Volume-99 October-2022 Pages 1-20

SBS Wiki

monthly e-Journal

For Private circulation only

By

SBS and Company LLP
Chartered Accountants

CONTENTS

Dear Readers,

In this 99th edition, we bring you articles covering the recent pronouncement of Supreme Court in Ganapati Dealcom, where in it was held that the benami transaction (prohibition) act is applicable prospectively and not retrospectively. This is a landmark judgment, since it puts rest to all the proceedings initiated before the enactment of amendment act in 2016.

The next article is on the issues that would arise under GST laws when a partner retires from the firm by taking the exact amount that was lying to credit of his capital and current account and in instances where he takes more than that. Though the said issues were covered by the new sections in the income tax act, the position under GST laws is unclear as of now. Hence, there is a requirement for the Central Government to formulate provisions or give clear instructions before the litigation crops up.

The next article is on the determination of date for issuance of notice under income tax act for the purposes of Section 148. The Delhi High Court has framed five scenarios under which the date of issue of notice needs to be determined. Though it is held that such notices are to be treated as issued after 1st April 2021, being time barred for carrying the assessment/re-assessment, the same is saved by the Supreme Court's judgment in Ashish Agarwal, wherein it was held that such notices to be treated as valid. However, the Delhi High Court's judgement will be pretty useful for future issues.

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.

Thanking You,

Suresh Babu S
Founder & Chairman

GST

RETIRING PARTNER AND PARTNERSHIP FIRM – CERTAIN GST ISSUES

Contributed by CA Sri Harsha

We all are aware that the settlement of retiring partner from a partnership firm is not an easy task. The journey, the ups and downs, the emotions involved, the timing of retirement and various other factors are evidently enough to create atense environment between the retiring partner and continuing partners. To add fuel to the fire, the taxation issues also contribute a lot to this uphill task.

On the income tax side, in our previous articles, we have addressed the issues, pre and post insertion of new Section 9B and Section 45(4). The new insertions have provided certain respite but has not taken away the complete strain. May be in coming years, the incidental and ancillary issues surrounding that will also be resolved, paving way to more clarity. On the GST side, the issues started to crop up, mainly due to inadequate legislature. In this article, we will try to raise certain important issues on that front.

Issue #1 – Will the Retiring Partner be called as Service Provider?

Normally, when a partner retires from a firm, there will be a retirement deed in place. The retirement deed inter alia states that the retiring partner is foregoing all the rights in the firm towards the continuing partner. The retiring partner will be entitled for balances lying to credit of his capital and current accounts. However, on many occasions, the retiring partner will be paid more than what is lying in his capital and current accounts. We need to analyse the tax implications in both the scenarios. One, when his capital and current account balance is Rs 100 and he is paid Rs 100 and two, when his capital and current account balance is Rs 100 and he is paid Rs 150. It is important to note that, the income tax implications significantly vary in both the instances. However, our focus is only the probable implications under GST.

In order to answer the above, it is important to understand, what is the relation between the partner and partnership firm qua the GST law? Are they called employee and employer respectively? Are both of them constitute a single entity and cannot be seen as two different persons? This should pretty much lays foundation to our issue. If the retiring partner is called as employee and partnership firm is the employer, then the transactions between the partner and firm may fit under Schedule III to Section 7 of CT Act[1] and hence the same may neither be called as supply of goods nor supply of services. If someone argues that, the retiring partner and firm are one and the same, a sole entity and cannot be separated, then there will be no tax implications, because the basic tenet of 'supply', which pre-requisites two people fails. Let us explore the same.

The first argument that retiring partner is employee and firm is the employer has to be tested under the provisions of the CT Act. Entry 1 of Schedule III provides that services provided by employee to the employer in the course of or in relation to his employment are treated as neither a supply of goods nor a supply of services. From a patient reading, it appears that above entry covers the standard employee and employer transactions and a partner and firm cannot be covered in it. The partner and firm cannot be said to be the employee and employer respectively, for the reason that partner along with other conceives the

[1]Central Goods and Services Tax Act, 2017

firm and not the other way around. Hence, it would be tough to call the partner as employee of the firm, despite of the fact that the firm pays salary, bonus and other similar items to the partner. Accordingly, it can be said that the contract between the partner and firm is not a contract for service but a contract for partnership. It is a settled proposition that any income, salary, bonus and other similar items received by a partner for discharge of obligations as per the partnership deed is nothing but a special share of profits in them. The above was reiterated by Supreme Court in RM Chidambaram Pillai [2]. Hence, the argument that partner is drawing salary from the firm and that makes him the employee and firm as employer, may not stand to the scrutiny of the law.

Let us take, the second argument, whether the partner and firm can be called as single entity and hence, there are no two separate distinct entities. A peep into the service tax law may provide certain thoughts on this aspect. The Gujarat High Court in the matter of Cadila Healthcare Limited [3]has held that services provided by a partner to the firm cannot be called as taxable service, since the firm and partners are one and same. In absence of two distinct entities, which is mandatory for charging service tax, the transactions between the partner and firm cannot be brought to tax, since the firm is no different from the partner. The High Court has reached this conclusion based on the fact that the expression 'person' has not been defined under the service tax law prior to 01.07.2012. In absence of specific definition of 'person', the High Court stated that the partner and firm cannot be seen as distinct. The CESTAT Bangalore in the matter of Gautam Bhattacharya and Yatin Vijaya Patil[4] has also held that the partner and partnership firm cannot be said to be distinct entities and accordingly the salaries received by partners from the firm are not subjected to service tax.

From the above, it appears that the High Court in the matter of Cadila Healthcare Limited (supra) stated that in absence of definition of 'person' to include 'firm' in its ambit, the partner and partnership firm are not different. However, in the matter of Gautam Bhattacharya and others (supra), the CESTAT, though the period is post 01.07.2012, wherein the definition of 'person' exists on the statute book and specifies 'firm' as a person, still went ahead and concluded that partner and partnership firm are same. Hence, the picture is not clear under the old law. Seen under GST law, the expression 'person' has been defined to include 'firm' in its ambit. Now, the question that remains answered is, whether by applying the High Court judgment in Cadila Healthcare Limited (supra), the partner and partnership firm should be seen as distinct persons, because of existence of definition of 'person' or apply the CESTAT judgment in Gautam Bhattacharya and others (supra) and plead that both of them are same and the definition of 'person' does not make any difference. If the rationale of High Court is taken forward, then the partner and partnership firm are different and transactions between them should be brought for scrutiny under the GST laws (let us call this, Arg #1). If the rationale of CESTAT is taken forward, then the partner and partnership firm are same entity and the transactions between them does not exist under the GST laws (let us call this, Arg #2).

Let us not forgot, we have not answered the main issue till now. We are still struggling to understand the nature of relation between the partner and partnership, which would be the base for an appropriate response to the issue framed. The winner of the war between Arg #1 and Arg #2 would show us a direction.

[2][1977] 106 ITR 292 (SC)
[3]2022 (5) TMI 800 – Gujarat High Court
[4]2022 (3) TMI 230 – CESTAT Bangalore

Let us take Arg #1 for analysis. The argument is that partner and partnership firm are different if the definition of 'person' exists. As discussed earlier, the GST laws has a definition of 'person' and includes 'firm' in its ambit. Hence, the Arg #1 gains certain credence. Further, the same is accentuated by the existence of Section 7(1aa) of CT Act. The said sub-section states that the activities or transactions, by a person, other than individual, to its members or its constituents or vice-versa for cash, deferred payment or other valuable consideration is treated as supply. The question that would arise is, whether the partner and partnership firm fit under the ambit of Section 7(1)(aa) and hence, they have to be treated as separate from each other? In our view, the sub-section (aa) does not cover the firm and partnership in its ambit. It is true that the definition of 'person' includes the firm and accordingly there is a possibility to argue that 'firm' falls under the ambit of Section 7(1)(aa). However, can the partner be called as 'members' or 'constituents'. The response would be negative.

We believe that the birth of Section 7(1)(aa) can be attributed to the decision of the Honourable Supreme Court in the matter of Calcutta Club Limited[5] , wherein it was held that there would not be any service tax liability for the activities or transactions between the club and its members. Apprehending a similar situation in GST laws, the Government has introduced the current sub-section. This is also evident from the explanation to Section 7(1)(aa) which states that person and its members or constituents would be treated as separate persons notwithstanding anything contrary judgment. Hence, it can be understood that the subject sub-section intends to cover only such transactions between the clubs and its members and not between the partnership firm and partner.

This is also supported from the language of definition of 'business' vide Section 2(17)(e). It includes provision by a club, association, society, or any such body (for subscription or any other consideration) of the facilities or benefits to its members in its ambit and does not include transactions between the partners and firm. If the intention is to cover the firm and its partners, the said part of the definition should have included the firm and partners also in its ambit. Hence, the Arg #1 has a weak case. Let us pause for a moment on Arg #1 and proceed to analyse to Arg #2 and then conclude as to who is the winner?

The Arg #2 stands on premise that, though there exists a definition of 'person' under the GST laws, the partner and partnership firm should be treated as a single entity but not distinct. As discussed earlier, there does not exist a similar provision in case of clubs and associations for the partnership firms to treat the partner distinct from the partnership firm. Under the provisions of Income Tax laws, there is enough infrastructure to tax the transactions between the partner and firm. For example, when a capital asset is brought into the firm by the partner as capital, the same is taxable in the hands of partner [see Section 45(3)], when a capital asset or money is allotted to the partner at the time of reconstitution of firm, the gains arising thereof are taxable in hands of firm [see Section 45(4)] and similarly when stock in trade or capital asset is allotted to the partner at the time of reconstitution or dissolution of firm, the firm is obliged to pay tax [see Section 9B]. However, there does not exist any similar infrastructure under the GST laws. Does this mean, that the legislature thinks for the purposes of GST laws, the partner and partnership firm are one and the same? This is not clear. There can be any surprise from the Government stating that Section 7(1)(aa) is enough to call out the firm and partner are different, though it can be argued that they do not fit there. In our view, Arg #2 has more chance to win.

[5] 2019 (10) TMI 160 – Supreme Court

Further, the rationale of Arg #1 that existence of definition of 'person' does not take the case forward. The inclusion of 'firm' in the ambit of definition of 'person' is to treat the firm as a separate legal entity for the purposes of assessment and other incidental measures. The decision of Supreme Court in the matter of Jullunder Vegetables Syndicate[6] , which was distinguished subtly by the High Court in Cadila Healthcare Limited (supra) stating that in the former case, the sales tax law has included 'firm' as a dealer, whereas in the latter case, the service tax law does not define 'person'. In other words, the High Court communicated that if the service tax law also employs the definition of 'person', the decision of Supreme Court in Jullunder Vegetable Syndicate (supra) would have been applied. But it is to be noted that the Supreme Court was not dealing with the question as to whether the partner and partnership firm are one and the same? The question that was dealt by Supreme Court therein, was whether in absence of specific provision under the sales tax law, can the revenue proceed to tax the dissolved firm with respect to the pre-dissolution turnover? The Supreme Court answered in negative by stating that the definition of 'dealer' includes the firm and since the firm is stated to be a separate legal entity, the revenue cannot proceed to tax the partners for the liability of firm. Further, since the sales tax law does not have provisions dealing with assessment of dissolved firms, there cannot be any assessment, if the firm is dissolved prior to initiation of assessment and definitely not on the partners. Hence, it can be understood that the Supreme Court was dealing with a separate question than what was dealt by High Court in Cadila Healthcare Limited (supra).

Though one may argue that stipulation of 'firm' in the definition of 'person', is good enough to create a veil between the partners and partnership firm, the argument cannot be taken forward to a longer distance, because the other infrastructure, as pointed out earlier, is missing. Hence, just existence of separation is only a step in the entire process and not the entire process. Hence, in our view, the Arg #2 favours much than Arg #1, though tax authorities would argue the contrary.

Though, we have concluded that Arg #2 wins, let us for time being proceed with an assumption that Arg #1 wins. In such a scenario, let us analyse both the instances, where the retiring partner takes the exact amount lying in capital and current accounts and more than said amount. Needless to say, if Arg #2 is adopted, then there is no need to analyse because there are no two persons.

In light of Arg #1 and in situation, where the retiring partner has in his capital and current account, a credit of Rs 100, and takes exactly, the said amount, there should not be any implications under the GST laws. This is for the reason that the partner has invested certain amounts over a period of time, withdrew certain amounts and profits and losses have been allotted him as per his share and the result is balance of capital and current account. Hence, Rs 100 is nothing but the dividend or profit or appreciation including the initial capital amount invested by the partner. In simple words, the partner takes initial capital and profit earned over a period of time. Can the said amount be called as amount paid for services provided by partner to firm? If yes, what is the service involved? Exiting from the partnership firm can be called as a service? Transferring rights in favour of the continuing partners can be brought into the ambit of 'service'? If yes, what is the 'consideration' for such assumed 'service'? Will the balance in capital and current account represents 'consideration' for the purposes of GST laws?

[6] 1966 AIR 1295

None of the above questions make sense in commercial terms. The retiring partner would argue that he is retiring because he does not want to continue in the business of the firm and how can the same be called as 'service'? The definition of 'services' is laid down in an open ended manner intending to cover all transactions a human mind cannot comprehend. On top of it, the Entry 5(e) of Schedule II states that 'agreeing to the obligation to refrain from any act, or to tolerate an act or a situation, or to do an act' as services. In such expanded breath of 'service', can the retiring partner be said to be providing service to the continuing partners or firm by retiring?

In our view, the same may not be correct. Though the definition of 'service' is wide enough, there cannot be any inference of 'service', when a partner retires from the firm. It also should not fall into the prey to Entry 5(e). Circular 178/10/2022 – GST dated 3rd August 2022 vide Para 4 states that the element of contractual relationship, where one supplies goods or services at the desire or another, is an essential element of supply. The said circular also clarified that Entry 5(e) should be as a result of contractual arrangement. Hence, it cannot be argued that there exists a contractual relationship between the retiring partner and firm. Accordingly, one may conclude that the activity of partner retiring from firm cannot be stated to be 'service'. Assuming that be a service, where is the consideration? Can the capital and current account balance be called as consideration? The answer should be no because, the activity at best can be termed as transaction in money and be out of the definition of 'service'. Even assuming that there is a service, the same fails because there is no consideration for such service.

Now, let us proceed to examine, the implications under the other situation in light of Arg #1. In this situation, the retiring partner takes Rs 150, where his closing capital and current account balance is Rs 100. Whether a service can be inferred now? If not Rs 100, can Rs 50 (150 – 100) be called as consideration for the service? This is tricky. The income tax law specifically taxes this extra Rs 50. Under the GST laws, we cannot infer a service based on the availability of consideration. In other words, the service has to be first identified and later the consideration, but not the way around. Hence, our first job is to identify whether there is a 'service' involved?

The retirement deed states that the retiring partner exhausts all the rights in the firm in favour of the continuing partners and does not have any rights in assets of the firm. Whether this particular activity can be called as 'service'? We have tried to analyse the same in situation, where the partner takes the exact amount from the firm. We have concluded that there cannot be any service inferred. In our view, even in this situation also, the partner cannot be said to providing any service to the firm or continuing partners. However, the tax authorities may infer the service involved because the retiring partner is taking more than what is lying to credit of his capital and current account balances, in this case, Rs 50. Even assuming that there is a service involved and consideration for the same is Rs 50, where is the legislative infrastructure to bring this into tax net? In absence of necessary and clear legislative infrastructure, it would be not easy for the tax authorities to put tax on that Rs 50. Further, before taxing the Rs 50, the nature of such amount need to be analysed. Whether the said Rs 50 is goodwill or profits arising from revaluation of assets or share in future profits or non-compete fee? The tax implications may differ in each particular situation and there cannot be a standardized approach.

To conclude, in our view, the retiring partner cannot be called as service provider, definitely in situation, where the exact amount is withdrawn. In second situation, where the retiring partner takes more than the closing balance, then there is a possibility for he being called as service provider for the amount in excess of his closing balance. The above is in light of Arg #1, on assumption that partner and firm are different. If Arg #2 wins, then in any instance, it can be said that there is no service provider and service receiver.

Issue #2 – If assets were allotted to retiring partner, is the firm obliged to pay tax on the said transaction?

This brings us to the second and last issue. Continuing with the above example and obviously in light of Arg #1, if the retiring partner takes Rs 150 as against his closing balance of Rs 100 and the Rs 150 is settled in form of assets instead of cash, then whether the firm would be obliged to pay tax on such settlement by use of assets?

Our first defence would be there is no supply when the firm allots the assets to the retiring partner instead of cash. The assets cannot be said to be supplied to the retired partner. They are used for settling the retiring partner capital and current account balances. If someone argues that there is a supply, where is the consideration for such supply? Will the retiring partner pay anything? Can the capital and current account balance can be said the consideration for such allocation of assets? The answer would be an emphatic negative. In fact, the retiring partner may be called as service provider but not the firm. Further, assuming there is a service provided by retiring partner, then his consideration is being settled by way of allocation of assets and not the other way around. Hence, there does not arise any instance for the firm to pay tax on the allocation of assets.

However, Entry 4(a) of Schedule II states that where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, such transfer or disposal is supply of goods by the person. How do we come out of this? In our view, one should look Entry 4(a) only when there is a supply in first instance. This is also evident from Section 7(1A), where it states that activities or transactions constitute a supply in accordance with provisions of Section 7(1), they shall be treated as supply of goods or services as referred to in Schedule II. Since, in the instant case, there is no supply in the first place, when the firm allots the assets in lieu of cash to the retiring partner, there cannot be any tax by virtue of Entry 4(a).

For now, we end this article with the above two issues. We understand that this is only the beginning of the journey and there would be much more advancement in the legislature to tackle the GST issues that arises between the partners in case of retirement and dissolution.

This article is contributed by CA Sri Harsha. The author can be reached at harsha@sbsandco.com

DIRECT TAX

PROHIBITION OF BENAMI TRANSACTIONS ACT – APPLIES PROSPECTIVELY – SC IN GANPATI DEALCOM

Contributed by CA Sri Harsha & CA Narendra

History:

Prior to introduction of Benami Transactions (Prohibition) Act in 1988, the benami transactions were recognised as a specie of legal transactions pertaining to immovable properties. The nature of a benami transaction has been described by the Judicial Committee of Privy Council in Gurnarayan v Shoelal Singh[1], thus –

The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country ..... The rule applicable to benami transactions was stated with considerable distinctness in a judgment of this Board delivered by Sir George Farewell. Referring to a benami dealing, their Lordships say: It is quite objectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of the common law that where a feoffment is made without consideration the use results to feoffer.

So long, therefore, as a benami transaction does not contravene the provisions of the law, the courts are bound to give it effect. As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him....."

(57th Report of Law Commission)

As between the benamidar and the real owner, the law fully recognised the ownership of real owner, and disregards the benamidar subject to certain statutory exceptions. However, after understanding the evils of the benami transaction, an ordinance was brought into prohibit the real owner to recover the property from the benamidar, thus, legislatively putting an end to the encouragement benami transactions.

Journey till now:

An ordinance was promulgated which was titled as Benami Transactions (Prohibitions of the Right to Recovery Property) Ordinance, 1988. The ordinance contained 4 sections and the main object of the ordinance is to prohibit the right to recover property held benami. Section 4 of the ordinance provides for repeal of various sections in different legislations which subtly provide for the right to the real owner to recover the property from the benamidar.

Post promulgation of above Ordinance, the Law Commission was asked to take up the provisions of Ordinance for detailed examination and give its report. The Law Commission has given its suggestions and incorporating the same, the Benami Transactions (Prohibition) Act, 1988 ('original Act') was passed repealing the Ordinance. The Act contained 9 sections and the preamble of the act states as 'to prohibit the benami transactions and right to recover property held benami and for matters connected therewith or incidental thereto'.

[1] AIR 1918 PC 140

Section 3 prohibits benami transactions. Section 4 prohibits right to recover property held as benami and Section 5 provides for acquisition of benami properties. Section 6 specifies that nothing stated in this act shall affect the provisions of Transfer of Property Act, 1882 or any law relating to transfers for illegal purposes. Section 7 repeals Section 81, 82 and 94 of the Indian Trusts Act, Section 66 of Code of Civil Procedure, 1908 and Section 281A of IT Act, 1961. Section 8 confers the rule making power on Central Government and Section 9 repeals Ordinance with savings clause.

Because the 1988 act does not have the provisions relating to confiscation, appeal mechanism and other procedures, the act could not be implemented effectively. The Standing Committee on Finance in 2011-12 vide Report 58 recommended to repeal the 1988 act and introduce 2011 Bill to cure the infirmities the 1988 act possesses. However, the bill could not be passed since the Lok Sabha has dissolved and accordingly the bill got lapsed.

In 2015-16, the Standing Committee on Finance vide Report 28 stated that an amendment Act has to be passed to cure the infirmities the 1988 has. The reasoning laid down by Standing Committee to pass an Amendment Act instead of New Act is as under:

In this context it is submitted that a new bill incorporating the above features was prepared and forwarded to the Ministry of Law. In the Repeals and Saving clause a specific sub-clause had been included, so as to ensure that any benami transaction which had been undertaken by any person between the year 1988 and date of proposed bill coming into force, was also covered under new legislation. This implied that Benami Transactions, on which no action was taken under the 1988 Act, would be recognized as benami transaction under new act, and consequential action would follow. The Ministry of Law was of the opinion that aforesaid provision was unconstitutional in view of Article 20 of Constitution, and therefore could not be included in repeals and savings. Therefore, no action would be possible on any such transactions which occurred between 1988 and the date of repeal of 1988 Act. As a consequence, the Benami transactions during the period of twenty six years, would be in fact granted immunity since no action could be initiated in absence of specific provision in Repeals and Savings clause. It was therefore suggested by Ministry of Law, that it would be advisable to comprehensively amend the existing Benami Transactions (Prohibition) Act, 1988, so that the offences committed during the last 26 years are also covered. This would enable action against Benami transactions undertaken after the commencement of 1988 Act. Therefore, the present Bill is an Amendment Bill and not a Bill proposing a new Act.

Accordingly, Benami Transactions (Prohibition) Amendment Act, 2016 ('amendment Act') was passed, which came into effect from 01st November 2016. The amendment Act contains detailed provisions, which were absent in the original Act. The amendment Act has also laid down the guidelines required for attachment and other related matters.

Challenge before Supreme Court:

As soon as the amendment act was passed, the tax authorities have initiated the proceedings under the consolidated act (original Act+ amendment Act). The said proceedings were challenged stating that the provisions of amendment Act are applicable only after the amendment Act is enacted and not for the period prior to that. Since the amendment Act was enacted only in November 2016, the tax payers/assesses contention was that the said act will apply only for transactions entered post November 2016 and transactions entered between 19.05.1988 and 01.11.2016, cannot be tried under the amended act. Further, the offence under the original Act and the amended act are different, the amended act should be treated as substantive and to be applied prospectively.

On the other hand, the revenue stated that the original Act has recognized the offence and it does not have the procedural provisions, the vacuum, which was filled by the amendment Act. Since the amendment Act only tried to fill the procedural vacuum in the original Act, the said act must be applied retroactively.

The Honourable Calcutta High Court in the matter of Ganapati Dealcom Private Limited[2] has held that the amendment Act nowhere specifies that it must be applied retrospectively and accordingly, the amendment Act cannot be used to cover a transaction(which may be in the nature of offence as per amendment Act but not an offence as per original Act) conducted in 2011 as an offence under the original Act. The said judgment was challenged before the Honourable Supreme Court by Union of India and the analysis of said judgment is subject matter of this article.

Before understanding the analysis of Supreme Court, it is important to understand the arguments canvassed by Revenue and Respondent, which are tabulated as under:

Particulars	Summary of Main Arguments
Arguments by Revenue	• The amendment Act was dealing only with the procedure not with the offence. The offence of 'benami transaction' was already recognised in the original Act and not stipulated for the first time in the amendment Act. • Hence, the amending act should not be treated as substantiative or new law to treat the same as operative only prospective basis [relies on the principle that procedural law can be retrospective, and bar is only against the substantive law] • The legislative intent behind amendment Act was not to bring new act but to ensure that no immunity is granted to persons who have engaged in benami transaction when the original Act is in effect.

[2][2019] 112 taxmann.com 367 (Calcutta)

	• Acquisition of property as provided in section 5 of original act is same as confiscation provided under Section 5 of the amended Act and relying on the judgment of Supreme Court in Yogendar Kumar Jaisawal vs. State of Bihar[3] , the Revenue argued that confiscation of property (as stipulated by Section 27 vide amending act) is civil in nature and cannot be treated as punishment to attract the provisions of Article 20(1) of Constitution. • Assuming that the legislation is criminal in nature, the Revenue submitted the Parliament has power to enact retrospective legislation even in case of criminal statute as long as it complies with the provisions of Article 20(1) and argued that as per Article 20(1) prohibition exists only on conviction and sentencing of the ex-post facto law and not against passing such a law.
Arguments by Respondent	• The amendment Act was not stated expressly to be applied in retrospect. Hence, the same should be applied prospectively. • Argued that when the statute carves different penalties in respect of benami transactions entered in the unamended regime vis-à-vis benami transactions after the amended regime, the amended act to be treated as prospective. • Relying on the judgment of Supreme Court in Vatika Township Private Limited[4] , the respondent-company argued that the enactment which substantially affects the rights of people cannot be applied retrospectively. Since the definition of 'benami transaction' in the amended act covers more offences than existed under the un-amended legislation, it has to be observed that the amendment Act substantially affects the rights and so to be held to apply prospectively.

Analysis by Supreme Court:

On Types of Benami Transaction:

After tracing the history of the benami law in the country, the Supreme Court stated that there were two loose categories of transactions which were colloquially called as 'benami'. The same were explained by way of examples:

- 'B' sells property to 'A' (real owner), but the sale deed mentions 'C' as the owner/benamidar (let us call this as 'Instance – I')
- 'A' sells property to 'B' without intending to pass the title to 'B' (let us call this as 'Instance – II')

[3] [2016] 3 SCC 183
[4] [2015] 1 SCC 001

The Court stated that Instance – I can be termed as real benami transaction and Instance – II can be called 'loosely' as a benami transaction [Refers to Sree Meenakshi Mills Limited[5] and Thakur Bhim Sigh[6] to arrive at the said distinction]. The Court stated that under the original Act, only the nature of transactions mentioned in Instance – I were covered and reading of the transactions mentioned in Instance – II in the definition as existed under the original Act would amount to judicial overreach, since it would be against the strict reading of criminal law.

Further, the definition of 'benami transaction' under the original Act is capable of covering such transactions which were held by third party in the fiduciary capacity and stated that the property holder's lack of beneficial interest in the property which was a vital ingredient to call a transaction as benami was completely absent in the definition under original Act.

On Section 3 and section 5 of Original Act:

The Court stated that provisions of original Actcompletely ignore the aspect of mens rea as provisions of section 2(a) and section 3 of the original Act have been drafted as such (the concept of mens rea has been considered by the 57th law commission report but same was not integrated into the original Act).

The question now arises is, whether such a criminal provision, which the Parliament now intends to make use of, to confiscate properties after 28 years of dormancy, could have existed in the books of law?

The Court stated to answer the above, that is, whether the amendment Act is retroactive or prospective, it needs to be seen, whether the original Act was constitutionally valid? Referring to the various judgments that gave the judiciary the power to test the constitutionality of the legislations, the court stated that the provisions of Section 3 and Section 5 of original Act has to be analysed for the constitutional validity.

In the context of section 2(a) and section 3 of the original Act, the Court stated that the original Act was merely a shell, lacking the substance that a criminal legislation requires for being sustained. The Court stated that absence of mens rea in the original Act and appearance of the same in the amendment Act (vide section 53) indicates that doing away of the mens rea aspect was without any rhyme and reason and ended up creating an unusually harsh enactment.

Next, the ignorance of the vital ingredient of beneficial ownership exercised by the real owner contributes to the making the law even more stringent and disproportionate with respect to benami transactions that are in nature mentioned in Instance – I. In removing such an essential or vital ingredient, the legislature has not laid out any specific reason which makes the entire provision susceptible to arbitrariness. Further, those provisions of original Act have never been utilised as there was a significant vacuum in enabling the functioning of such provisions.

[5] AIR 1957 SC 49
[6] AIR 1980 SC 727

Coming to the section 5 of the original Act, which deals with acquisition of benami property by the government, the Court further held that Section 5 is half-baked which did not provide various items and just left it to the delegated legislation, which has resulted the delegation as excessive and arbitrary and accordingly held that the Revenue stand that the amendment Act is merely procedural cannot be valid.

The Court held that the original Act is an inconclusive law, which is left the essential features to delegated legislation and hence cannot be said to be valid. The gaps left in the original Act were not merely procedural, rather the same were essential and substantiative. Accordingly, the Court concluded that Section 3 and Section 5 of original Act were unconstitutional from the inception. However, by adopting the concept of 'prospective overruling', the Court stated that the above discussion does not affect the civil consequences contemplated under Section 4 of original Act or any other provisions.

The Court stated that since the Section 3 and Section 5 of original Act were held to be unconstitutional, the changes brought by amendment Act must be understood as new provisions and new offense and thus cannot be called as retroactive. Finally, coming to the argument of Revenue that acquisition of property and confiscation are same in nature and such confiscation is civil in nature, the Court held that the attachment arising in the case of benami transaction is punitive in nature and cannot be said to be civil. Accordingly held that the same cannot be applied retroactively.

On Section 3 of Amended Act:

Further, the amended act provides separate punishments/consequences for those transactions which are entered between an enactment of original Act and amended Act, and for those transactions which are entered transactions after the amendment Act. In respect of these, provisions, the Court went on to state that concerned authorities cannot continue proceedings in relations to transactions prior to amendment even though the amended Act.

Concluding Remarks:

Rajasthan High Court in the case of Niharika Jain[7] has held that provisions of amendment Act cannot be applicable retrospectively owing to substantial changes in the Actand introduction of additional penal provisions into the Act. However, Chhattisgarh High Court in the case of Tulsiram and Manki Bai [8]has held that amendment Act has not repealed or superseded the original Actin any manner. Further, section 3(2) specifically provides for transactions entered before the enacting the amendment Act and the intention of the parliament is to cure loopholes in original Act and not to repeal the original Act.

However, the Supreme Court has struck down such section 3(2) of the Amendment Act stating the transactions entered before the enactment of amendment Act cannot be persecuted or penalised.

As far as the amendments are concerned, original Act does not have full mechanism to enforce such law against benami transactions. As stated earlier, to remove such anomalies, Government has decided to make substantial changes to Benami Transactions (Prohibition) Act,1988. Such an objective can be achieved by the Government by enacting a separate new bill instead of making amendments to original

[7]CW-2915/2019
[8]Writ Petition (C) No. 3819 of 2019

Act.But Government acting on the advisory of Ministry of Law (as discussed in the introduction of the article), has decided to make amendments to original act and there is a sound and logical reason in bringing amendment act,even though there are just 9 sections in the original Act,instead of new separate Act. Bringing a new law may provide immunity to past transactionshence,Government has decided to make amendments to existing law by way of passing amended bill.

The then Hon'ble Finance Minister, in respect of question asked by the member of Parliament why Government is introducing an amendment bill instead of new bill, has stated that '*Anybody will know that a law can be made retrospective, but under Article 20 of the Constitution of India, penal laws cannot be made retrospective. The simple answer to the question why we did not bring a new law is that a new law would have meant giving immunity to everybody from the penal provisions during the period 1988 to 2016 and giving a 28-year immunity would not have been in larger public interest, particularly if large amounts of unaccounted and black money have been used to transact those transactions. That was the principal object. Therefore, prima facie the argument looks attractive that 'there is a 9-section law and you are inserting 71 sections into it. So, you bring a new law.', but a new law would have had consequences which would have been detrimental to public interest.*'

In other words, the Government has fair idea of the consequence/outcome if new enactment is made, as such new act would be effective prospectively and cannot be applied retrospectively owing to challenge from Article 20 of the Constitution. However, the above objective was not considered by the Supreme Court. Accordingly, the Government, even after bringing amendment Act, has not achieved the intended objective. Therefore, all the transactions entered between the said dates have been granted immunity and all proceedings initiated would be required to be dropped. The proceedings for subject matter of property which was acquired after the amendment act was made effective can only be pursued by the tax authorities. It is highly likely a review petition would be filed by Revenue before the Supreme Court asking to consider the intention and objective behind passing the amendment act instead of getting a new act.

This article is contributed by CA Sri Harsha & CA Narendra, Chartered Accountants. The author can be reached at harsha@sbsandco.com

DIRECT TAX

DETERMINATION OF DATE OF ISSUE VIS-A-VIS VARIOUS MODES OF ISSUE OF NOTICE

Contributed by CA Sri Harsha & CA Narendra

Introduction:

Issue of Notice under section 148 of ITA[1] after 31.03.2021 under old provisions has created a buzz in the reassessment matter in recent times. Finally, the matter reached the Supreme Court in the case of Ashish Agarwal[2] and CBDT[3] has issued an instruction[4] to implement the decision of Supreme Court. For detailed analysis of the above issue, read our article here[5].

When the above issue is taking the discussion at various judicial fora, parallelly, one more issue has stood up and raised its voice to make a big impact in the reassessment controversy.

Section 149 (old provisions as well as amended provisions) states that the Notice under section 148 shall not be ***'issued'*** after the expiry of time limit specified in section 149 for making the reassessment under section 147.

After the introduction of FAS[6], assessments are being completed digitally wherein issue of Notice and submission of reply to such Notice are to be performed digitally in the e-filing website of the Income Tax.

As such notices are to be issued digitally, the questionarises, whether the signing of notice by using digital signature certificate (DSC)is to be considered as issue of notice or sending of such notice through email is to be considered as issue?

In this regard, the Allahabad High Court in the case of Daujee Abhushan Bhandar Pvt Ltd[7] has held that firstly notice shall be signed by the income tax authority and then it has to be issued either in paper form or be communicated in electronic form by delivering or transmitting the copy there of to the person therein named by modes provided in section 282which includes transmitting in the form of electronic record.

Accordingly, the Allahabad High Court has held that the point of time when a digitally signed notice in the form of electronic record is entered in computer resources outside the control of the originator i.e., the assessing authority that shall the date and time of issuance of notice under section 148 read with Section 149 of the Act.

However, the Hon'ble Madras High Court in the case of Malavika Enterprises[8] has negated the Allahabad judgement in Daujee Abhushan Bhandar Pvt Ltd (supra) and held that

'With due respect to the Division bench of the Allahabad High Court, the issue threadbare discussed by it refers to the date of issuance and not of receipt, but after making discussion in reference to all the provisions, conclusions have been drawn referring to the date of receipt, without discussion as to when it enters a computer resource outside the control of the originator.'

Accordingly, Madras High Court has dismissed the writ petition filed by the appellant stating that as the notice has been signed by using DSC on 31.03.2021 and same has been issued on 31.03.2021, date of receipt of email cannot be considered as date of issue of notice. For detailed analysis of the above two judgements, read our article here[9].

[1] Income Tax Act, 1961
[2] [2022] 138 taxmann.com 64 (SC)
[3] Central Board of Direct Taxes
[4] Instruction No. 01/2022, dated 11-05-2022
[5] Supreme Court on Reassessment controversy – more than 90,000 Notices to be alive - Taxmann
[6] Faceless Assessment Scheme
[7] WRIT TAX No. - 78 of 2022
[8] [2022] 137 taxmann.com 398 (Madras)
[9] Issue of Notice through Email

The whole issue is to determine the date of issue of notice when such notice is issued digitally. In order to understand this issue, one has to read section 282A of the ITA and section 13 of the Information Technology Act,2000.

Number of writ petitions have been filed before the Delhi High Court in the cases of Suman Jeet Agarwal & Ors[10] and Delhi High Court has categorically framed various instances under which notice under section 148 has been issued.

- **Category A**: is in respect of writ petitions - where Notice is dated 31stMarch, 2021 or before but digitally signed on or after 1st April, 2021, however sent and received on or after 1stApril, 2021.

- **Category B**: is in respect of writ petitions where Notice is dated 31stMarch, 2021 or before digitally not signed, however sent and received on or after 1st April 2021.

- **Category C**: is in respect of writ petitions where Notice is dated 31stMarch, 2021 or before digitally signed on or before 31st March, 2021, however sent and received on or after 1stApril 2021.

- **Category D**: is in respect of writ petitions where Notice is dated 31stMarch, 2021 or before digitally signed on or before 31st March, 2021, no service either by e-mail or by post or any other mode and assessee came to know later on through Portal or receipt of subsequent Notice under Section 142(1).

- **Category E**: is in respect of writ petitions where Notice is dated 31 March,2021or before manually signed, no service by e-mail but dispatched through speed post on or after 1st April, 2021.

Before the Delhi High Court, both revenue and the assessee have vehemently argued to support the stand taken by them in respect of issue of notice under section 148 through digital mode.

Contention of the Revenue:

In respect of notices issued by the authorities, it has been stated that a special software has been designed by the Income Tax Department namely ITBA, through which notices to assessee would be issued. Functioning of the ITBA software is as follows:

- AO[11] uses the ITBA software and generates the notice under section 148.

- AO has two options while generating the Notice viz. generating the notice with DSC and generating the notice without affixing the DSC.

- If first option is exercised, AO has to affix the DSC within 15days. Once the DSC is affixed then, ITBA software generates the mail to the assessee. If AO fails to affix the DSC within such 15days, ITBA software triggers the email and sends the notice to the assessee.

- If second option is exercised, ITBA software generates the email and sends the Notice to the assessee. The ITBA software's process of triggering of e-mail and sending of Notices to the E-filing portal's data base is an automated function in both the scenarios.

On 31stMarch, 2021, the average time taken for triggering of the email by the ITBA software was approximately 6 hours. The said delay was due to the high number of documents being generated on the said date.

[10][TS-752-HC-2022(DEL)]

[11]Assessing Officer

Once the AO exercises his option and generates the notice, he cannot cancel it. In other words, once the notice is generated and DIN[12] is created, AO loses complete control over the notice and he can neither amend, alter nor cancel the said notice.

In terms of section 13 of the Information Technology Act, 2000, AO is to be considered as *'originator'* and ITBA portal is the *'computer source'.* Therefore, such generation of the notice and creation of DIN has to be considered as issue of notice for the purpose of section 149 of ITA.

Contention of the Assessee:

Section 149 states that notice has to be issued within the time limit. It does not contain expression 'assessing officer', therefore no distinction can be made between the AO and the ITBA software. Time taken by the ITBA software is attributable to the AO.

Under section 13 of the Information Technology Act, ITBA software is to be considered as 'originator'. Therefore, the dispatch of electronic would occur only when same enters the computer source outside the control of the ITBA software and only after such dispatch, it shall be considered that the notice is issued.

As per the provisions of section 282A of the ITA, for a notice to be issued, such notice has to be signed and thereafter it can be issued (in paper form) or can be communicated (in electronic form).When such notice is issued in the paper form, it has to leave the office of the concerned authority to consider is has valid issue. However, in the digital mode, communication is instant and therefore, merely putting the notice into transmission cannot be considered as valid issue, but such notice has to be effectively sent out by the concerned authority. Until a ITBA server sent the email to the assessee, it cannot be considered as valid issue of notice as stated in section 282A of the ITA.

[12]Document Identification Number

High Court Ruling:

After considering the arguments made by the revenue as well the assessee, and after considering the various judicial precedents, High Court has framed following questions of law to be answered.

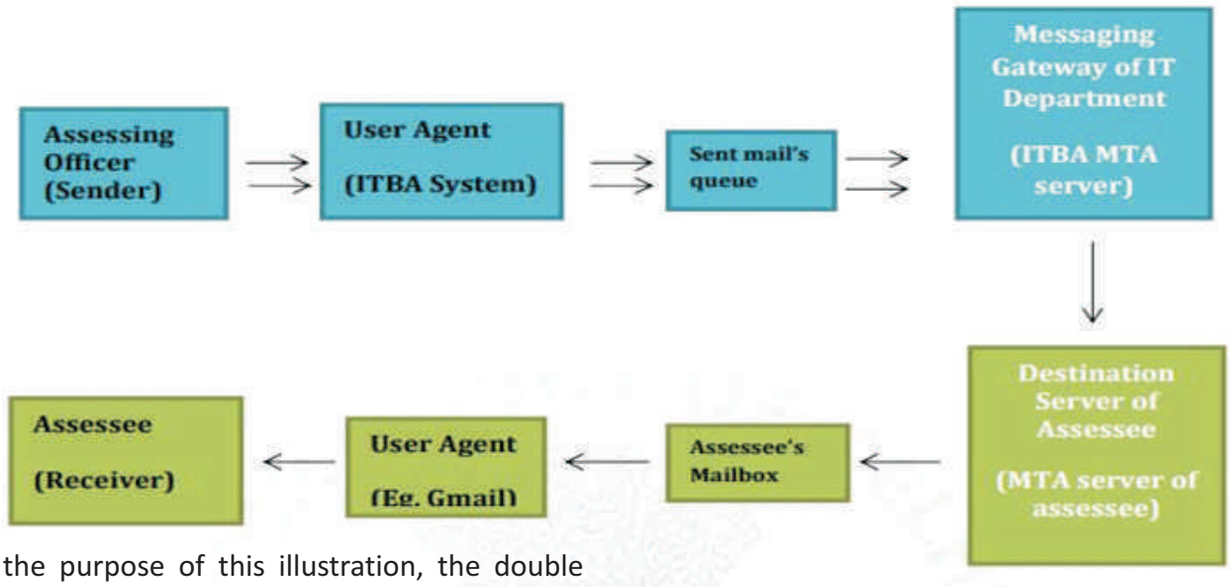
i. *Whether the JAO's act of generating Notice in the ITBA portal on 31stMarch, 2021, without dispatching the notice meets the test of the expression 'shall be issued' in Section 149 of the Act of 1961, and saves the notices from being time barred?*

   In this regard, the High Court has held that the expression 'issue' in its common parlance and legal interpretations means that the issuer of the notice must after generating and signing it make an overt act to ensure due dispatch of the notice to the assessee. On perusal of the submission of the revenue, it is revealed that while the function of generation of notice in ITBA software and signing of such notice is executed by the AO, function of drafting of email and triggering of email to the assessee is performed by the ITBA software.

The High Court held that mere generation of the notice on ITBA software shall not constitute the issue of notice in the eyes of law. Issue of notice in paper form is completed when such notice is dispatched and in electronic form, it is when the email has been dispatched.

ii. *Whether "dispatch" as per Section 13 of the Act of 2000 is sine qua non for issuance of Notice through electronic mail for the purpose of Section 149 of the Act of 1961?*

iii. *Whether the time taken by the ITBA's e-mail software system on 31stMarch, 2021, in dispatching the e-mails to the assessees is not attributable to the JAOs and the Notices will be deemed to have been issued on 31st March, 2021?*



For the purpose of this illustration, the double arrows indicate transmission between computer resources that are of the ITBA e-mail software system and therefore, within the control of the Department; and the single arrows indicate transmission between computer resources that are within the control of or used by the assessee.

It would be relevant to note that the time taken by the ITBA software on 31stMarch,2021 was not due to any software glitches. The programming to dispatch the notices in a controlled manner and batch mode was pre-existing fact and to the knowledge of the revenue.

Hence, it is sine qua non for issuance of notice through electronic mail for the purpose of Section 149 of the Act and time taken by the ITBA's e-mail software system on 31stMarch, 2021, in dispatching the e-mails to the assessees is attributable to the AO.

iv. Whether the Section 148 Notices sent as an attachment through e-mails, from the designated e-mail addresses of the JAOs, which do not bear the respective JAO's digital signature, are valid under Section 282A the Act of 1961 read with Rule 127A of the IT Rules?

In this regard, the High Court after referring to section 282A and memorandum to the Finance Bill,2016, it has held that affixation of DSC is not mandatory for the purpose of issue of Notice under section 148.

v. Whether upload of the Section 148 Notice on the "My Account" of the assessee on the E-filing portal is valid transmission under the Act of 1961?

In this regard, the High Court has held that in order to consider the issue of notice by placing the same in e-filing website is valid, revenue must have issued a real time alert.

However, as the assessee is aware of the notices later and such proceedings are pending, High Court has inclined to quash the same. **The first date on which the notices were accessed by the assessee in e-filing website shall be considered as date of issue of notice.**

The whole issue arose in writ petition before various High Courts because, if is considered that the notice is issued on or after 01stApril,2021, it would be considered outside the time limit specified in section 149 of the ITA and bad in law as scheme of reassessment has been changed substantially from 1st April,2021.

However, it is imperative to remember the decision of the Hon'ble Supreme Court in the case of Ashish Agarwal(supra). The Hon'ble Supreme Court has held that notices issued under section 148 to assessees under the old provisions shall be deemed to have been issued under section 148Aas substituted by the Finance Act, 2021.

After the above analysis, the High Court has proceeded to answers the questions relating to various instances under which notice under section 148 was issued.

- **Category 'A' (Notice isaffixed with DSC):**

Notices falling under category 'A', which were digitally signed on or after 1stof April, 2021, are held to bear the date on which the said notices were digitally signed and not 31st March 2021. The said petitions are disposed of with the direction that the said notices are to be considered as show-cause-notices under Section 148A(b) as per the directions of the apex court in Ashish Agarwal (supra).

- **Category 'B' (Notice without affixing DSC):**

Notices falling under category 'B' which were sent through the registered e-mail ID of the respective JAOs, though not digitally signed are held to be valid. The said petitions are disposed of with the direction to the JAOs to verify and determine the date and time of its dispatch as recorded in the ITBA portal in accordance with the law laid down in this judgment as the date of issuance. If the date and time of dispatch recorded is on or after 1stApril, 2021,notices are to be considered as show-cause-notices under Section 148A(b) as per the directions of the apex court in Ashish Agarwal (supra).

- **Category 'C' (Notice is affixed with DSC):**

Notices falling under category 'C' which were digitally signed on 31stMarch 2021, are disposed of with the direction to the JAOs to verify and determine the date and time of dispatch as recorded in the ITBA portal in accordance with the law laid down in this judgment as the date of issuance. If the date and time of dispatch recorded is on or after 1stApril, 2021, the notices are to be considered as show-cause-notices under Section 148A(b) as per the directions of the apex Court in Ashish Agarwal (supra).

- **Category 'D' (Notice uploaded in the e-filing website):**

Notices falling under category 'D' which were only uploaded in the E-filing portal of the assessees without any real time alert, are disposed of with the direction to the JAOs to determine the date and time when the assessee viewed the notices in the E-filing portal, as recorded in the ITBA portal and conclude such date as the date of issuance in accordance with the law laid down in this judgment. If such date of issuance is determined to be on or after 1stApril 2021, the notices will be construed as issued under Section 148A(b) as per the directions of the apex court in Ashish Agarwal (supra).

- **Category 'E' (Notice is dispatched physically):**

Notices falling under category 'E' which were manually dispatched, are disposed of with the direction to the JAOs to determine in accordance with the law laid down in this judgment, the date and time when the notices were delivered to the post office for dispatch and consider the same as date of issuance. If the date and time of dispatch recorded is on or after 1stApril, 2021, the notices are to be construed as show-cause-notices under Section 148A(b) as per the directions of the apex Court in Ashish Agarwal (supra).

Further, another issue which is originally not categorised has also been cleared by the High Court. i.e., issue of notice through email of the unrelated party.

In this regard, the High Court has held that issue of notice to email of the unrelated party cannot be considered as valid issue. However, as per section 282 of the ITA read with Rule 127 of IT Rules, notice can be issued to email address available in ITR filed by the assessee, in the case of the company, email address available in the MCA website, any email made available by the assessee to the AO.If such email is sent to different mail other than the above-mentioned cases, it shall not be considered as valid issue of notice. However, as assessee is aware of the notice by way of e-filing website, such case can be covered under 'Category D' above.

Author's Comments:

The Delhi High Court has cleared the clouds to the major extent when it comes to issue of notice under digital mode. In summary, date of issue of notice can be determined as follow:

S.No.	Scenario	Date of issue of Notice
1	When notice is signed with DSC	Date of triggering of email by the ITBA software.
2	When notice is not signed with DSC	Date of triggering of email by the ITBA software.
3	When notice is made available in e-filing website sans real time alert	First date of such notice is accessed by assessee
4	When notice is sent through post	Date of dispatch to the assessee
5	When email is sent to unrelated party	First date of such Notice is accessed by the assessee

Further, all above cases in writ, though the decision of the above High Court provides relief, has go back to the file of the AO to start the reassessment proceedings afresh. This is because of the decision of the Supreme Court in the case of Ashish Agarwal (supra).

However, the analysis and the judgement provided by the High Court is useful for future notices and is the notice is issued digitally, the date of triggering of email by the ITBA software shall be considered as date of issue of notice and not the date of its generation/signing.

Further, as far as signing of the notice with the DSC, the High Court has held that for the purpose of section 148, notice need not be affixed with the DSC. However, if any particular provision requires affixing the DSC, same shall be duly signed with the DSC by the respective authority.

This article is contributed by CA Sri Harsha & CA Narendra, Chartered Accountants. The author can be reached at harsha@sbsandco.com

By

Team SBS

Hyderabad: Unit 510, 5th Floor, Gowra Fountainhead, HUDA Techno Enclave, Behind Hotel Westin, Patrika Nagar, Hi-Tec City, Hyderabad- 500 081,Telangana, India.
Sri City (Tada): Suite No. 306, 2nd Floor, Arcade 2745,Central Expressway, Sri City, Andhra Pradesh - 517 646. India.

Disclaimer:

*The articles contained in **SBS Wiki**, are contributed by the respective resource persons and any opinion mentioned therein is his/their personal opInion. **SBS Wiki** is intended to be circulated among fellow professional and clients of the Firm, to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). The information provided is not for solicitation of any kind of work and the Firm does not intend to advertise its services or solicit work through **SBS Wiki.** The information is not intended to be relied upon as the sole basis for any decision. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.*

***SBS AND COMPANY LLP [Firm]** does not endorse any of the content/opinion contained in any of the articles in **SBS Wiki,** and shall not be responsible for any loss whatsoever sustained by any person who relies on the same.*

To unsubscribe, kindly drop us a mail at kr@sbsandco.com with subject 'unsubscribe'.