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By

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CONTENTS

Dear Readers,

Greetings for the season!

In this edition, we bring you to quite a few interesting articles.

The recent decision of Supreme Court in the matter of Calcutta Club Limited dealing with principle of mutuality qua the indirect taxes has a greater impact on taxation under GST regime. Hence, we thought of analysing the said judgment and tried to apply the essence to GST regime to understand the way forward for clubs.

The next article is on the recent changes to tax rates for domestic companies. The said article captures the comparisons among different rates along with specific conditions.

The article on 'IBC vs RERA- IBC Wins' is another blessing from the Supreme Court on the IB Code. The Supreme Court stating that remedies under IBC and RERA will be simultaneously available for a house owner makes the position of house owner more secure and stable.

The article on 'Ancestral Property vs Self-Acquired Property' is also a daunting issue in the Hindu Law, which was quite a bit addressed by Supreme Court in the recent decision.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

I am also glad to announce that we have launched our mobile app 'SBS Connect' on the eve of completion of 10 years. Now, Wiki and other resources can be accessed through 'SBS Connect'. Please use 'SBS Connect' to stay connected with us.

Thanking You,

Suresh Babu S
Chairman &Managing Partner

GST

CONCEPT OF MUTUALITY - A REAL CONCERN

Contributed by CA Sri Harsha

The recent decision of three-member bench of Honourable Supreme Court in the matter of Calcutta Club Limited[1] with respect to the concept of mutuality in tax laws has ignited more concerns rather settling the dust. The said decision has great impact on the current goods and service tax regime, (GST) where the clubs might take this judgement as a precedent and stop paying tax, which may give birth to another round of decades of litigation. This article tries to deal with the concept of Mutuality and its applicability under the GST regime.

History of Taxation based on the concept of Mutuality :

There is a lot of history on taxation pertaining to taxation based on mutuality whether incorporated or unincorporated. The state taxation authorities considering the need for resources and to put a check to tax evasion, have always tried to tax on such kind of transactions which are not normally understood as 'sale'. One of such items being, the tax on supply of goods by a club (incorporated or not) to its members for cash, deferred payment or other valuable consideration. The tax on the said transaction compelled such clubs to approach various courts. The main line of defence for the clubs was that they operate on principle of mutuality and basis such principle there would not be any tax on supplies made to its members. The principle of mutuality, in simple words, means, 'No man can trade with himself; he cannot make, in what is its true sense or meaning, taxable profit by dealing with himself'. Since in the case of club, there would be complete identity between the contributors and beneficiaries, there cannot be any profit by dealing with oneself. In other words, the underlining philosophy of principle of mutuality is that there are no two persons involved and there is always one only. In the absence of two persons, which is prerequisite for any tax[2] to be applicable, the clubs always argued that they are not subject to tax.

Amending the State Tax laws without amending the Constitution – A Futile Exercise:

Understanding this, the state tax authorities started amending their respective tax laws, stating that a club is a dealer, the activity of club is a business (even though there is no profit motive) and also including the activity of supply of goods by clubs to its members for a consideration in the definition of 'sale'. Despite amendments to the said expressions in their respective state laws, the clubs had approached courts stating that the tax authorities cannot by just amending the definition of 'sale' in their acts propose tax on such transactions, when the expression 'sale' used in Entry 54 of List II[3] still refers to normal meaning of 'sale'. Eventually the matters have reached the Honourable Supreme Court and in one of the matters of Young Men's Indian Association[4] , the Court has held that there is no transfer of property from one to another in spite of definition contained in the sales tax law. We will come back in a moment to this.

[1] [2019] 110 taxmann.com 47 (SC)
[2] Unless specific language is brought in tax laws stating that both of them are distinct
[3] Schedule VII to Constitution of India
[4] 1970 (1) Supreme Court Cases 462

Prior to this judgement a three-member bench[5] of Supreme Court had an occasion to deal with taxation of supplies made by co-operative society (which is registered co-operative society) to its members in this matter of Enfield India Co-operative Canteen Limited[6] . The Court has held that the expression 'sale' which is used in Entry 54 of List II has to be understood in its widest terms to include sales made by club. Also, the Court proceeded to state a registered society is a body corporate with power to hold property and cannot be assumed that property which it holds is property of which its members are owners paving a way to, thinking that the clubs/societies once being incorporated become distinct from its members. It also made a remark stating that in case of unincorporated club, there is no distinction among members and club and in such cases, there could not be any sale in absence of two separate persons. Also, it stated that if an incorporated club can substantiate on facts that it acts as an agent of the members, then the principle of mutuality still holds good and there cannot be any tax, despite of the fact of incorporation. Since there was nothing to show them that the society is acting as agent or trustee, the tax was held tobe applicable in that case.

Now, let's go back to the matter of Young Men's Indian Association (supra), the six member-bench of Supreme Court has distinguished the judgement of Enfield India Co-operative Canteen Limited (supra) where in it was stated that if the club even though a distinct legal entity is only acting as an agent for its members in matters of supply of various preparations to them no sale would be involved as element of transfer would be completely absent.

Further, Justice J C Shah has passed a dissenting judgment[7] in Young Men's India Association (supra), wherein he has highlighted that the reliance placed on the English judgements in the matter of Graff v Evans and Trebanog Working Men's Club and Institute Limited vs Macdonald to understand the principle of mutuality do not apply to the taxation statues, as such judgments were pertaining to the matter of quasi-criminal nature.

He also stated that liability to tax of the transaction strictly depends upon its legal form. If an incorporated members clubs supplies its property to its members at a fixed tariff, the transaction would be sale even though the transaction is on no-profit basis. Where, however, the club is merely acting on behalf of the members to make available to them refreshments, beverages and other articles, the transaction will not be regarded as sale, for the club is the agency through which the members have arranged that the refreshments, beverages and other articles should be made available. *The test in each case is whether the club transfers property belonging to it for a price or the club acts as agent for making available property belonging to its members.* As the facts involved in Young Men's India Association indicated that the association is not transferring the property belonging to them but was merely acting as agent for and on behalf of members, there would not be any tax was concluded by Justice J C Shah.

[5]Where Justice JCShah was one of the members

[6](1968) 2 SCR 421

[7]Having held that Graff v Evans and related judgments do not apply to the taxation statutes in the matter of Enfield India Co-operative Canteen Limited, has gone on record to make his dissenting judgment to such limited extent.

61st Law Commission Report:

Having lost the issue before the Supreme Court in the matter of Young Men's Indian Association, the Ministry of Law and Justice has made a reference to Law Commission to provide a report on certain problems connected with the levy of tax on sale of goods. The Law Commission vide its 61st Report on May 1974 has stated, two aspects amongst other. One, it re-emphasised[8] the view of Justice J C Shah as far as the taxation of supplies made by unincorporated clubs. Two, it stated, the tax cannot be levied on supplies made by incorporated clubs unless the expression 'tax on sale' as existing in Entry 54 of List II is amended to include such sales in its ambit by amending Constitution. Finally, the Law Commission recommended no amendment to Constitution on the reason that the clubs or association would not be large and may discourage the co-operative movement.

46th Amendment Act:

However, the Government has proceeded with amendment to Constitution of India vide The Constitution (Forty Sixth Amendment) Act, 1982, to introduce a new definition for the expression 'tax on sale or purchase of goods'. A new article in the form of 366(29-A) has been introduced to lay down the meaning of the said expression, wherein six instances of sale which are not normally understood as sale are brought in. One of the such entries, deals with, a tax on supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration.

Para 3 of Statement of Objects and Reasons appended to Constitution (Forty Sixth Amendment) Act, 1982 specifically states that 'Similarly, while sale by a registered club or other association of persons (the club or association of persons having corporate status) to its members is taxable, sales by an unincorporated club or association of persons to its members is not taxable as such club or association, in law, has no separate existence from that of the members'. In light of such understanding that in case of incorporated clubs, since the members and club are distinct (for the sole reason of being incorporated), the Government may have thought there is no specific requirement to mention in the expression of 'tax on sale or purchase of goods' that sale made by incorporated associations to its members also as an instance. Since the Law Commission and Justice J C Shah has made observations that the unincorporated clubs and its members are same, the Government has chosen to specifically mention that sales made by unincorporated club in the ambit of expression 'tax on sale or purchase of goods'.

Understanding Calcutta Club Limited:
(Sales Tax)

With this brief history, let us now proceed to dissect the current judgment of Supreme Court in the matter of Calcutta Club Limited (supra).

[8]No specific dissent on the judgment was made in the report

Before Tribunal and High Court:

The sales tax authorities had issued notice proposing tax on the sales made by Calcutta Club Limited (Calcutta Club) to its members. The notices were appealed before the Tribunal stating that there could not be any tax because the Calcutta Club is acting as an agent to its members and there is only reimbursement of expenses and no consideration. The Tribunal after referring to various judgments has held that there cannot be any tax on sales made by Calcutta Club to its permanent members since the suppliers and recipients are same persons and there is no exchange of consideration. The Revenue has filed a writ petition before High Court challenging the order of Tribunal. The High Court opined that the decision in the matters of Automobile Association of Eastern India[9] is not a precedent and on reading of 46th Amendment Act and definition in sales tax law, sale of goods by Club to its members would be exigible to tax ***but in the case in hand, the drinks and beverages were purchased from the market by Club as agent of members. The High Court further opined that in the factual matrix the element of mutuality is not obliterated and held that no tax is payable by Calcutta Club for sales made to its members.***

Before Division Bench of Supreme Court:

The Revenue took the matter before the Division Bench of Supreme Court. The Division Bench after referring to various judgments on principal of mutuality has stated that the decisions of the Supreme Court in the matter of Fateh Maidan Club[10] and Cosmopolitan Club[11] have drawn a distinction when a club acts as an agent of its members and when the property of club is transferred to its members (please recall the observation of Justice J C Shah in his dissenting opinion in the matter of Young Men's Indian Association). The Division Bench continued to state that the said distinction even though accepted in the said two judgments, however the said decisions do not elucidate and clearly expound, ***when the club is stated and could be held as acting as an agent of the members and therefore, would not be construed as a party which had sold the goods. These are significant and relevant facets which much be elucidated and clarified so that there is no ambiguity in appreciating and understanding the aforesaid concepts 'acting as an agent of the members' or when the property is transferred in the goods sold to the members.***

Basis above, the Division Bench has referred the matter to the larger bench in view of the law laid down in Cosmopolitan Club (supra) and Fateh Maidan Club (supra), since none of the judgments really lay down whether the doctrine of mutuality would apply or not but proceed on the said principle relying on earlier judgments. Accordingly, the Division Bench has referred the matter to the larger bench to answer specifically as to whether the doctrine of mutuality is still applicable to incorporated clubs or any clubs after the 46th Amendment Act and whether the judgment of Young Men's Indian Association still holds good after the 46th Amendment Act.

[9](2002) 40 STA 154 (SC) - wherein it was held by Supreme Court post amendment to Constitution, the levy of tax can be sustained and for the period prior to the amendment, since the decision in the matter of Young Men's India Association has not answered the question as to whether tax is payable and no adjudication has been made to such an extent, it directed the appellants to pursue the remedies available

[10](2017) 5 Supreme Court Cases 638

[11](2017) 5 Supreme Court Cases 635

Before Larger Bench of Supreme Court:

The Larger Bench after referring to Graff v Evans (supra), Trebanog Working Men's Club and Institute Limited v Macdonald (supra), 61st Law Commission Report, 46th Amendment Act, Young Men's Indian Association (supra), Enfield India Co-operative Canteen Limited (supra) has held that if at all the 46th Amendment Act tried to bring any sale in its ambit, it is the sale by unincorporated club to its members and not the incorporated clubs. This is for the reason that Article 366(29-A)(e) only deals with tax on supply of goods by unincorporated association or body of persons and not incorporated associations.

The Larger Bench brushed aside the argument of Revenue's reliance on the definition of 'person' and stating that incorporated clubs by incorporation would be distinct from its members and hence there is no necessity to include them in the ambit of Article 366 (29-A)(e), by holding that concept of separate legal entity as applicable to normal companies would not be applicable for clubs even though they are incorporated. The Larger Bench has placed reliance on Trebanog Working Men's Club and Cricket Club of India Limited v Bombay Labour Union[12] to support their conclusion that a corporate structure would not create a distinctness between the members and club. However, the Larger Bench has not distinguished the concept of separate legal entity as recognized by Supreme Court in the matter of Enfield India Limited Co-operative Canteen Limited (supra).

Further, the Larger Bench has stated that the 46th Amendment Act has not dealt with the legal principle enunciated by Supreme Court in the matter of Young Men's Indian Association[13] in entirety and proceeded to make an amendment based on a limited perspective. understanding. The understanding of framers that sales made by incorporated club to its members as taxable is incorrect and accordingly incorporated clubs are not in the ambit of Article 3666(29-A)(e) .

Then reverting to the position of taxability on supplies made by unincorporated club to its members, the Larger Bench stated that the definition of 'consideration' as per the Indian Contract Act, 1872 recognises two different persons and since the Young Men's Indian Association has held that in light of doctrine of mutuality, there is no transaction between club and its members, there cannot be any sale of goods to itself and conclude that the ratio of Young Men's Indian Association has not been done away with by the limited fiction introduced by Article 366 (29-A)(e).

Further, the larger bench based on certain definitions under Income Tax Act, 1961 has stressed that if at all the principle of mutuality is to be excluded, then specific language as used in Income Tax Act, 1961 has to be used and failure of doing so in Article 366(29-A)(e), the principal still holds good for the purposes of sales tax.

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[12](1969) 1 SCR 600

[13]The said judgment has held that there cannot be tax on two grounds. One the definition of 'tax on sale' as per the Constitution is not in sync with the definition of 'sale' as per sales tax laws. Two, even though the club is incorporated and treated as distinct entity, so long as the club acts as agent or trustee to its members, the principal of mutuality does not get lost. 46th Amendment has only addressed one aspect, the definition of 'sale' and left the other one unaddressed.

Understanding Ranchi Club Limited & Sport Club of Gujarat Limited: (Service Tax)

Along with Calcutta Club Limited, the Larger Bench is also asked to decide the applicability of service tax in case of provision of services by Clubs to its members. The issue in both the matters was that the clubs principal plea was that there are no two separate persons for the purpose of levy of service tax and also placed reliance on Young Men's Indian Association (supra) stated before respective High Courts that there is no service tax payable.
The Revenue before the Larger Bench argued that the definition of 'club or association' excludes anybody established or constituted by or under any law for the time being in force and the clubs or association cannot be said that they are established or constituted and accordingly they fall out of the exclusion limb and liable for tax. The Larger Bench set aside such argument by stating that the expression 'constituted' takes care of the clubs or association which are constituted under respective acts even though they may not be said to be established. Hence, the Larger Bench held that there is no obligation on clubs or association which are incorporated to pay service tax on services provided to its members (this is not because of principle of mutuality, but because of specific exclusion in the taxable service).

However, things have changed after the advent of negative list which was effective from 01.07.2012. Post introduction of negative list, the definition of 'service' was made wide in its ambit to cover every possible economic activity. Explanation 3 was inserted to definition of 'service' in Section 65B(44) of Finance Act, 1994 to state that in case of unincorporated associations or body of persons and their members are statutorily to be treated as distinct persons.

The Larger Bench when dealing with taxation of services provided by club to its members post negative list has stated that since the language used in Explanation 3 only deals with unincorporated clubs or association and does not deal with incorporated clubs, the levy of tax for services provided by incorporated club may not exist since it may be assumed that the legislature has continued with pre-2012 scheme of not taxing clubs when they are in the incorporated form.

However, the decision is silent about the taxability of services provided by unincorporated clubs to its members in light of the Explanation 3 to Section 65B(44).

Unanswered Questions:

For Calcutta Club Limited – Sales Tax:

- The Larger Bench devoted most part to incorporated clubs since they were the majority and held that they are not covered in the ambit of Article 366(29-A). While so there is no clear answer as to why there would not be any tax in case of unincorporated club to its members even after the 46th Amendment. The answer if one may derive is by way of reference to definition of 'consideration' and reliance on Young Men's Indian Association (a judgment which was pertaining to period prior to 46th Amendment). Hence, to this extent the judgment may be needed to be revisited.

- The basic feature that the members and club are distinct, once the club is incorporated cannot be dispensed with especially, when unincorporated associations or clubs are treated as different from its members for the taxation purposes. The brushing away of the basic feature of separate legal entity by the larger bench may be questioned in the subsequent judgments of Supreme Court.

- Further, the Larger Bench has nowhere made an extensive analysis on the aspect for which a reference is made by Division Bench, that is under what circumstances, the club is treated as an agent and when it is said to be there is a transfer of property in goods from club., a long period of litigation is awaited

For Ranchi Club Limited & Sports Club of Gujarat Limited – Service Tax:

Pre-Negative List:

- There was no discussion on taxability of services provided by unincorporated clubs or association to its members, since both Ranchi Club and Sport Club are incorporated entities. The reasoning of Justice J C Shah in the matter of Enfield India Co-operative Canteen Limited (supra) may apply here and can be stated that in case of unincorporated club, the club and members are same and in absence of two different persons and in absence of deeming provision as existed for the purposes of sales tax in light of Article 366 (29-A)(e), there would not be any tax which may be payable by unincorporated clubs or association. This position would also have to be seen in conjunction with the explanation to Section 65(121) which specifically states that taxable service would include services provided by unincorporated association or body of persons to members. However, there is nothing in statute which would bring on to say that unincorporated association and members thereof are two distinct persons. Hence, the position as settled in the matter of Enfield India Co-operative Canteen Limited (supra) may be still pressed.

Post-Negative List:

- Once negative list is introduced, the definition of 'service' is laid down in a wider ambit to bring in every possible economic activity to tax. In light of the paradigm shift in taxation, the larger bench's view that the services provided by club in its incorporated form is not taxable as in line with pre-2012 scheme may come up for challenge in future. This is for the reason post 2012, what is stated is not taxable and everything else is taxable. The reasoning that the clubs are acting as an agent to its members would be a safer bet to make the incorporated clubs out of tax net .

- The decision is silent about the taxability of services provided by unincorporated clubs to its members. This is important because there existed a specific language in form of Explanation 3 to Section 65B(44) to treat the unincorporated clubs and its members as distinct persons.

Applying the Judgment to GST[14] regime:

Applying the ratio of the larger bench judgment to GST regime would be quite a challenging task

The definition of 'business' as provided under Section 2(17) of CT Act[15] has been defined to provide that any provision by a club, association, society, or any such body of the facilities or benefits to its members shall be considered to a 'business'. In this definition, unlike Article 366(29-A)(e) or the provisions of erstwhile value added tax/service tax law, the language is not limited to unincorporated clubs or associations.

However, the term 'supply' as laid down vide Section 7 of CT Act does not have any such express provision to deem that the clubs or associations and its members are treated as distinct persons for the purpose of 'supply' and for other provisions of the Act. On the contrary, under the erstwhile service tax law, the Explanation 3 to the definition of 'service' sought to provide that unincorporated club or association and its members are treated as distinct persons.

Further, the term 'person' as defined under Section 2(84) of CT Act is similar to the definition contained in erstwhile value added tax/service tax law, and has not provided that mutual entities and their members are different or distinct persons for the purpose of GST law. ***Therefore, in this context the issue that would arise is whether express provision in the definition of 'business' alone is sufficient to bring members' club or association supplying goods or services to its members within the ambit of supply?***

The answer may be 'yes', because, the challenge as existed in sales tax regime was inconsistency between the definition of 'sale' as per the sales tax laws and Entry 54 of List II. Because of which, there was a requirement to amend the Constitution to iron out such inconsistencies. However, under GST laws, there is no such inconsistency.

Further, Section 7(1A) of CT Act provides certain activities or transactions which constitute as supply under sub-section (1) of section 7 would be listed in schedule II which shall be either treated as supply of goods or supply of services as referred in the said schedule. Clause 7 of this schedule provide that the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuation considered would be considered as supply of goods. In this clause the language used is limited to 'unincorporated association or body of persons'. Further, this clause is limited to supply of goods and is not extended to services.

Further, the exemptions under Entry 77 and 77A of NN 12/17-CT(R) provides for an exemption for specified services undertaken by an unincorporated body or a non-profit entity registered under any law. The use of the phrase 'non-profit entity registered under any law' may signify that services of both unincorporated and incorporated associations are subject to tax, but exemption is extended for the services specified in the said entries.

[14]Goods and Services Tax

[15]Central Goods & Services Tax Act, 2017 – A reference to this act means a simultaneous reference to State Goods & Services Tax Act, 2017, unless expressly stated otherwise.

Let's summarise:

- The expression 'business' includes in its ambit any provision by club, association, society, or any such body of the facilities or benefits to its members. This in a way signifies that club and members are different and not the same.

- The meaning of 'supply' does not specifically state that provision of goods or services by club, association, society or any such body to its members as 'supply'. However, the language used therein is ***'all forms*** of supply of goods or services or both ***such as***…..'. Hence, it may be argued that the expression 'such as' is meant to illustrate and covers the supplies made by club to its members even though a specific mention was not made therein. This is especially, when the definition of 'sale' in erstwhile laws specifically included such activities (leaving the taxability aspect apart).

- Entry 7 of Schedule II specifies that supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuation considered would be considered as supply of goods. Hence, the legislature made it clear that if an unincorporated association or body of persons supply goods, then such supply shall be treated as supply of goods. This entry resolves two issues. One, it states that the unincorporated associations or body of persons engaged in supply of goods will be treated as supply of goods and all provisions of CT Act qua goods will be applicable to such transactions. In all other instances, the supplies will be treated as services and taxable as services.

- Exemption is carved out for unincorporated or non-profit entities engaged in provision of certain services subject to certain conditions is provide vide Entry 77 and 77A of NN 12/17-CT(R). This also signifies that un-incorporated entities and incorporated entities are treated as separate from its members and there is enough language akin to Income Tax Act, 1961 to exclude the principle of mutuality.

We also believe that every argument taken above can be set aside by taking diametrically opposite line of argument and we respect the same and also recognise that there is a lot of under supply of language and inconsistencies in the language used which signifies an abundant room for clarifications and litigations.

Applying concept of Agency or Trustee between Clubs and Members – GST regime:

Schedule I read with Section 7(1) of CT Act provides for activities to be treated as supply even if made without consideration, clause 3 provided to treat the supply of goods between agent and principal with or without consideration as deemed supply. Upon perusal of this clause, the supply of goods by an agent to the principal would be deemed to be a supply when the agent undertakes to receive such goods on behalf of the principal. This clause also does not cover services within its ambit.

In case of supplies by members' club or association to its members, the said club or association could be said to be an agent of the members. Such club or association operating on principle of mutuality can be said to have received the goods from vendors on behalf of their members and subsequently said to have supplied the said goods to the members.

The term 'agent' has been defined under Section 2(5) of the CT Act to mean a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another. The said definition is meant to include all kinds of consignment agents that operate in a normal commercial supply chain and it does by any means indicate mutual entities within its ambit. Thus going by the definition of 'agent' and clause 3 of schedule I may not be relevant to the context of members' club or association supplying goods or services to their members.

Conclusion:

Hence, one may argue that the judgment does not directly have an impact on the taxation under GST laws or argue that judgment has direct impact on taxation under GST laws. In our view, there would certainly be an impact in cases where the club is acting as an agent to its members. In all such cases, the larger bench decision would still apply, and the principle of mutuality holds good unless specifically excluded by using language, which is absent in GST laws. Hence, in all cases, where it can be substantiated that club is acting as the agent of its members, the taxation would fail under GST laws.

However, the challenge is as to when it can be said that club carries activities as an agent of its members, which the larger bench ought to have dealt with but failed to do so in detail. This becomes a billion-dollar question and lead to lot of litigation around this aspect. The Supreme Court in any upcoming matter on this aspect has to consider the above aspect in order to settle the dust.

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DIRECT TAXES

TAX RATE CHANGES FOR DOMESTIC COMPANIES

Contributed by CA Suresh Babu S & CA Ramaprasad T

Income Tax Act, 1961, as amended from time to time, has provided for tax rates applicable to the companies. From viewpoint of tax rate, the companies be classified into 'domestic company[1] ' and 'foreign company[2] '.

In this article we analyse the rate of income tax payable by 'domestic company' in light of changes brought into Taxation Laws (Amendment) Ordinance 2019.

History of Rate Cuts:

Normally, a 'domestic company'is subject to tax @30%[3] on total income under ITA. While presenting Budget in 2015, the Honourable Finance Minister in his speech has made proposal to reduce the rate of corporate tax from 30% to 25% over next four years. This rate reduction comes with a condition of elimination of exemptions or accelerated deductions available under various sections.

Finance Act, 2016 has introduced two changes in the corporate income taxes. One being introduction of Section 115AB which provides for taxation of 'domestic company' engaged in manufacturing @25% in the absence of certain deductions[4] available under the Act. Second change being charge of tax @29% for companies having turnover not exceeding Rs. 5 Crores during the Financial Year (FY)2014-15.

Finance Act, 2017 has introduced tax rate of 25% for 'domestic company' having turnover not exceeding Rs. 50 Crores during the FY 2015-16.

Finance Act, 2018 has extended the benefit of concessional rate of tax of 25% to the 'domestic company' having turnover not exceeding Rs. 250 Crores during the FY 2016-17.

Finance Act, 2019 has further extended the benefit of concessional rate of tax of 25% to the 'domestic company' having turnover not exceeding Rs. 400 Crores during the FY 2017-18.

[1]Sec 2(22A) of Income Tax Act, 1961 (ITA) defines, the 'domestic company' as 'Indian company or other company, which in respect of its income is liable to tax under this Act, has made prescribed arrangement for declaration and payment, within India of the dividends, including on preference shares, payable out such income'.
[2]Sec 2(23A) of ITA defines 'foreign company' to mean a company which is not a 'domestic company'.
[3]For easy of understanding, only tax rates are specified, reader has to add surcharge and cess to arrive at final rate.
[4]Ref Annexure

In nutshell:

Source	Rate of Tax	Nature	Conditions
FA, 16	29%	Mandatory	Turnover for FY 14-15 do not exceed INR 5 Crores
FA, 16	25%	Optional	**Only** for new manufacturing company as stated above
FA, 17	25%	Mandatory	Turnover for FY 15-16 do not exceed INR 50 Crores
FA, 18	25%	Mandatory	Turnover for FY 16-17 do not exceed INR 250 Crores
FA, (No2) 2019	25%	Mandatory	Turnover for FY 17-18 do not exceed INR 400 Crore

For other domestic companies the rate of tax continues to be 30% (i.e., where turnover exceeds the prescribed limits)plus surcharge and cess as applicable.

Surcharge:

In addition to tax, surcharge is levied on income tax. It is levied @ 7% on tax, when the total income exceeds INR 1 Crore but does not exceed INR 10 Crores and @ 12% when total income exceeds INR 10 Crores.

Taxation Laws (Amendment) Ordinance 2019:

In order to promote growth and investment few changes inter-alia are proposed in ITA, particularly in relation to rate of tax for 'domestic company'.

Through this Ordinance change(s) is proposed[5] to the existing Section 115BA besides insertion of two new sections namely Section 115BAA and Section 115BAB.

[5]W.e.f 01/04/2020

Changes proposed (Other than MAT[6] related) through Ordinance is summarised as follows:

Section	Status	Change Proposed	Conditions
115BA	Existing Section	Once option under Section 115BAA is exercised, the option of paying tax @25% under this section may be withdrawn.	• The option to apply provisions of Section 115BAA be exercised in the prescribed manner on or before the due date specified under Section 139(1) for any previous year relevant to the assessment year 2020-2021.
115BAA	New Section	At the option of the domestic company, tax on total income be computed @22%.	• The option to apply provisions of Section 115BAA be exercised in the prescribed manner on or before the due date specified under Section 139(1) for any previous year relevant to the assessment year 2020-2021; • Certain Deductions and as well set off of brought forward losses attributable to such deductions are not allowed[7] . However, normal depreciation and deduction under Section 80JJAA are allowed; • Once the Option is exercised the same cannot be withdrawn.

[6]Minimum Alternative Tax as referred to in Sec 115JB

[7]Ref Annexure

115BAB	New Section	At the option of the domestic company, tax on total income be computed @15%.	• A new domestic company set up and registered on or after 01/10/2019 and commenced manufacturing activity on or before 31/03/2023; • Company should be engaged in the business of manufacturing or producing an article or thing and research in relation to or distribution of article manufactured or produced by it; • The company should not be formed by splitting up or reconstruction of business already in existence; • Does not use any pre used plant and machinery subject to cap of 20% of total value of plant and machinery. However, imported pre used Plant and Machinery is allowed without limit of 20% subject to satisfaction of certain conditions; • Does not use any building previously used as a hotel or convention centre as defined under Section 80-ID; • Certain Deductions and as well set off of brought forward losses attributable to such deductions are not allowed[8] . However, normal depreciation and deduction under Section 80JJAA are allowed;

[8]Ref Annexure

			• Provisions of Section 92BA will apply and profits be computed having regard to Arm's Length Price referred to in Section 92F. • The Option to apply provisions of Section 115BAB be exercised in the prescribed manner on or before the due date specified under Section 139(1) for any previous year relevant to the assessment year 2020-2021.

Surcharge:

The 'domestic company' exercising the option provided in Section 115BAA or 115BAB is subject to surcharge of 10% on income tax. 'domestic company' which exercised the option under Section 115BA is subjected to surcharge normally applicable (as stated supra).

MAT (Sec 115JB):

As per Section 115JB(5A), from Assessment Year 2020-21, the provisions of Section 115JB are not applicable to 'domestic company' exercising option under Section 115BAA or Section 115BAB

Further, as per Section 115JB(1), the tax rate for the purpose of application of provisions of Section 115JB is reduced to 15% on the amount of book profits.

MAT Credit (Sec 115JAA):

Sec 115JAA(2A) provides that where tax is paid under Section 115JB, credit for the tax so paid to the extent of difference between tax paid under Section 115JB and amount of tax payable on the total income be allowed. The amount of tax credit shall be carried forward up to 15th assessment year succeeding the assessment year in which tax credit is available.

The said tax credit shall be allowed to be set-off in the year when tax becomes payable on the total income computed under the Act to the extent of difference between tax on total income and tax payable under Section 115JB.

No changes are proposed to Section 115JAA in the ordinance. However, Central Board of Direct Taxes vide circular 29/2019 dated 02-10-2019 has clarified that *'as the provisions of section 115JB relating to MAT itself shall not be applicable to the domestic company which exercises option under section 115BAA, it is hereby clarified that the tax credit of MAT paid by the domestic company exercising option under section 115BAA of the Act shall not be available consequent to exercising of such option'.*

As per AS 22 'Taxes on Income' when a company is liable to pay tax under Section 115JB it is to be shown as current tax at gross amount. The MAT credit, to the extent of difference between tax paid under Section 115JB and tax payable on total income, is shown as an asset by crediting to profit and loss account[9].

From above mentioned circular it could be inferred that MAT credit shown as an asset in the balance sheet of the domestic company exercising the option under Section 115BAA has to relinquish the same.

Conclusion:

The ordinance has brought a significant change in rate at which 'domestic company' be taxed. Some ambiguities still persist particularly in respect of treatment of MAT credit on exercising the option of low tax regime. Though the CBDT circular has clarified the fact that MAT credit cannot be adjusted against the tax liability while applying the new provisions of Sec 115BAB/115BAA but allowability or otherwise of the deduction on writing off of MAT credit existing in the books of account is unanswered.

ANNEXURE:
Specific Deductions not allowed when opted for sec 115BAB/115BAA: -

- Sec 10AA
- Sec 32(1)(iia)
- Sec 32AD;
- Sec 33AB;
- Sec ABA;
- Sec 35(1)(ii);
- Sec 35(1)(iia);
- Sec 35(1)(iii);
- Sec 35(2AA);
- Sec 35(2AB);
- Sec 35AD;
- Sec 35CCC;
- Sec 35CCD;
- Part C of Chapter VI-A except 80JJAA
  - Sec 80HH to 80 RRB

[9]GN on Accounting for Credit Available in respect of MAT under Income Tax Act, 1961 issued by ICAI

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RERA

CLASH OF IBC AND RERA - IBC WINS! - OTHERS

Contributed by CA Suresh Babu S & CA Sri Harsha

The recent judgment of Honourable Supreme Court in Pioneer Urban Land & Infrastructure Limited & Others v Union of India[1] apart from holding the constitutional validity of the amendment made to Insolvency & Bankruptcy Code, 2016 (IBC/Code) vide Insolvency & Bankruptcy Code Amendment Ordinance, 2018 (Amendment Ordinance) has held that the provisions of RERA laws should give way to the provisions of Code, when both of them clash. This article is an attempt to understand the fear of developers, the standpoint of allottees and the final verdict of the Court to the extent of the caption of the article.

The Supreme Court is faced with large number of writ petitions challenging the constitutional amendments made to IBC, wherein the 'allottee [2]' of 'real estate project [3]' is included in the definition of 'financial creditor', the allottee is being allowed to be represented in Committee of Creditors (CoC) via authorised representatives and rights and duties of authorised representatives have been challenged.

Prior to the Amendment Ordinance, the National Company Law Appellate Tribunal (NCLAT) in the matter of Nikhil Mehta and Sons (HUF) v AMR Infrastructure Limited has held that amounts raised by developers under the assured return schemes had the 'commercial effect of borrowing' and accordingly can be called as 'financial creditor' to trigger the corporate insolvency resolution process (CIRP) under IBC. Further, the Supreme Court in the matter of Chitra Sharma & Others[4] has allowed the appointment of a representative of home buyers to participate in the meetings of Committee of Creditors to protect the interest of home buyers pertaining to CIRP of Jaypee Infratech Limited which was triggered by IDBI Bank. Similarly in the matter of CIRP of Amrapali Group, the Supreme Court has passed an order[5] allowing the representative of home buyers to participate in CoC meetings to protect the interest of such home buyers.

Basis the above judgments passed by Supreme Court, the Insolvency Law Committee stated to make amendments to IBC to clarify, as a matter of law, allottees of real estate project as financial creditors. Accordingly, taking the proposal of such law committee into consideration, the Government has made amendments to IBC vide Amendment Ordinance to include the allottee in the definition of financial creditor. As stated earlier, the said amendments were in challenge qua the writ petitions filed.

Petitioner's Reasoning – Developers Standpoint:

The main reasons for which the amendments are being challenged are summarised hereunder:

- The amendment to include the 'allottee' in the ambit of 'financial creditor' would act against the objects of the Code, which is to maximise the value of assets so that the shareholders of a corporate debtor do not suffer from bad/poor management.

[1] 2019 (8) TMI 532- Supreme Court
[2] The expression has the same meaning as laid down in 2(d) of Real Estate (Regulation & Development) Act, 16
[3] The expression has the same meaning as laid down in 2(zn) of Real Estate (Regulation & Development) Act, 16
[4] 2018 (8) TMI 661 - Supreme Court
[5] Bikram Chatterji & Others v Union of India - 2019 (7) TMI 1233 - Supreme Court

- The amendment looks at only 'bad eggs' and entities which have completed building projects in time and are compliance can be jeopardised by allottees by filing Section 7 petitions to blackmail the developers into making payments which would divert funds which are otherwise to be used for the project.

- A perfectly good management which has number of projects in hand can be removed at instance of one allottee and either replaced in which case the huge funds infused by developer would be at naught or worse still lead to commercial death, if CIRP does not result in any success. In other words, the amendment gives such a power to the allottee to make a perfectly solvent company turn into an insolvent company which is not in the best interests of anyone including allottees.

- The amendments were notwithstanding to the fact that there was a separate legislation namely, the Real Estate (Regulation & Development) Act, 2016 (RERA) which deals in detail with real estate sector and provides for adjudication between the allottees and promoters, with large number of safeguards for the allottees.

- A reading of the decision of Supreme Court in the matter of Swiss Ribbons[6] would reveal that not a single characteristic mentioned for 'financial creditor' would not apply to the allottee and accordingly the amendment requires to be set aside.

- The home buyers would not fall within the category of 'financial creditor' or 'operational creditor' and should therefore be subsumed only with RERA, which is a complete code dealing with real estate industry. RERA being a special act as opposed to the Code, which is general act and ought, therefore RERA has to prevail.

Respondent's Defence – Union of India's Standpoint:

- IBC is not a recovery mechanism. When a home buyer approaches National Company Law Tribunal (NCLT) and his petition being admitted, he does not get his money back in the near foreseeable future and has to stand in line and await either the vagaries of a resolution plan which gives him certain percentage of money and/or completes the project for him. In the event of winding up, the home buyer has to stand in line and receive whatever is available. As opposed to this, the home buyer approaches RERA in which, upon showing breach on part of real estate developer, they would claim whatever has been paid in full together with interest thereon. This being the case, it is wholly incorrect to paint a picture that the allottee would make the solvent developer as insolvent at an earliest opportunity because of the amendment.

[6](2019) 4 SCC 17

Respondent's Defence – Allottees Standpoint:

- Number of counsels appearing for individual allottees argued that the RERA and consumer fora are not meaningful remedies for allottees at all. They have stated that these beneficial amendments if struck down, they would be back in the same position as they were before enactment of other measures, which have not really worked to afford them a relief.

The Decision of Supreme Court:

The Supreme Court after setting out Para 120 of Swiss Ribbons (supra) stated that the legislative judgment in economic choices must be given a certain degree of deference by Courts and the amendments made to IBC has to be read in the said context and proceeded to lay down the reasons for the current amendments as pointed by Insolvency Law Committee, which found that the delay in delivery or possession by developers has become a common phenomenon, and the amounts raised from home buyers contributes significantly to the financing of construction of such flats.

That being the case, it was important therefore to clarify that home buyers are treated as financial creditors and have their rightful place in CoC, when it comes to making important decisions as to the future of company, which is the execution of real estate project in which the buyers are ultimately housed.

IBC v RERA:

The Supreme Court after referring to the various provisions of RERA laws has stated that Section 88 of RERA it was stated that the provisions of RERA were in addition to and not in derogation of the provisions of any other law for time being in force and as per Section 89, RERA is to have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

Then, referring to Section 238 of Code, which states that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law, the Court stated there is no provision similar to Section 88 of RERA in the code, which is meant to be a complete and exhaustive statement of the law insofar as its subject matter is concerned.

The Court further held that the non-obstante clause of RERA came into force from 1st May 16, as opposed to non-obstante clause of code which has come into force from 1st December 16. Further, the amendment with which Petitioners are concerned came effective from 6th June 18. **Under these circumstances, the Court stated that it is little difficult to accede the arguments advanced by Petitioners, that RERA is a special enactment which deals with real estate projects and must, therefore be given precedence over the code, which is a general enactment dealing with insolvency generally.**

The Court further held that the fact that RERA is in addition to and not in derogation of the provisions of the any other law, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies.

The Court also stated that when dealing with two acts which have non-obstante clause, the later act should be given way to the earlier act, for the reason, that it is presumed that the Parliament is aware of the former act when making the later act and it is such wisdom, the later act has to be given precedence. Also, presence of Section 88 in RERA which states that remedies available under RERA are in addition to and not in derogation of other acts would also make it clear, that code would prevail over RERA.

Accordingly, the Court held that even by a process of harmonious construction, RERA and the code must be held to co-exist and, in event of clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute, which, in case of conflict, would override the general statute, the Code.

In concluding remarks as far as the Code v RERA is concerned, the Court has stated as under:

As a matter of fact, the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the corporate debtor. This is to take place by replacing the management of the corporate debtor by means of are solution plan which must be accepted by 66% of the Committee of Creditors, which is now put at the helm of affairs, in deciding the fate of the corporate debtor. Such resolution plan then puts the same or another management in the saddle, subject to the provisions of the Code, so that the corporate debtor may be pulled out of the woods and may continue as a going concern, thus benefitting all stakeholders involved. It is only as a last resort that winding up of the corporate debtor is resorted to, so that its assets may be liquidated and paid out in the manner provided by Section 53 of the Code. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. The object of RERA is to see that real estate projects come to fruition within the stated period and to see that allottees of such projects are not left in the lurch and are finally able to realise their dream of a home, or be paid compensation if such dream is shattered, orat least get back monies that they had advanced towards the project with interest. At the same time, recalcitrant allottees are not to be tolerated, as they must also perform their part of thebargain, namely, to pay instalments as and when they become due and payable. Given the different spheres within which these two enactments operate, different parallel remedies are given to allottees – under RERA to see that their flat/apartment is constructed and delivered to them in time, barring which compensation for the same and/or refund of amounts paid together with interest at the very least comes their way. If, however, the allottee wants that the corporate debtor's management itself be removed and replaced, so that the corporate debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy is available is recognised by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection fora, he being given the choice to withdraw such complaint and file an application before the adjudicating officer under RERA read with Section 88….

Conclusion:

The above judgment of Supreme Court makes it clear that the provisions of RERA should give way to the provisions of IBC, when there is a clash among them. This judgment gives more strength to the home buyers who were ill-treated/duped/deceived by the disgruntled developers to this time. No doubt, at the same time, it would be hard pill for digestion for a genuine developer, but in our opinion, if the main objective of a home buyer is to get his flat/apartment, then invoking the code is the last resort. There are necessary safeguards built in the Code to see that the genuine developer is not kept away from the business. Hope, the home buyers would use the Code only in the extreme of the extreme case and not every now and then.

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OTHERS

ANCESTOR PROPERTY VS SELF-ACQUIRED PROPERTY

Contributed by Research Team

One of the most vexed question under the Hindu Law, is, whether a property acquires the character of self-acquired property or ancestral property. This is important because, if the property assumes character of self-acquired, then it falls into the hands of his sons as not coparcenary property, but would devolve upon on them in their individual capacity. In other words, the father has unfettered rights to do so with such property and neither his sons or grand sons would not have any claim on such property. However, if the property is held to be assuming the character of ancestral property, then the son, grand son and great grand son would acquire right in such property from the birth itself. In simpler words, the father cannot have unfettered rights qua such ancestral property and requires the consent of all the three downward generations, if existed, at the time of disposing such property.

Hence, there are multiple property disputes all over the country, with various state high courts, holding different and separate views as to when a property becomes an ancestral property or self-acquired property. The Honourable Supreme Court had an occasion to examine the said issue (by consolidating decisions of various state high courts) in a recent matter of Govindhbahi Chhotabhai Patel & Ors vs Patel Ramanbhai Mathurbhai[1] . In this article, we try to analyse the said judgement and understand the character of property and consequential rights attached to it.

The facts of the case are that the appellants are sons of Chhotabhai Patel (CP/donor), who died in 2001. During the life time of CP, he has executed a gift deed dated November 15, 1977 in favour of defendant Ramanbhai Patel (RP/donee). ***The main issue before the trail court among the challenge to genuineness of the gift deed, whether the property is ancestral property and accordingly CP does not have any right to execute gift deed in favour of RP.*** The matter reached to High Court and after framing the substantial questions of law, the High Court has set aside the judgment and decree passed on by trail court and judgement and decree passed by the first appellate court.

The High Court has held that the suit property is not an ancestral property for the reason that the said property is purchased by Ashabhai Patel (AP - father of CP/donor) and it is by virtue of will executed by AP, property came to be owned by CP in 1952. Since the property is self-acquired by AP and devolved to CP by way of will, the properties are self-acquired properties of CP and cannot be held to be ancestral property in the hands of CP. Having the character of self-acquired property, CP is competent to gift the same to whomsoever he chose to.

The sons of CP has challenged such judgment of High Court before the Supreme Court. The main grounds taken by appellants, sons of CP, were that, the findings of High Court that the property devolved on CP/donor by virtue of will, therefore ceases to be ancestral property is contrary to the judgement of Supreme Court in CN Arunachala Mudaliar vs CA Murugantha Mudaliar & Another [2]. The sons of CP has also relied on the judgment of Shyam Narayan Prasad vs Krishna Prasad & Others[3] , wherein it was held that self-acquired property of a grandfather devolves upon his son as ancestral property.

[1]https://www.livelaw.in/top-stories/fathers-self-acquired-property-given-to-son-by-willgift-self-acquired-property--148423?fb_comment_id=2620313924657452_2621004277921750

[2]AIR 1953 SC 495

[3](2018) 7 SCC 646

RP/donee has argued, the sons of CP has failed to prove that said property was ancestral after admitting that their grandfather has purchased and given it under will to their father to the exclusion of other family members. Further, the judgement in the matter of CN Arunachala Mudaliar (supra) is to the effect that property bequeathed or gifted to a son by Mitakshara father will be treated as self-acquired property in the hands of donor.

The Supreme Court against this backdrop, has proceeded to, examine, the important question, whether the property in the hands of CP would assume the character of self-acquired or ancestral. The sons of CP has stated that there was a partition among the CP and his brothers in 1964 and since the property was partitioned in 1964, the said property acquired the character of ancestral. The Court stated that just because there was a partition, the property does not assume the character of self-acquired property. The Court further stated that since AP has self-acquired the said property and bequeathed to the CP/donor, the said property qua CP/donor assumes the character of self-acquired even applying the ratio of judgment of CN Arunachala Mudaliar (supra) as relied by sons of CP.

The question which was considered by a three-member bench in the of CN Arunachala Mudaliar (supra) was that whether properties acquired by defendant under Will are to be regarded as self-acquired or ancestral in his hands. The plaintiff claimed partition of property of suit filed against his father and brother. The stand of the father was that the house property was the self-acquired properties of his father and he got them under a Will executed. ***The three-member bench held that father of a Joint Hindu Family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired property and his male issue could not interfere with these rights in any way.*** The three-member judge also held that it was not possible to hold such property bequeathed or gifted to son must necessarily rank as an ancestral property. It was further held that a property gifted by a father to his son could not become ancestral property in the hands of the son simply by reason of the fact that the son got it from his father or ancestor.

The Supreme Court then referred to the judgement of Bombay High Court in the matter of Jugmohan Das v Sir Mangal Das[4] [which was also ratified by Allahabad High Court, Lahore High Court and Supreme Court in the matter of CN Arunachala Mudaliar (supra)], wherein it was held that if the son takes the property by devise, the property continues to be self-acquired in his hands. The Bombay High Court has held that a bequest by will, is a gift made in contemplation of death. It only differs from a gift in the fact that it takes effect at future time instead of immediately. Since, there is no doubt that a man can give away self-acquired property to whomsoever he pleases, including his own sons, and there is no doubt that property so given would be considered self-acquired in the hands of donee and therefore, follow that the property given by Will would equally be self-acquired in hands of devisee.

Then the Supreme Court proceeded to discuss another judgement relied on by the sons of CP vide Shyam Narayan Prasad (supra). The said matter was dealing with the status of partitioned property post partition. In such a situation, the court held that property post partition would acquire the character of ancestral property. Since the facts in the instant case and Shyam Narayan Prasad (supra) were different, the ratio of later judgment does not apply to the facts on the hand.

[4](1886) ILR 10 Bom 528

Accordingly, the Supreme Court proceeded to conclude that the property was self-acquired by AP and since he obtained such property via Will and no further intention to designate such property as ancestral emanates from Will, by applying the ratio of CN Arunachala Mudaliar (supra) held that such property assumes the character of self-acquired and not ancestral. Since the property was self-acquired in the hands of CP, he is competent to gift it to RP.

Also, the judgement of Delhi High Court in the matter of Sh. Surender Kumar vs Sh. Dhani Ram & Others[5] vide Para 7 has summarised as to when a property becomes ancestral or self-acquired in case of Hindu Undivided Family (HUF) vis-à-vis Section 8 of Hindu Succession Act, 1956 (HSA):

- If a person dies after passing HSA and there is no HUF existing at the time of the death of such a person, inheritance of immovable property of such a person by his successors – in – interest is no doubt inheritance of 'ancestral' property, but the inheritance is as self-acquired property in the hands of the successor and not as HUF property although the successor(s) indeed inherits 'ancestral' property i.e., a property belonging to his parental ancestor

- The only way in which HUF/joint hindu family can come into existence after 1956 (and when a joint hindu family did not exist prior to 1956) is if an individual's property is thrown into a common hotchpotch. Thus, if an HUF property exists because of its such creation by throwing of self-acquired property by a person in the common hotchpotch, consequently there is entitlement in coparceners, etc. to a share in such HUF property.

- An HUF can also exist if paternal ancestral properties are inherited prior to 1956, and such status of parties qua the properties has continued after 1956 with respect to the properties inherited prior to 1956 from paternal ancestors. Once that status and position continues even after 1956, of HUF and of its properties existing, a coparcener etc., will have a right to seek partition of properties.

- Even before 1956, an HUF can come into existence even without inheritance of ancestral property from paternal ancestors, as HUF could have been created prior to 1956 by throwing of individual property into a common hotchpotch. If such HUF continues even after 1956, then in such case a coparcener etc. of an HUF was entitled to partition of HUF property.

From the above decision of Delhi High Court in the matter of Sh. Surender Kumar (supra) and Supreme Court in the matter of Govindhbahi Chottabhai Patel (supra), it is clear that the issue that when a property constitutes a self-acquired or ancestral is not free from ambiguity is quite ambiguous and the judgment in Govindhbahi Chottabhai Patel (supra) helps to resolve the ambiguity and inconsistency prevalent to certain extent. However, till such more clarity on the subject evolves, the disputes are expected to arise.

[5](2016) 1 High Court Cases (Del) 17

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