained under the Act. But it is also known as *donatio mortis causa* and also covers a gift under *marz-ul-maut* in Mohmedan Law.

It is therefore utmost essential to understand clearly this concept of "gift in contemplation of death". Gift of a movable property made by a person who is seriously ill and is likely to die shortly is called "gift in contemplation of death" or *donatio mortis causa*. A person can gift any movable which he could dispose of by a Will. But, the subject-matter of gift cannot be an immovable property. Conceptually, it is closer to a property passing on death (like through a Will) as compared to a gift inter vivos. This is precisely the reason that "gift in contemplation of death" was subjected to estate duty under section 8 of the Estate Duty Act, 1953[2] but was exempt from gift-tax under section 5(1)(xi) of the Gift-tax Act, 1958[3].

Under both the above laws[4], the expression "gift in contemplation of death" was assigned the same meaning as in section 191 of the Indian Succession Act, 1925. While there is no such reference to section 191 of the Indian Succession Act, 1925 in section 56(2)(x) of the Act, in the absence of any other definition or meaning, let us see what it contains.

As observed in an often-quoted decision in *CGT* v. *Abdul Karim Mohd.* [1991] 191 ITR 317 (SC)[5] (at page 322), the requirements of a gift in contemplation of death as laid down by section 191 of the Indian Succession Act are :

(i) the gift must be of a movable property ;

(ii) it must be made in contemplation of death ;

(iii) the donor must be ill and expect to die shortly of the illness ;

1. See clause (IV) of the proviso to clause (x) of sub-section (2) of section 56.
2. Abolished with effect from March 16, 1985.
3. Abolished with effect from October 1, 1998.
4. See the *Explanation* below section 8 of the Estate Duty Act, 1953 and clause (d) of the *Explanation* below section 5 of the Gift-tax Act, 1958.
5. No doubt, this decision was in the context of exemption of gift in contemplation of death under section 5(1)(xi) of the Gift-tax Act, 1958, the principles and observations are applicable in the present context as well and hence cited generously in this article.

(iv) possession of the property must be delivered to the donee ; and

(v) the gift does not take effect if the donor recovers from the illness or the donee predeceases the donor.

It is crucial to note that the Supreme Court in this case has held (at page 325) that if a gift in contemplation of death is recognized by the personal law of the parties satisfying the conditions contemplated under section 191 of the Indian Succession Act, it cannot be denied exemption even assuming that section 191 as such would not be applicable to the parties.

Gift in contemplation of death is thus a conditional gift and not an absolute gift, because if the donor recovers, the gift has to be returned to the donor. To put it differently, the gift becomes absolute only on the death of the donor[1] though the possession of the thing has already been handed over to the donee. In nature, it is midway between a lifetime gift and a gift by will—the distinction is that a deathbed gift is made in lifetime but conditional on death, whereas a lifetime gift is effective on delivery.

Relying upon an English decision in *Cain* v. *Moon* [1896] 2 QB 283, 286, the Supreme Court in the above-referred case of *Abdul Karim Mohd.* (supra) further observed (at page 323 of 191 ITR) that there is nothing new in the requirements provided under section 191 of the Succession Act ; that they are similar to the constituent elements of a valid *donatio mortis causa* ; that for an effectual *donatio mortis causa*, three things must combine : *first*, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death ; *secondly*, there must have been delivery to the donee of the subject-matter of the gift ; and, *thirdly*, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover. This last requirement is sometimes put somewhat differently, and it is said that the gift must be made under circumstances shewing that it is to take effect only if the death of the donor follows.

The Supreme Court in this case took into consideration (at page 324) the following enlightening passage from *Halsbury's Laws of England* (4th edition, vol. 20, page 41, para 67) :

> "There is an implied condition that the gift is to be retained only in the event of death, even though the donor does not expressly say so. The death may take place some time afterwards, or the donor may actually die from some other illness, but if the donor recovers from illness, during which the gift is made the donee has no title, and can only hold what was delivered to him in trust for the donor."

1. See *Jaitunbi Fatrubhai* v. *Fatrubhai Kasambhai* [1948] AIR 1948 Bom 114.

The Supreme Court also noted (at page 324) the following words from *Jarman on Wills* (8th edition, vol. 1, pages 46-47) which also throw light on this subject :

> "The conditional nature of the gift need not be expressed : It is implied in the absence of evidence to the contrary. And even if the transaction is such as would, in the case of a gift inter vivos, confer a complete legal title, if the circumstances authorize the supposition that the gift was made in contemplation of death, *mortis causa* is presumed. It is immaterial that the donor in fact dies from disorder not contemplated by him at the time he made the gift."

The Supreme Court also quoted from *Corpus Juris Secundum* (page 917, para 110) that a gift *mortis causa* is revoked by the recovery of the donor from the illness.

The Supreme Court in this case also held that gift under *marz-ul-maut* under the Mahomedan Law was eligible as "gift in contemplation of death" for this purpose because it has all indicia of a gift in contemplation of death under section 191 of the Indian Succession Act, 1925.

Mulla on Hindu Law takes the view that the concept of *donatio mortis causa* or "gift in contemplation of death" is recognized in Hindu Law.[1]

It is however interesting to note that under Hindu Law, when a person renounces the world and becomes a sadhu or sadhvi, it is his or her civil death.[2] But a gift in contemplation of such "civil death" does not qualify for exemption here. What qualifies for exemption here is a gift in contemplation of physical death, not mere civil death.[3] Similarly, a gift made in contemplation of suicide is not valid.[4]

Apart from the essential constituents of a valid gift in contemplation of death discussed hereinabove, the following guiding principles of practical significance can be culled out from various authorities :

(i) The donor need not necessarily die from the same illness or disorder from which he was suffering when he made the gift. For example, the donor is suffering from paralysis, but he may die of a sudden cardiac arrest.

(ii) Apprehension of death is indeed a subjective apprehension of the donor. In *Ujjal Singh Mann* v. *GTO* [1976] 2 TTJ (Chd) 1192, though the donor suffered from diabetes which is not an illness which can result in

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1. *Mulla on Hindu Law,* 16th edition, page 411. See *Visalatchmi* v. *Subbu* [1871] 6 Mad H. C. 270 ; *Bhaskar* v. *Sarasvatibai* [1893] 17 Bom. 486, 495.
2. *Mulla on Hindu Law,* 16th edition, page 156.
3. Drawing support from *Joint CGT* v. *Shri Shreyans J. Shah* [2005] 95 ITD 179, 195 (Mum) (TM).
4. *Agnew* v. *Belfast Banking Co.* [1896] 2 Ir R 204.

immediate death, the fact that the donor was confined to bed from July 1970 till March 1971, when he died, was a significant fact for holding the gifts made during this period as gifts in contemplation of death. In *CGT* v. *Thevanai Achi* [2006] 285 ITR 31 (Mad) it was held that the mere fact that the donor was 90 years of age was sufficient to hold that he is expected to die shortly and therefore the gift made by him was a gift in contemplation of death. It was observed that the medical certificate given by the doctor that the donor was in poor health and was not expected to survive for more than a month was only additional material supporting the assessee's case but even without it the assessee had established the case.

(iii) It is obviously advisable to explicitly spell out in the document that the gift is in contemplation of death. But the recitals in the deed of gift are not conclusive to determine the nature and validity of the gift. The party may produce evidence aliunde to prove that the donor had gifted the property when he was seriously ill and contemplating his death with no hope of recovery. These factors, in conjunction with the factum of death of the donor, may be sufficient to infer that the gift was made in contemplation of death.[1]

(iv) It is one of the requirements of the gift in contemplation of death that the donee becomes the owner of the gifted property only if the donor dies, and if the donor recovers from the illness the recovery itself operates as the revocation of the gift. But it is not necessary to state in the gift deed that the donee becomes the owner of the property only upon the death of the donor. Nor is it necessary to specify that the gift is liable to be revoked upon the donor's recovery from the illness. The law acknowledges these conditions from the circumstances under which the gift is made.[2]

(v) Since a valid gift in contemplation of death is effective only on the death of the donor, if the donee appropriates to himself the gift before the death of the donor, say, by investing the money in an immovable property or in his business, the gift will not be regarded as gift in contemplation of death because by appropriation of the gifted amount, the gift became absolute before the death of the donor.[3]

(vi) In a valid gift in contemplation of death, the donor dies within a reasonable time of making the gift. Now, what is reasonable time is a very subjective phenomenon and would depend upon the facts and circumstances of each case. Death within six weeks of making the gift was found

1. *CGT* v. *Abdul Karim Mohd.* [1991] 191 ITR 317, 323 (SC). See also *Williams on Executors and Administrators* (14th edition, page 315).
2. *CGT* v. *Abdul Karim Mohd.* [1991] 191 ITR 317, 323-324 (SC).
3. See *F. Susai Raju* v. *ITO* [2017] 163 ITD 533 (Chennai).

valid in a case before the Supreme Court[1] but in another case gift made eight months before the death was found unacceptable considering the totality of the circumstances.[2] In *Ujjal Singh Mann* v. *GTO* [1976] 2 TTJ (Chd) 1192 the donor was confined to bed from July 1970 till March 1971 (when he died) during which period he made piecemeal gifts, which were accepted as valid gifts in contemplation of death. As a general principle, one may say that death is a contingency not depending on the will of the donor ; the exemption may apply in the case of a gift *mortis causa* made bona fide one year to six months prior to death.[3]

(vii) While a gift deed is the most advisable document, a duly sworn affidavit of the donor may also be acceptable.[4] To avoid litigation and make a hasslefree claim of exemption from tax under section 56(2)(x) of the Act in respect of a gift in contemplation of death, it is advisable to make a carefully drafted gift deed bearing the principles emerging from the foregoing discussion in mind.

(viii) It is also advisable to carefully preserve the medical records of the donor. For example, in *Ujjal Singh Mann* v. *GTO* [1976] 2 TTJ (Chd) 1192 the medical certificate issued by the doctor attending the donor played a decisive role in the gift qualifying as "gift in contemplation of death". Medical certificate was given credence even in *CIT* v. *Thevanai Achi* [2006] 285 ITR 31 (Mad).

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1. See *CGT* v. *Abdul Karim Mohd.* [1991] 191 ITR 317 (SC).
2. See *F. Susai Raju* v. *ITO* [2017] 163 ITD 533 (Chennai).
3. *V. Balasubramanian's Law & Practice of Estate Duty*, 4th edition, page 101.
4. In fact, in *CGT* v. *Abdul Karim Mohd.* [1991] 191 ITR 317, 320 (SC) the document for making the gift in contemplation of death was styled as "settlement will".

SECTION 47(XIII) OF INCOME-TAX ACT – A RIDDLE WRAPPED IN A PUZZLE !

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Introduction

Section 47(xiii) of the Income-tax Act provides that any transfer of a capital asset or intangible asset by a firm to a company, as a result of succession of the firm by a company in the business carried on by the firm, will not be regarded as transfer, and accordingly, nothing contained in section 45 shall apply to such transactions. This is, however, subject to the various conditions laid down in the proviso to this clause. Section 47A(3) provides for withdrawal of such exemption, where such conditions are not complied with.

The question now is, what will be the position if the parties concerned decide not to avail of this exemption, or if at the time of assessment, the Assessing Officer declines to grant such exemption contemplated in section 47(xiii). A case of this type came up for consideration before the hon'ble Kerala High Court recently in *K.T.C. Automobiles* v. *Deputy CIT* [2019] 14 ITR-OL 168 (Ker).

K.T.C. Automobiles v. *Deputy CIT* (supra)

The brief facts of this case are as follows :

The partnership firm was converted into a private limited company. Before such conversion, the land which belonged to the firm, was revalued, and, the enhancement in the value of the land, was credited to the current accounts of the partners of the firm. On conversion of the firm as a company, the enhancement in the value of the land, was shown as loan from the partners, in the hands of the company.

The Assessing Officer treated the transaction as capital gain in the hands of the firm, and brought it to tax. The appeals to Commissioner of Income-tax (Appeals) and Income-tax Appellate Tribunal having failed, this appeal was filed before the High Court by the firm. The hon'ble Kerala High Court considered the appeal, in the light of the provisions contained in the proviso to section 47(xiii) and also the provisions in section 47A(3) of the Income-tax Act. It was pointed out by the court that in order to take the transfer of a capital asset by a firm to a company, as a result of succession

1. FCS, FCMA, BGL.

of a firm by a company, out of the purview of section 45 of the Act, one of the conditions to be satisfied was that the partners of the firm should not receive any consideration or benefit, otherwise than by way of allotment of shares of the company. Receiving any benefit, in any form or manner, even indirectly would result in violation of the provision contained in clause (c) of the proviso to section 47(xiii) of the Act, and it would bring the transfer within the ambit of section 45.

The hon'ble court further pointed out that in view of section 47A(3), the liability to pay tax on capital gain shall fall on the successor company, and not on the firm.

Comments

(i) The finding of the court that exemption under section 47(xiii) shall not apply in this case, is not commented upon here, as the issue under consideration is what will happen if this condition is not satisfied.

(ii) Sub-section (3) of section 47A(iii) reads as follows :

"Where any of the conditions laid down in the proviso to clause (xiii) of section 47 are not complied with, the amounts of profits and gains arising from the transfer of such capital asset or intangible asset not charged under section 45, by virtue of the conditions laid down in the proviso to clause (xiii) of section 47, shall be deemed to be the profits and gains chargeable to tax of the successor company for the previous year in which the requirements of the proviso to clause (xiii), are not complied with.

This provision has to be read in its entirety to understand and appreciate the legislative intention. The following conditions are necessary to invoke this provision :-

(a) Any of the conditions laid down in the proviso to clause (xiii) is not complied with.

(b) The profits and gains from the transfer of such capital asset or intangible asset, has not been charged under section 45, by virtue of the conditions laid down in clause (xiii) of section 47.

It will be seen from the above, that the condition precedent for invoking this sub-section, is that the profits and gains from such transfer have not been charged by virtue of section 47(xiii)."

(iii) The Department has contended, that the applicability of section 47A(3) would arise only at a stage subsequent to the assessment process, if it was discovered that there was violation of the provisions contained in the proviso to section 47(xiii). It is also relevant to point out that section 47A(3) deals with a situation in which the profits or gains arising of the transfer of capital asset 'has not been charged under section 45'. In this case, the Assessing Officer has treated the transaction as capital gain of the firm and brought it to tax. It is also to be noted that the title of section 47A itself reads as 'withdrawal of exemption in certain cases'. This implies that the exemption has been granted first and has to be withdrawn because of breach of conditions.

(iv) It may also be interesting to point out that the hon'ble court itself has pointed out in paras 10 and 13 of the judgment that the transaction will fall under section 45 of the Act, which was exactly what the Assessing Officer has done.

As there is a clear finding by the court in this case that the provisions of section 47(xiii) will not apply, and that the transaction has to be assessed under section 45, it would be useful to find out what will happen if this transaction is brought within the ambit of section 45. This issue has been dealt with in great detail by the hon'ble Bombay High Court in the *Texspin* case, and this decision has been quoted and followed by a large number of High Courts and Tribunals. It may, however, be noted that all these cases relate to periods prior to April 1, 1999, whereas clause (xiii) was introduced under section 47.

CIT v. *Texspin Engg. and Mfg. Works* [2003] 263 ITR 345 (Bom)

This case relates to the assessment year 1996-97. After listening to the contentions of the rival parties in this case, the hon'ble court made the following observations :

(i) Succession of partnership firm by a company, in accordance with the provisions of Part IX of the Companies Act, 1956 (section 575), is a case similar to transmission. There is much difference between transfer and transmission.

(ii) Section 45(1) is the charging section. It has to be read with the computation sections, i.e., section 48, etc.

(iii) In such cases, the company succeeds the firm. Generally, in the case of a transfer of a capital asset, two important ingredients are – existence of a party and a counter-party and, secondly, incoming consideration qua the transferor. When a firm is treated as a company, the said conditions are not attracted. There is no conveyance of the property executable in favour of the limited company. The vesting of the properties of the firm in the company, is not consequential or incidental to a transfer. It is a statutory vesting of properties in the company.

(iv) There is no transfer of the property as contemplated in section 45(1) of the Income-tax Act. Even assuming, for the sake of argument, that there is a transfer of a capital asset under section 45(1) because of the term "transfer" in section 2(47)(ii), even then, the court is of the view that liability to pay capital gain tax would not arise because section 45(1) is required to be read with section 48, which provides the mode of computation. These two sections are required to be read together as the charging section and the computation section together form a package. Where there is neither a transfer nor any consideration towards the property, these provisions will not apply.

(v) Section 2(47)(ii) treats extinguishment of any rights in the property as "transfer". As in the absence of any consideration section 48 does not apply, we can try and see whether the provisions of section 45(4) will apply. Section 45(4) deals with a situation where there is a transfer of capital asset by way of distribution of capital assets on the dissolution of the firm. There is a difference between vesting of the property, in this case in the company, and distribution of property. On vesting in the limited company, under Part IX of the Companies Act, 1956, the properties vest in the company as they exist. On the other hand, distribution on dissolution presupposes division, realization, encashment of assets and, appropriation of the realized amount, as per priority like payment of taxes to the Government, BMC, etc., payment to unsecured creditors, etc. This difference was brought out conceptually in the judgment of the hon'ble Supreme Court in the case of *Malabar Fisheries* v. *CIT* [1979] 120 ITR 49 (SC). In the present case, section 45(4) is not attracted as the very first condition of transfer by way of distribution of capital assets is not satisfied.

(vi) In *CIT* v. *George Henderson and Co. Ltd.* [1967] 66 ITR 622 (SC) and *CIT* v. *Gillanders Arbuthnot and Co.* [1973] 87 ITR 407 (SC), it has been held by the hon'ble Supreme Court that the expression "full value of the consideration" used in section 48, does not mean the market value of the asset transferred, but shall mean "the price bargained for by the parties to the transaction". It has been further held that the consideration for the transfer of a capital asset is what the transferor receives in lieu of the assets, viz., money or money's worth and, therefore, the very asset transferred or parted with cannot be considered as consideration for the transfer. Therefore, the expression "full value of the consideration" cannot be construed as having a reference to the market value of the asset. The allotment of shares has no correlation with the vesting of properties in the company, under Part IX of the Companies Act, 1956. As there is neither a dissolution of the firm nor any consideration involved in the process, section 45(4) is ruled out.

In the light of the above, the hon'ble Bombay High Court came to the conclusion that when a partnership firm is taken over by a limited company in accordance with Part IX of the Companies Act, 1956, there is no question of any capital gain and consequent taxation of such gain.

Post Texspin judgment scenario

The above judgment of the hon'ble Bombay High Court, turned out to be a leading case on this topic and has been followed by a large number of judgments of other High Courts and Tribunals. An illustrative list of just judgments is given below :

(i) *Deputy CIT* v. *R. L. Kalathia and Co.* [2016] 381 ITR 180 (Guj)

(ii) *Deputy CIT* v. *Well Pack Packaging* (Tax Appeal No. 368 of 2001) (Guj).

(iii) *CIT* v. *United Fish Nets* [2015] 372 ITR 67 (AP)

(iv) *CIT* v. *Rita Mechanical Works* [2012] 344 ITR 544 (P&H)

(v) *CADD Centre* v. *Asst. Commissioner* (Tax Appeal No. 2619 of 2006 (Mad)) [2016] 383 ITR 258 (Mad)

(vi) *CIT* v. *Ajanta Raj Dairy* [2014] 90 CCH 0170 (All)

(vii) *L. K. S. Gold House Pvt. Ltd* v. *L. K. S. Gold Palace* [2005] 57 SCL 362 (Mad)

(viii) *CIT* v. *A. N. Naick Associates* [2004] 265 ITR 346 (Bom)

(ix) *CIT* v. *Nathan and Co. Trichy* T. C. (A) No. 1458 of 2005 (Mad)

(x) *CIT* v. *Unity Care and Health Services* ITA No. 3170 of 2005) (Karn)

In addition, numerous Tribunals have followed the above-cited judgment in the *Texspin* case.

Conclusion

(1) It will be clear from the above judgments that in the eyes of law there is no "transfer" of assets when a firm is converted into a company in accordance with the provisions of the Companies Act. There is near unanimity in this view.

(2) In the above circumstances, the question that arises is why such clause (xiii) was introduced with effect from April 1, 1999, exempting such transactions from section 45, subject to the various conditions laid down therein.

(3) If the conditions laid down in the proviso to section 47(xiii) are not satisfied, the worst thing that could happen is that the transaction will be covered by section 45, which in any case has been made inapplicable by the judgment in *Texspin* and other cases !

(4) The answer to this puzzle could be found from the fact that while clause (xiii) was introduced with effect from April 1, 1999, the judgment in *Texspin* case was delivered only on March 5, 2003, i.e., almost four years after its introduction. Parliament did not have the benefit of these judgments, when this provision was introduced !

However, even after a catena of decisions, the Department did not take any steps to rectify this anomaly ! As a result, clause (xiii) under section 47 has become redundant and inoperative !

THE FINANCE BILL, 2020

Section-wise Analysis

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Introduction

The Finance Bill has proposed about one hundred and two amendments notwithstanding the repeated criticism that such large number of amendments are best made by a Taxation Amendment Act and not smuggled through a Finance bill, which is mainly intended to be an annual statement of income and expenditure. Such amendments should be carried out by way of a Taxation Amendment Act when sufficient time is possible with Rajya Sabha to contribute equally with Lok Sabha. Finance Bill is passed by Lok Sabha with no right for Rajya Sabha to make any amendment, except to send it back to Lok Sabha. With party system in vogue with both Houses controlled by the same party, the expected check from Rajya Sabha is even less effective. The Finance Bill attempts to be everything for everybody by trying to address all the complaints made before it.

The assurance, however, that fundamentals are strong is true, because our economy is not the result of the policies of the Government, but the result of the contribution of its people, whose rate of savings is high and their contribution by way of labour is significant. India has the largest stock of gold in the world, with no attempt so far to mobilize them.

The people at the lowest state of the society continue to suffer, while the liquor which contributes to their misery is distributed by a State undertaking forgetting our Gandhian advice, which was recalled by Justice S. Mohan in the decision of the Supreme Court in *Madras City Wine Merchants' Association* v. *State of Tamil Nadu*, as under :

> "Thanks to the courage and wisdom of Mr. C. Rajagopalachari (Rajaji), prohibition came to be introduced in his own native District of Salem in the year 1937 by enacting Madras (later Tamil Nadu) Prohibition Act of 1937. By stages it was extended throughout the State in 1948. So much so the Gandhian ideal of the abolition of evil of drinking was realised. To recall the father of the Nation, Mahatma Gandhi :

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2. B.Sc., F. C. A., L. L. B.

'Nothing but ruin stares a nation in the face that is prey to the drink habit' . . ."

The lengthy budget speech of our Finance Minister has a feel-good factors, trying to satisfy every sector and meet every grievance. Panchayat Raj is still a dream, notwithstanding the proposed use of artificial intelligence and digitization with extended faceless assessment to appeal. Unless Panchayats are recognised as an important unit of the Government with its own budget, even as canvassed in one of the forgotten books of our former IAS Officer, Mr. Gurumurthy. The comments by Mr. N.A. Palkhivala that our laws are bad enough and it is worst administered, continues to be so.

The income-tax provisions that have been incorporated in the Finance Bill, 2020 are discussed hereinafter.

Section 2(13A)

The Real Estate Investment Trusts (REIT) defined under section 2(13A) of the Income-tax Act ("Act"), are now relieved from the requirement of listing their units in the stock exchange. This is a welcome measure to encourage real estate business and also improve ease of doing business for the real estate industry.

Section 2(42A)

This section now rationalizes the period of holding of segregated portfolios in the Mutual Funds ("MFs") as that of the original unit or main portfolio held by the assessee.

Section 6

An individual may carry out substantial economic activities from India but still remain a non-resident, without declaring and paying taxes on his global income in India and every other jurisdiction. This misuse of the tax law is now plugged by the Finance Bill. It rationalizes the residential status of Individuals, who avoid paying tax in India or any other country, even though his income is sourced from India. The Bill, therefore, proposes to amend *Explanation 1(b)* to section 6 to substitute the words "182 days" with "120 days". Also, the requirement of "not-ordinarily resident" in India for Individuals and HUF that he/it should be non-resident at least for 9 out of 10 years is now amended to at least for 7 out of 10 years.

The Bill also inserted a non obstante clause (1A) to section 6 to provide that an individual, being an Indian citizen, shall be deemed to be resident in India in any previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

It is also clarified that an Indian citizen who becomes a deemed resident due to amended section 6, his income earned by him outside India shall not be taxed in India, unless it is derived from India.

Section 9

Section 9(1)(i) defining income deemed to accrue or arise in India provides the set of circumstances in which income accruing or arising, directly or indirectly, is taxable in India. The Bill inserts a new *Explanation 2A* on digital transactions to declare that "Significant Economic Presence (SEP)" of a non-resident in India shall constitute "business connection" in India and SEP for this purpose means—

(i) such advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India ;

(ii) sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India ; and

(iii) sale of goods and services using data collected from a person who resides in India or from a person who uses internet protocol address located in India.

It is also proposed to tax in India the income of a non-resident from the sale, distribution or exhibition of cinematographic films.

Section 9A

The Finance Bill proposes to relax two conditions required under section 9A of the Act, whereby eligible offshore investment funds would not constitute business connection in India.

Section 12AB

A new section 12AB on charitable institutions regulates the procedure for registration, vesting the Commissioner with powers to call for necessary documents and information and to pass an order of registration only on satisfaction as regards genuineness of the trust or institution. The power is vested on the Principal Commissioner or Commissioner, but the exercise of the power will be in such form and manner as may be prescribed, so that one has to await necessary rules as regards the further conditions for satisfaction on the part of the Commissioner for registration as regards genuineness. Genuineness being a concept based more on opinion, no guidelines can be so strict or so complete as to specify the requirement of satisfaction as regards genuineness. But it is felt that the rules can be framed to guide the authorities as regards the genuineness by the expected rules to be framed as regards registration.

Section 12AB would substitute reference to section 12A(1)(b). It also provides for notification under section 10(46) meant for Government institutions.

Once a trust or institution is registered, it is made clear that section 10(23C) would have no application. Provisional registration is contemplated subject to any modifications of the objects as directed. Time limit is prescribed for audit under section 44AB requiring such audit to be completed one month prior to the due date for filing return. The Commissioner is required to pass orders on application within a month of application.

The power of the Assessing Officer to recompute the income to make part of the income taxable with reference to any benefit to an interested person is now made part of registration, so that where there is a provision for such interested person or any benefit, there would be no registration or if registered, it will be cancelled. The new provision also provides for the requirement that the applicant for registration should satisfy any other law applicable to such institutions. These amendments will take effect from June 1, 2020.

Section 17(2)(vii) and (viia)

Taxation of perquisites undergoes a change by amendment to section 17(2)(vii) which provides for inclusion of contribution exceeding Rs. 7,50,000 towards approved superannuation fund, contribution to recognised provident fund, and 80CCD scheme as taxable perquisite to be assessed as salary in the hands of the employees.

It also inserts a new clause (viia) to section 17(2), taxing the annual accretion by way of interest, dividend or any other such funds so as to bring the annual accretion to tax in the same year of accretion, as a taxable perquisite.

Section 35

In section 35 meant to encourage scientific research, a new fifth proviso is inserted in sub-section (1) to provide for withdrawal of recognition, unless registration is carried out in such form and such manner as may be prescribed for a period of five years, so that the concession is not misused. However, it is restricted to actual research with details of such research to be communicated to the authorities for which a form is also to be prescribed. This amendment will be effective from June 1, 2020.

Section 55(2)

An *Explanation* is inserted newly under section 55(2)(b)(ii) liberalising the limit for application of the benefit of this provision for income assessable under the head "Other Sources" by a corresponding amendment to section 55(2) as well.

Section 57

An amendment to clause (i) of section 57 of the Act with effect from April 1, 2021 omits reference to section 115-O as a consequence of abolition of the dividend distribution tax.

A proviso inserted to the section places a ceiling on deduction of interest exceeding 20 per cent. of dividend income in respect of units of mutual fund. It also bars any relief under section 10(23D) in respect of units of specified company defined under section 10(35). These amendments will be effective from April 1, 2021 from assessment year 2021-22.

Section 72AA

A new section 72AA is inserted providing for the right to avail of the carry-forward loss and unabsorbed depreciation in a scheme of amalgamation including those of Government companies apparently meant to avoid tax on the merger of banking companies now underway. This amendment will be effective from April 1, 2020.

Section 80EEA

Section 80EEA provides for claim of interest on housing loan sanctioned between April 1, 2019 to March 31, 2020 (where the assessee does not own any other residential property and the stamp duty value of such property is less than Rs. 45 lakhs) up to Rs. 1,50,000 for loan sanctions period to March 31, 2020.

Section 80G and GGA

A charitable trust or institution are now expected to give information as regards donations received by it by insertion of a new proviso to section 80G(5) and section 80GGA, so as to make the donors accountable for the donations made by them with the form to be prescribed for this purpose. The new provision will be effective from June 1, 2020.

Section 80-IA

Section 80-IA, which allows tax holiday or deduction of 100 per cent. profits for ten consecutive years to infrastructure companies is amended by sub-section (7) to provide that the deduction under this section will be available only if the tax audit report and other reports are filed one month prior to due date of filing return of income under section 139(1) of the Act.

Section 80-IAC

Tax benefit to the start-ups provided by way of 100 per cent. deduction of their profits in 3 out of 7 years is enhanced by increasing period of eligibility. Total turnover limit increased from Rs. 25 crores to Rs. 100 crores and the period limit from 3 to 7 years, increased to 3 to 10 years. Option is made available for the employee to pay tax later on the sweat equity.

Section 80-IB

Section 80-IB is amended to provide that tax deduction under this section is available to profits and gains of certain industrial undertaking, only if the tax audit report and other reports are filed one month prior to the due date of filing return of income under section 139(1) of the Act.

Section 80-IBA

Section 80-IBA is amended to provide that tax deduction under this section, which is available to profits and gains from affordable housing projects approved by the Competent Authority before March 31, 2020, now stands extended to March 31, 2021. This is applicable from assessment year 2021-22.

Section 80JJAA

Section 80JJAA deduction is now made available on additional cost of new employees, only if the tax audit report and other reports are filed one month prior to the due date of filing the return of income under section 139(1) of the Act. This is applicable from assessment year 2020-21.

Section 80M

Section 80M has been inserted with effect from April 1, 2021. It provides that if the gross total income of a domestic company includes dividend income, then a deduction of an amount equal to the inter-corporate dividend income received from the domestic companies will now be allowed under this section, to the extent the dividend is distributed. This is applicable from assessment year 2021-22.

Section 90/90A

Section 90 and 90A relating to agreements by the Central Government with foreign countries or specified associations for avoidance of double taxation of income is now amended. The Central Government shall now enter into such agreements, without creating opportunities for non-taxation or reduced taxation through tax evasion/avoidance including the process of treaty-shopping aimed at obtaining reliefs provided in the said agreements for indirect benefit to the residents of any other country/territory. These amendments are applicable from assessment year 2021-22.

Section 92CB

It relates to the power of Board to make Safe Harbour Rules. Section 92CB(1) provides that the determination of arm's length price under section 92C or section 92CA shall be subject to Safe Harbour Rules. This is applicable from assessment year 2020-21.

Section 92CC

Section 92CC relating to Advance Pricing Agreement (APA) is amended to provide that the Board (with Central Government approval), may enter into an APA with any person, determining the arm's length price, specifying the manner in which arm's length price is to be determined in respect of attribution of income referred to under section 9(1)(i) in relation to an international transaction to be entered into by that person.

Section 92F

Section 92F relates to definitions of certain terms such as "computation of arm's length price", "specified date", etc. Specified date, which so long meant the "due date" as given under section 139(1), is now changed to the date one month prior to the due date for furnishing the return of income under section 139(1). This is applicable from assessment year 2020-21.

Section 94B(1A)

New sub-section (1A) in section 94B is inserted to liberalise deduction for non-resident banks liable to tax on interest paid for debts issued by a permanent establishment.

Section 94B

Section 94B relates to limitation on interest deduction in certain cases. Section 94B(1) provides that where an Indian company, or a permanent establishment ("PE") of a foreign company in India, being the borrower of debt from non-resident associated enterprise ("AE"), incurs any expenditure by way of interest or of similar nature exceeding Rs. 1 crore, such excess interest is not allowed. This provision is now amended to exclude persons engaged in the banking business in India. This is applicable from assessment year 2021-22.

Section 115A

Section 115A relating to tax on dividends, royalty and technical service fees in the case of foreign companies will now exclude the reference to dividends in section 115-O, so that all dividend income is taxed in the hands of non-resident consequential to omission of Dividend Distribution Tax. This is applicable from assessment year 2021-22.

Section 115AC

Section 115AC relates to tax on income from bonds or Global Depository Receipts ("GDR") purchased in foreign currency or capital gains arising from their transfer. This section is now amended to provide for taxation of dividend excluding dividends referred to in section 115-O, so that all dividend income is taxed in the hands of non-resident consequent to the omission of Dividend Distribution Tax. This amendment is applicable from assessment year 2021-22.

Section 115ACA

It relates to tax on income from Global Depository Receipt (GDR) purchased in foreign currency or capital gains arising from their transfer. This section will now exclude dividends referred in section 115-O, so that all dividend income is taxed in the hands of the non-resident, consequent to omission of Dividend Distribution Tax. This amendment is applicable from assessment year 2021-22.

Section 115AD

It relates to tax on income of Foreign Institutional Investors ("FII") from securities or capital gains arising from their transfer. It is now proposed to omit the reference of dividends under section 115-O, so that all dividend income is taxed in the hands of the FIIs. This amendment is consequential to omission of the Dividend Distribution Tax and is applicable from assessment year 2021-22.

Section 115BAA

Section 115BAA is amended to modify the computation of total income without deduction under any provisions of Chapter VI-A, other than the provisions of section 80JJAA or section 80M. This amendment is applicable from assessment year 2020-21.

Section 115BAB

This section relating to tax on income of new manufacturing domestic companies has modified the condition to provide that the total income of the company to be computed without any deduction under any provisions of Chapter VI-A other than the provisions of section 80JJAA has now extended the deduction to also cover section 80M. Moreover, the rate of income-tax for domestic manufacturing company will be 15 per cent., if certain conditions are complied with. This benefit applicable to the manufacturing sector is now extended to the business of generation of electricity. The amendment is applicable from assessment year 2020-21.

Sections 115BAC and 115BAD

New sections 115BAC relating to tax on income of individuals and Hindu undivided family ("HUF") and 115BAD relating to tax on income of certain resident co-operative societies are included in this Finance bill.

Section 115BAC provides that notwithstanding anything contained in this Act but subject to the provisions of this Chapter, the income-tax payable in respect of the total income of a person, being an individual or a HUF, for assessment year beginning on or after April 1, 2021, shall, at the option of such person, be computed at the following rate, if the condition of not availing of any exemption or deduction or depreciation or set-off of losses is complied with.

TABLE

Sl. No.	*Total Income*	*Rate of tax*
(1)	*(2)*	*(3)*
1.	Up to Rs. 2,50,000	Nil
2.	From Rs. 2,50,001 to Rs 5,00,000	5 per cent.
3.	From Rs. 5,00,001 to Rs. 7,50,000	10 per cent.
4.	From Rs. 7,50,001 to Rs. 10,00,000	15 per cent.
5.	From Rs, 10,00,001 to Rs. 12,50,000	20 per cent.
6.	From Rs, 12,50,001 to Rs. 15,00,000	25 per cent.
7.	Above Rs. 15,00,000	30 per cent.

Where the person fails to satisfy these conditions in any previous year, the option shall become invalid in respect of the assessment year relevant to that previous year and other provisions of the Act shall apply, as if the option had not been exercised for the assessment year relevant to that previous year. The amendment is applicable from assessment year 2020-21.

Section 119A

A new section 119A is inserted to empower the Central Board of Direct Taxes ("CBDT"/"Board") to declare a "Taxpayer's Charter" and issue such guidelines to other income-tax authorities as it may deem fit for the administration of such Charter. The Charter would lay down the taxpayer's rights. This amendment will take effect from April 1, 2020.

TDS under sections 194A, 194C, 194H, 194-I, 194J

It is proposed to increase the monetary limits for deduction of tax at source on interest other than "Interest on securities", contract payment, commission, rent or professional fees and to provide ceiling for exemption for an individual or a HUF, whose total sales, gross receipts/turnover from the business/profession carried on by him exceed Rs. 1 crore in case of business or Rs. 50 lakhs in case of profession during the financial year immediately preceding the financial year in which such income is credited or paid. Issue of TDS certificate is abolished. These amendments will take effect from April 1, 2020.

Section 194K

New section 194K inserted by the Finance Bill, 2020 extends the benefit of exemption for income from any mutual fund specified under section 10(23D), wherever the distributions is by means other than cash with further amendments to make the business of mutual funds easier.

Section 194LBA/194LC

New sections 194LBA and 194LC are inserted with the object of making compliance easier in respect of income from business under sections 194LBA and 194LC. It is yet another amendment made along with others, to ease the provisions of tax deduction at source.

Section 194-O

New section 194-O is inserted, where an e-commerce participant is facilitated by an e-commerce operator through his digital platform. Such e-commerce operator shall, at the time of the credit of the amount of sale/services/both to the account of an e-commerce participant or at the time of payment by any mode, whichever is earlier, deduct tax at the rate of 1 per cent. of the gross amount of such sales/services/both.

Section 133A

Survey powers are now restricted to those approved by a Joint Director/Joint Commissioner, to avoid abuse of survey powers.

Section 139

Due date of furnishing of return of income for certain persons, including a working partner of the specified firm is 30th day of September of the assessment year. It is proposed to amend the said clause so as to omit the word “working” in sub-clause (iii) and to provide that the due date for filing such return of income for all partners shall be the 31st day of October of the assessment year. This amendment will take effect from April 1, 2020.

Section 140

Section 140 provides for return of income as to the person by whom it has to be verified. To remove the practical difficulties in verifying and filing the tax returns in case of company and Limited Liability Partnership (“LLP”), it is amended to empower “any other person” as may be prescribed by the CBDT/Board to verify the return of income. These amendments will take effect from April 1, 2020.

Section 143

It provides that the Central Government may formulate a scheme by a notification in the Official Gazette, for the purposes of making assessment of total income or loss of the assessee under section 143(3), to impart greater efficiency, transparency and accountability by certain means to be specified therein. In order to enable assessment under section 144 under the aforementioned notified scheme, it is proposed to amend this sub-section to include the reference of section 144 of the Act in it. These amendments will take effect from April 1, 2020.

Section 234G

A new section 234G is inserted to provide for levy of a fee of Rs. 200 per day for default in filing or delivery of required certificate/statement under sections 35 and 80G, subject to penalty not exceeding the amount regarding which the default occurred. This amendment will take effect from June 1, 2020.

Section 250

Section 250 relating to the procedure in appeal by the Tribunal is amended to provide for presumption of a scheme for disposal of appeal by way of notification to ensure greater efficiency, transparency and accountability. This amendment will take effect from April 1, 2020.

Section 253

Order passed by Principal Commissioner or Commissioner under section 12AB is specifically made subject matter of appeal to the Tribunal. This amendment will take effect from June 1, 2020.

Section 254

The Income-tax Appellate Tribunal ("ITAT") shall not pass any order of stay of income-tax, unless the assessee has deposited not less than twenty per cent. of the amount of tax liability (or furnished security of an equal amount in respect thereof), including any interest, fee, penalty, or any other sum payable under the Act.

Section 271AAD

New section 271AAD provides for penalty for false entry or omission of entry in the books of account so as to cover areas which are not covered under penalty provisions.

Section 271K

A new section 271K is inserted to empower the Assessing Officer to levy a penalty for defaults under sections 35 and 80G from Rs. 10,000 to Rs. 1 lakh, if the assessee fails to furnish the certificate or statements required under the Act.

Section 274

Section 274 has been amended to authorise the Government to notify an e-scheme for imposing penalty under Chapter XXI, to impart greater efficiency, transparency and accountability. This amendment will take effect from April 1, 2020.

Section 285BB

A new section 285BB relating to annual information statement has been inserted, which provides that the prescribed tax authority will upload an annual information statement in the registered account of the assessee. This amendment will take effect from June 1, 2020.

Section 288

The Bill proposes under section 288 to provide that an insolvency professional can now act as an "authorised representative" and appear before the income-tax authority or the Income-tax Appellate Tribunal.

Section 295

The Finance Bill amends section 295 to empower the Central Board of Direct Taxes to formulate rules for the income computation of a non-resident from its operations/activities (SEP) carried out in India.

GIFTS BETWEEN HUF AND MEMBERS : EXEMPT UNDER SECTION 56(2)(x) ?

JIGNESH R. SHAH[1]

Section 56(2)(x) of the Income-tax Act, 1961 ("the Act") contains a legal fiction to the effect that if any person receives any benefit in terms of money or money's worth, without consideration or for inadequate consideration, such benefit is taxable as income in his hands under the head "income from other sources". In effect, a gift or deemed gift is subjected to tax as income in the hands of the recipient.[2] This provision encompasses within its fold three types of gifts : (i) sum of money ; (ii) immovable property and (iii) property[3] other than an immovable property. There is a threshold exemption of Rs. 50,000 of such gift from this tax.

There are, of course, some exemptions from this charge, contained in the proviso to section 56(2)(x) such as gift received from any relative, gift received on the occasion of the marriage, etc.

The term "relative", for this purpose, is defined in the *Explanation* below clause (x) of sub-section (2) of section 56 (read with clause (e) of the *Explanation* to clause (vii) of sub-section (2) of section 56).

In the light of the meaning and connotation of the term "relative" as so defined it is proposed to discuss in this article whether gift from a Hindu undivided family (HUF) to its member and vice versa, that is to say, gift from a member of the HUF to the HUF, would qualify for exemption from tax under section 56(2)(x).

Let us first understand the meaning of the term "relative". Looking at its central importance here, this definition deserves verbatim reproduction :

"(e) 'relative' means,—

(i) in case of an individual—

(A) spouse of the individual ;

(B) brother or sister of the individual ;

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1. Advocate, High Court, Mumbai.
2. As is known, gift-tax, hitherto levied under the Gift-tax Act, 1958, has been abolished from October 1, 1998.
3. The term "property" is defined to mean nine specific items enumerated therein (which includes an immovable property). See the *Explanation* below clause (x) of sub-section (2) of section 56 with clause (d) of the *Explanation* to clause (vii) of sub-section (2) of section 56.

(C) brother or sister of the spouse of the individual ;

(D) brother or sister of either of the parents of the individual ;

(E) any lineal ascendant or descendant of the individual ;

(F) any lineal ascendant or descendant of the spouse of the individual ;

(G) spouse of the person referred to in items (B) to (F) above ; and

(ii) in case of a Hindu undivided family, any member thereof."

Thus, the definition of the word "relative" is with reference to two distinct assessable entities or in two separate parts, namely, (i) an individual ; and (ii) an HUF.

Whether or not a person is a relative is to be seen with reference to, or from the perspective of, the recipient of the gift. Therefore, when a person receives gift, one has to see whether the donor falls within the definition of the expression "relative" with reference to the recipient of the gift. Stated simply, one has to see whether the recipient has received the gift from a "relative" and not vice versa. One does not have to see whether the recipient is a relative of the donor. One may wonder that if the donor is the relative of the recipient, the recipient would necessarily be the relative of the donor. But this may not always be so. For example, if an individual receives gift from his father's brother (uncle), the same would be exempt as gift from a relative because the father's brother is a relative who falls within item (D) above. But, if it is the other way round, that is to say, if a person receives gift from his brother's son (nephew), the same would not be exempt as gift from a relative because a brother's son does not fall within any of the above items (A) to (G) above and, hence, he would not be a relative. Thus, an uncle is a "relative" of his nephew, but a nephew is not a "relative" of his uncle. As a result, gift received by a nephew from his uncle would be exempt but not gift received by the uncle from his nephew. This discussion, though in the context of clause (i) above relating to "individual", is made here with a view to elucidate the mode of interpretation of the term "relative" which would be relevant while interpreting clause (ii) above relating to "HUF".

In the light of this basic discussion about the mode of interpretation of the term "relative", let us now analyse the exemption of gifts between an HUF and a member thereof.

Let us first examine the exemption of gift received by an HUF from its member. Here, the recipient of the gift is the HUF. Therefore, we have to examine whether the donor (i.e., member of the HUF) is a relative of the HUF. For this, we have to look at clause (ii) relating to "HUF" in the definition of the term "relative" reproduced above. Seen from this perspective, as is clearly mentioned in clause (ii), a member of an HUF is a "relative" of the HUF. Thus, gift received by the HUF from its member would qualify for exemption as gift from a relative.

But, if gift is received from an individual who is not a member of the HUF but none the less a relative of all the individual members of the HUF, would the same qualify as gift from a relative ? When we look at the definition of the term "relative" where an HUF has received the gift, we have to look at the above referred clause (ii) alone, which says that in case of an HUF the only relative is a member thereof, and none else. However, earlier, in the context of similar provisions under section 56(2)(v)[1] [a predecessor of the present section 56(2)(x)[2]], applicable to gifts received by an individual and an HUF, but where the definition of "relative" was with reference only to an individual (but not an HUF), it was held in *Harshadbhai Dahyalal Vaidhya (HUF)* v. *ITO* [2013] 144 ITD 605 (Ahd) [3] that gift received by the HUF from a "relative" (uncle[4]) of the karta of the HUF was gift received from "relative" and eligible for exemption. The Tribunal appears to have held to the effect that when the main provision is applicable to individuals and HUFs, the exemption also applies to individuals and HUFs alike. The Tribunal, therefore, held to the effect that gift received by an individual as well as by an HUF from a "relative" of the individual or of the members of the HUF, as the case may be, would be exempt.

More recently, however, the Delhi Bench of the Tribunal has expressed diametrically opposite views in *Subodh Gupta (HUF)* v. *Pr. CIT* [2018] 11 ITR-OL 576 (Delhi) ; [2018] 169 ITD 60 (Delhi). In this case the assessee-HUF received gift from the mother of the karta of the HUF. This decision was in the context of section 56(2)(vii)[5] [another predecessor of the present section 56(2)(x)] where the definition of "relative" was the same as applicable to the present section 56(2)(x). The Tribunal held in clear-cut terms in this case that the gift received by the HUF from an individual who is not a member of the HUF is not exempt—even though the individual donor is a

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1. Applicable to gifts received between September 1, 2004 and March 31, 2006.
2. Applicable to gifts received on or after April 1, 2017.
3. The Tribunal followed *Vineetkumar Raghavjibhai Bhalodia* v. *ITO* [2011] 140 TTJ (Rajkot) 58, which is applicable to the reverse situation, discussed in greater detail hereinafter.
4. Falling in item (D) above "brother or sister of either of the parents of the individual".
5. Applicable to gifts received between October 1, 2009 and March 31, 2017.

"relative" of each of the individual members of the HUF.[1] The Tribunal categorically rejected the assessee's contention that an HUF is a collection or group of individuals and since each individual member of the HUF was a "relative" of the individual donor and since the individual donor has given the gift out of natural love and affection for each member of the HUF collectively, the HUF (i.e., group of individuals) is a "relative" and, therefore, the gift received by it should be exempt—even though the donor is not a member of the HUF. The Tribunal observed in no uncertain terms that in the provision there are two specific and different types of exclusions provided for individuals and HUFs ; that one set of relatives has been defined in case of individuals and another set in the case of an HUF. The Tribunal observed that when an HUF receives gift, the simple question to be asked is whether the donor is a member of the HUF : if he is, the gift is exempt ; if he is not, it is not exempt. The Tribunal also recognized that in the definition of the term "person" given in section 2(31), an individual and an HUF are distinct assessable entities.

It is submitted that the view expressed by the Delhi Bench above in *Subodh Gupta* (HUF) (supra) is more convincing than the view expressed by the Ahmedabad Bench earlier in *Harshadbhai Dahyalal Vaidhya* (HUF) (supra). Therefore, it is submitted that gift received by an HUF from a non-member, though a relative of all the individual members of the HUF, does not qualify for this exemption.

Now, let us look at the reverse situation. If an individual member of the HUF receives gift from the HUF, would it be regarded as gift from a relative ? One may perhaps jump to argue that as stated in clause (ii) above, HUF and its members are relatives and, hence, if a member is a relative of the HUF, it necessarily follows that the HUF is also a relative of the individual member. However, it is not so, because when an individual member receives gift from the HUF, in order to find whether this is gift from a relative, one has to look at clause (i) above (starting with the words "in case of an individual") applicable to an individual because the recipient of the gift is an individual (member) and not the HUF. If we look at the definition of "relative" with reference to an individual in clause (i) above, the HUF does not feature in the list of relatives specified in items (A) to (G) above. Therefore, interpreting the law on first principle, it seems that when

1. The Tribunal considered and distinguished the decisions in, among others, *Vineetkumar Raghavjibhai Bhalodia* v. *ITO* [2011] 12 ITR (Trib) 616 (Rajkot) ; [2011] 140 TTJ (Rajkot) 58 ; *Harshadbhai Dahyalal Vaidhya (HUF)* v. *ITO* [2013] 144 ITD 605 (Ahd) ; *CWT* v. *C. P. Appanna* [1993] 202 ITR 678 (Karn) ; *CIT* v. *Gunvantlal Ratanchand* [1994] 208 ITR 1028 (Guj) and *Surjeet Lal Chhabda* v. *CIT* [1975] 101 ITR 776 (SC).

an individual member receives gift from the HUF, it would not be regarded as gift from a relative and, therefore, it would not qualify for exemption.

But, there is a series of Tribunal decisions where it is held that when all members of the HUF (donor) are relatives of the individual member (donee) receiving the gift, it is nothing but gift received "collectively" from a "group of relatives" (comprising in the HUF) and that the word "relative" though singular includes plural "relatives" also ; and, therefore, such gift would qualify for this exemption. The leading case on the point is *Vineetkumar Raghavjibhai Bhalodia* v. *ITO* [2011] 12 ITR (Trib) 616 (Rajkot) ; [2011] 140 TTJ (Rajkot) 58. This case pertained to section 56(2)(vi)[1] [another predecessor of the present section 56(2)(x)] where the definition of "relative" was only with reference to individuals (i.e., clause (i) in the definition of "relative" reproduced above) and not an HUF (i.e., clause (ii) in the definition of the term "relative" reproduced above). Here, the individual-assessee received gift from an HUF of which he was a member. In individual capacity all the members of the HUF (donor) were his relatives, but the fact was that the gift was received from the HUF. But, still the Tribunal took the view that when all the members of the HUF (donor) are relatives of the assessee (donee), the gift received from the HUF is nothing but gift received from a "group of relatives" and, therefore, it is exempt from tax as gift received from a relative. The Tribunal observed that though the word "relative" is used in singular sense it also means plural and as such gift received from "relatives" is not taxable[2]. In effect, the Tribunal has adopted the stand that when all members of the HUF are relatives, the donor-HUF virtually becomes an individual and the distinction between the HUF and the individual as distinct assessable entities disappears[3]. This decision in favour of the assessee has been consistently followed by the Tribunal in a number of subsequent cases, some of which are as follows :

(i) *Biravelli Bhaskar* v. *ITO* [2015] 44 CCH 234 (Hyd) ;

(ii) *Hemal D. Shah* v. *Deputy CIT* [2017] 49 CCH 564 (Mum)[4] ;

1. Applicable to gifts received between April 1, 2006 and September 30, 2009.
2. While reaching this conclusion, the Tribunal considered, among others, the following decisions : *CGT* v. *N. S. Getti Chettiar* [1971] 82 ITR 599 (SC) ; *Surjit Lal Chhabda* v. *CIT* [1975] 101 ITR 776 (SC) ; *CIT* v. *Gunvantlal Ratanchand* [1994] 208 ITR 1028 (Guj) and *CWT* v. *C. P. Appanna* [1993] 202 ITR 678 (Karn).
3. The Tribunal in this case also held that even otherwise gift received by a member of the HUF from the HUF is exempt under section 10(2). It is submitted with due respect that this proposition is also debatable, looking at the context and purpose of section 10(2).
4. In this case it was also held that if only some (and not all) members of the HUF are relatives of the donee-assessee, the gift would not qualify for exemption.

(iii) *Deputy CIT* v. *Ateev V. Gala* (ITA No. 1906/Mum/2014) (Order dated April 19, 2017) ; and

(iii) *Harshadbhai Dahyalal Vaidhya (HUF)* v. *ITO* (supra) (in reverse situation).

It is submitted that when the Act recognizes in section 2(31) and in the entire scheme of the Act (including in section 56(2)(x) itself) an individual and an HUF as distinct assessable entities (even though an HUF is not a person in general law) the argument that the gift received from an HUF by a member thereof is gift from a "group of relatives" is unconvincing. In the reverse situation, that is to say, when an HUF receives gift from a non-member, who is a relative of all the members of the HUF, as is rightly held by the Delhi Tribunal in *Subodh Gupta* (supra) (discussed in detail above), the theory of "group of relatives" is not acceptable inasmuch and an individual and an HUF are recognized as distinct assessable entities, it is submitted that the same principle applies in this situation as well. It is, therefore, submitted with due respect that the view expressed by the Tribunal in the above-referred series of decisions in favour of the assessee, though a broad and bold view, appears to be legally unconvincing. To put the controversy at rest, it is suggested that the Legislature should amend the definition of the term "relative" by adding one more item (H) after item (G) in clause (i) above applicable to individuals, to read "a Hindu undivided family of which the individual is a member". This will be converse of clause (ii) thereof and will make the definition complete.

To sum up, it is submitted—

(1) that gift received by an HUF from an individual member thereof is exempt, as is clearly provided in clause (ii) of the definition of the term "relative" ;

(2) that gift received by an HUF from a non-member, though he is a relative of all the individual members of the HUF, is not exempt ; and

(3) that gift received by an individual member from an HUF consisting of all his relatives is judicially held to be exempt, but the legal validity of that proposition appears to be doubtful.

STAY ON DEMAND

Amit Kumar Gupta[1]

Introduction

There has been always a tug-of-war between Assessing Officers and the assessee, where on one side, the Assessing Officers have the tendency to make huge additions and disallowances on various grounds and raise huge tax demands, while on the other hand, assessees want to pay minimum taxes on his hard-earned income by adopting various measures of tax plannings. Whenever taxpayers file the income returns, the Income-tax Department processes it and the return of an assessee gets picked for an assessment on the basis of set parameters by the Central Board of Direct Taxes. However it has been observed from time to time that income-tax assessments were often arbitrarily pitched at higher figures and huge demands are created against the assessee and coercive measures are adopted by the revenue authorities for the collection of disputed demand. This leads to the miscarriage of justice and immense hardships to the taxpayers.

Assessee-in-default under Income-tax Act

Section 220 deems an assessee-in-default under certain circumstances. Section essentially provides that an assessee may be deemed in default if any amount, other than by way of advance tax, specified in a notice of demand issued under section 156 is not paid within 30 days of the service of the notice unless the time limit of 30 days is shortened by the Assessing Officer after complying with certain formalities.

However, section 220(6) says that "Where an assessee has presented an appeal under section 246, the Income-tax Officer may, in his discretion, and subject to such conditions as he may think fit, treat the assessee as not being in default in respect of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of". Thus, section 220(6) empowers the assessing authority to treat an assessee as not being in default and in his discretion keep the collection of demand in abeyance in respect of the amount in dispute in the appeal as long as the appeal remains not disposed of or the appeal is pending before the first appellate authority.

Consequences of being an assessee-in-default

(a) *Interest* : As per section 220(2), if the taxpayer fails to pay the amount specified in any notice of demand issued under section 156 within the period as allowed in this regard, then he shall be liable to pay simple

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interest at 1 per cent. for every month or part of a month from the service of the demand notice.

(b) *Imposition of penalties* : As per section 221 of the Income-tax Act "When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in the case of a continuing default, such further amount or amounts as the Assessing Officer may direct him to pay from time to time".

(c) *Seizure and attachment* : As per section 281B of the Act "Where, during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the Revenue it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, by order in writing, attach provisionally any property belonging to the assessee".

(d) *Prosecution* : The consequences do not stop at mere imposition of penalties and steps to recover arrears but include the risk of being prosecuted under Chapter XXII of the Income-tax Act, 1961 depending upon the nature and gravity of the default.

High pitched assessments

One of the points that came up for consideration in the 8th meeting of the Informal Consultative Committee was that income-tax assessments were often arbitrarily pitched at higher figures and that the collection of disputed demand as a result thereof was also not stayed in spite of the specific provision in section 220(6) of the Income-tax Act, 1961.

Thus, to address the above Central Board of Direct Taxes issues Instruction No. 96 (F. No. 1/6/69-ITCC) dated August 21, 1969 "where the income determined on assessment was substantially higher than the returned income, say twice the latter amount or more, the collection of the tax in dispute, should be held in abeyance till the decision on the appeal provided there were no lapses on the part of the assessee".

The revenue maintains that these instructions stand withdrawn in view of the later instruction issued on the same subject of stay of recovery. However, the courts follow the spirit of these instructions as the same is referred in their judgments from time to time. Some of the cases are as follows :

In the case of *Valvoline Cummins Ltd.* v. *Deputy CIT* [2008] 307 ITR 103 (Delhi) the High Court had granted an absolute stay of demand because the assessment made was eight times of the returned income holding that a perusal of para 2 of the Central Board of Direct Taxes Instruction No. 96, dated August 21, 1969 shows that where the income determined is substantially higher than the returned income, i.e., twice the latter amount or more, then the collection of tax in dispute should be held in abeyance till the decision on the appeal is taken. In this case, the assessment was almost 8 times the returned income. Clearly, Instruction No. 96, dated August 21, 1969 would be applicable to the facts of the case. Under the circumstances, the assessee would, in normal course, be entitled to an absolute stay of the demand on the basis of the above instruction.

In the case of *Maheshwari Agro Industries* v. *Union of India* [2012] 346 ITR 375 (Raj), the Rajasthan High Court held that the tendency of making high-pitched assessments by the Assessing Officers is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice and sometimes even in insolvency or closure of the business, if such power was to be exercised only in a pro-Revenue manner. It may be akin to execution of a death sentence whereas the accused may get even acquittal from higher appellate forums or courts. Therefore, this court is of the opinion that such powers under sub-section (6) of section 220 of the Act also have to be exercised in accordance with the letter and spirit of Instruction No. 96 dated August 21, 1969, which states that where the income determined on assessment was substantially higher than the returned income, twice the later amount or more, the collection of the taxes in dispute is to be held in abeyance till the decision of the appeals provided there was no fault on the part of the assessee.

Thus, this court in view of Instruction No. 96 dated August 21, 1969, stayed the recovery of entire balance amount from the assessee, while directing the Commissioner of Income-tax (Appeals) to dispose of the pending appeal of the assessee within a period of six months from the date of order.

Urban Improvement Trust v. *Asst. CIT* : Assessee file a writ stating that the Commissioner, while passing the order, has not taken into consideration the law laid down by the hon'ble Supreme Court, this court and also the mandatory circulars issued by the Department of Income-tax itself – the view of the assessee is supported by the judgment of the hon'ble Delhi High Court in the case of *Soul* v. *Deputy CIT* [2010] 323 ITR 305 (Delhi) Held : when the assessed income is more than double of the returned income then the demand should be stayed till the decision of appeal – it is apparent that while deciding the stay application, the Assistant Collector has not taken into consideration the judgment and circulars cited by the petitioner – quash the order remanding to the Assistant Collector of Income-tax to consider the stay application afresh by providing an opportunity of hearing to the petitioner and also by taking into consideration judgments and circulars cited by the petitioner in favour of assessee).

Thus, the above decisions clearly state that what has been approved by the "Informal Consultative Committee of Parliament" and the then deputy Prime Minister/Finance Minister in Instruction No. 96 is still valid and is not be superseded by the circulars issued by the Central Board of Direct Taxes from time to time by the discussion concerning stay of demands. Hence, where income assessed is twice the income returned or more, the demand raised in such high-pitched assessments, on applications made by the assessee, has to be stayed until the disposal of appeals by the Commissioner of Income-tax (Appeals). The Assessing Officers cannot escape from the above instruction and the Assessing Officers, who are not adhering to this Instruction and are compelling the assessee to pay the demand, which is substantially higher, on the basis of Instruction No. 96, could be held to be guilty of not following the decision of a Committee of Parliament and could be said to be committing contempt of Parliament.

Limit of 20 per cent. of demand is flexible

The Board has, while stating generally that the assessee shall be called upon to remit 20 per cent. of the disputed demand, granted ample discretion to the authority to either increase or decrease the quantum demanded based on factors to be taken into consideration. The similar view has been held by various courts in many cases.

The hon'ble Supreme Court held as under while deciding the appeal titled as *Pr. CIT* v. *LG Electronics India Private Limited* [2018] 12 ITR-OL 334 (SC) "Having heard Shri Vikramjit Banerjee, learned ASG appearing on behalf of the appellant, and giving credence to the fact that he has argued before us that the administrative Circular will not operate as a fetter on the Commissioner since it is a quasi-judicial authority, we only need to clarify that in all cases like the present, it will be open to the authorities, on the facts of individual cases, to grant deposit orders of a lesser amount than 20 per cent., pending appeal".

The Bombay High Court, in the case of *Bhupendra Murji Shah* v. *Deputy CIT*, observed as under with regard to the instructions of Central Board of Direct Taxes, "We are not concerned here with the Circular of the Central Board of Direct Taxes. We are not concerned here also with the power conferred in the Assessing Officer of collection and recovery by coercive means. All that we are worried about is the understanding of this Deputy Commissioner of a demand, which is pending or an amount, which is due and payable as tax. If that demand is under dispute and is subject to the appellate proceedings, then the right of appeal vested in the petitioner/assessee by virtue of the statute should not be rendered illusory and nugatory. That right can very well be defeated by such communication from the Revenue/Department as is impugned before us. That would mean that if the amount as directed by the impugned communication being not brought in, the petitioner may not have an opportunity to even argue his appeal on merits or that appeal will become infructuous, if the demand is enforced and executed during its pendency. In that event, the right to seek protection against collection and recovery, pending appeal, by making an application for stay would also be defeated and frustrated. Such can never be the mandate of law. In the circumstances, we dispose both these petitions with directions that the appellate authority shall conclude the hearing of the appeals as expeditiously as possible and during pendency of these appeals, the petitioner/appellant shall not be called upon to make payment of any sum, much less to the extent of 20 per cent. under the assessment order/confirmed demand or claim to be outstanding by the Revenue.

Other Central Board of Direct Taxes guidelines

Instruction No. 1914 dated December 2, 1993 states the guidelines for staying demand :

A demand will be stayed only if there are valid reasons for doing so. Also, while considering the application under section 220(6), the Assessing Officer should consider all relevant factors having a bearing on the demand raised and communicate his decision in the form of a speaking order. A few illustrative situations where stay could be granted are—

• If the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier ; or

• If the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under whose jurisdiction the Assessing Officer is working) ; or

• If the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment.

The same view has also been conferred by the High Court, in the case of *Siemens India Ltd.* v. *K Subramanium, ITO* [1983] 143 ITR 120 (Bom) the Bombay High Court held that "The submission that an Income-tax Officer is not bound by the decision of a High Court within whose jurisdiction he is, if an appeal against that decision is pending in the Supreme Court, or a special leave application is pending in the Supreme Court against that judgment, cannot be accepted. Merely because an appeal has been filed or a special leave application is pending against it, does not denude a decision of its binding effect, and until set aside that decision is binding on all upon whom it operates as a binding precedent, unless where the operation of that judgment has been stayed by the Supreme Court. Not to follow the decision of the High Court within whose jurisdiction the Income-tax Officer is, would be tantamount to committing contempt of that court".

Mere filing of an appeal against the assessment order will not automatically provide stay of recovery of demand. Generally, it is observed that the assessee files appeal with the Department and does not file stay application. Stay application is to be compulsorily filed with the Assessing Officer as the filing of an appeal does not amount to an automatic stay of proceedings. The power not to regard such assessee a defaulter, has been given to the Assessing Officer, and its exercise depends upon his discretion on the receipt of stay application by the assessee.

Instruction No. 1914 was partially modified by Office Memorandum dated February 29, 2016 taking into account the fact that Assessing Officers insisted on payment of significant portions of the disputed demand prior to grant of stay resulting in extreme hardship for taxpayers. Thus, in order to streamline the grant of stay and standardise the procedure, modified guidelines were issued, which are as follows :

(A) In a case where the outstanding demand is disputed before Commissioner of Income-tax (Appeals), the Assessing Officer shall grant stay of demand till disposal of first appeal on payment of 15 per cent. of the disputed demand, unless the case falls in the category discussed in para (B) hereunder.

(B) In a situation where the Assessing Officer is of the view that the nature of addition resulting in the disputed demand is such that payment of a lump sum amount lower than 15 per cent. is warranted (e.g., in a case where addition on the same issue has been deleted by appellate authorities in earlier years or the decision of the Supreme Court or jurisdictional High Court is in favour of the assessee, etc.).

Instruction No. 1914 was further modified by Office Memorandum bearing number F. No. 404/72/93—ITCC dated July 31, 2017, where Central Board of Direct Taxes hikes standard rate of disputed tax payment from 15 per cent. to 20 per cent., to get stay of demand, where the demand is contested before the Commissioner of Income-tax (Appeals).

The Circulars and Instructions extracted above are in the nature of guidelines issued to assist the assessing authorities in the matter of grant of stay and cannot substitute or override the basic tenets to be followed in the consideration and disposal of stay petitions. The parameters to be taken into account in grant of stay of disputed demand are well settled—the existence of a prima facie case, financial stringency and the balance of convenience. "Financial stringency" would include within its ambit the question of "irreparable injury" and "undue hardship" as well. It is only upon an application of the three factors as aforesaid that the Assessing Officer can exercise discretion for the grant or rejection, wholly or in part, of a request for stay of disputed demand.

Conclusion

In spite of the above, it has been observed that orders are sometimes non-speaking, ignoring the Central Board of Direct Taxes circulars and various judicial precedents. In scrutiny assessments, often huge demands are created against the assessee by framing high-pitched assessments. This puts assessees to a great deal of hardship. The discretionary powers entrusted to Assessing Officers must be exercised judicially and reasonably and he should consider all the facts and circumstances of the case relevant to the exercise of the discretion, in all its aspects such as assessment history of the assessee, his conduct and co-operation in relation to the Department, points raised in the appeal, chances of recovery in case the appeal is dismissed, the hardship to the assessee by insistence on immediate payment and the like. Thus, the Assessing Officer should act in a reasonable manner to subserve the purpose of guidelines by various courts. Before exercising his discretionary powers, he should not act as a mere tax gatherer and should divorce himself from his position as the authority that made the assessment and consider the matter in all its facets, without, at the same time, sacrificing the interests of the Revenue.