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By

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Dear Readers,

In this 94thedition of ours, we bring you our inquisitive analysis on the judgment of Delhi ITAT in the matter of Young Indian. The story of Young Indian is quite popular and am saving your time from detailing the facts. The ITAT has made a detailed analysis of taxation of the value of assets under Section 28(iv) in the hands of Young Indian and a must read. Though the judgment deals with a total of 16 grounds, we have concentrated in the article, only the grounds that deal with the taxation. It would be as curious as any other commercial movie sequel as to what happens to the fate of tribunal's decision in the higher courts. Let's wait and see.

The next article is on the routine usage of the draconian powers under Section 83 of CT Act, 17. We have witnessed the usage of the Section 83 in a routine and absurd manner in one of our client's cases, which is a large taxpayer. The Commissioner went ahead and issued a provisional attachment order attaching 6 to 7 bank accounts, without any basis in the middle of inspection proceedings, thereby creating hardship for the client. We have advised the client to file a writ petition and the matter is currently before the High Court. The same procedure is followed by authorities dehors the circular issued by CBIC, all over the country, which is evident from the judgments used in our article. The only way to restrict the powers under Section 83 is to amend it by incorporating certain conditions for its usage.

The next article is on one of the most important issue of 'issue' of notice under Section 148 of ITA. The glaring contradictory judgments of Allhabad High Court and Madras High Court leaves the matter in uncertainty. The outcome of the judgments on this matter is very crucial in determining the fate of assessments.

The next article is on the recent decision of Supreme Court upholding the amendments made to FCRA Act. The FCRA Act was amended based on the experience gained by the executive. The said amendments were challenged on various grounds and the Supreme Court rejected all of them, upholding the amendments.

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

DIRECT TAXES

ISSUE OF NOTICE UNDER SECTION 148 - DAUJEE AND MALLIKA ENTERPRISES

Contributed by CA Sri Harsha & CA Narendra

Introduction

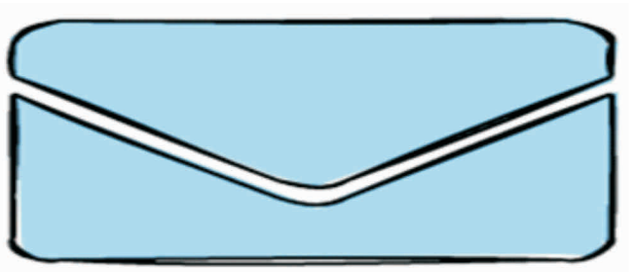
Issue of notice under Section 148 of Income Tax Act, 1961 (for brevity 'ITA') after 31.03.2021 under old provisions has created lot of litigation at various High Courts and currently the Supreme Court has reserved its judgement on such controversy. For detailed analysis of issue of notice under section 148, read our article here[1].

As the above controversy is settling down, a new issue has been come up for discussion at various High Courts. Earlier, assessments under section 143(3) or reassessments under section 147 are used to be completed in physical mode. However, after the introduction of Faceless Assessment Scheme (for brevity 'FAS'), the concept of assessment procedure has been changed totally to digital mode. For details of faceless assessment scheme, we recommend reading our Article on FAS here[2].

Section 149 (old provisions as well as amended provisions) states that 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, as stated earlier, assessments are being completed done digitally wherein issue of notice and submission of reply to such notice are to be performed digitally.

As such notices are to be issued digitally, the question that arose was , ***what is the date of issue of notice, whether it is signing of notice by using digital signature certificate or sending of such notice through email?***



Issue of Notice:

The term 'issue' has not been specifically defined under ITA. The Black's Law Dictionary defines the term 'issue' to mean 'To send forth; to emit; to promulgate; as, an officer issues orders, process issues from court. To put into circulation; as, the treasury issues notes. *To send out, to send out officially; to deliver, for use, or authoritatively; to go forth as authoritative or binding. When used with reference to writs, process, and the like, the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service etc.'*

To be precise, sending from the origin may be considered as 'issue' for the purposes of the Act.
Further, section 282A states that where any notice or document to be issued by any income tax authority, such notice or document shall be signed and issued in paper form or communicated in electronic form, to mean that signing of notice may not be considered as issue of notice.

As such notices are to be issued digitally, the question that arose was , what is the date of issue of notice, whether it is signing of notice by using digital signature certificate or sending of such notice through email?

[1] SBS-I-19th-Edition.pdf (sbsandco.com)
[2] wiki (sbsandco.com)

The Hon'ble Gujarat High Court in the case of Kanubhai M. Patel (HUF)[3] has held that mere signing of notice cannot be equated with issuing of notice and the date on which the same were handed over for service to the proper officer would be considered as date of issue. When the notice is issued in paper form, the date on which the said notices were actually handed over to the post office for the purpose of booking for the purpose of effecting service on the petitioners has to be considered as date of issue.

The issue of notice in paper form is covered by the above judgement. However, after the introduction of FAS, income tax authority is issuing notices in digital form.

When the notice is issued in digital form, how to determine date of issue of notice? High Courts have interpreted the term issue of notice in digital form in recent times, which is detailed hereunder.

<u>In the matter of Daujee - Allahabad High Court:</u>

The Hon'ble Gujarat High Court in the case of Daujee Abhushan Bhandar Pvt. Ltd[4] (for brevity 'Daujee') has analyzed the various provisions of Income Tax Act and Information Technology Act and delivered its judgement.

- The words "issue" or "issuance of notice" have not been defined under the Act. However, the point of time of issuance of notice may be gathered from the provisions of the Act and the Rules and the Information Technology Act, 2000.
- Section 282A provides for authentication of notices and other documents by signing it. Sub- Section 1 of Section 282A uses the word"signed" and "issued in paper form"or "communicated in electronic form by that authority in accordance with such procedure as may be prescribed". Thus, signing of notice and issuance or communication thereof have been recognised as different acts.
- The communication in electronic form has been prescribed in Rule 127A of the Rules 1962 which provides a procedure for issuance ofevery notice or other document and the e-mail inelectronic mail which has to be issued from the designated e-mailaddress of such income tax authority.
- Rule 127A (1) of the Income Tax Rules states that every notice/document communicated in electronic form by any income tax authority shall be deemed to be authenticated in case of email, if the name and office of such income tax authority is printed on the email body and is issued from the designated e-mail address of such income tax authority.
- Thus, mere signing of notice using digital signature (for brevity 'DSC') cannot be considered as issuance of notice. After signing the notice by using the DSC, income tax authority has to issue such notice to the assessee either in paper form or through email.
- Section 13 of Information Technology Act states that the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator'.

[3][2011] 12 taxmann.com 198 (Gujarat)
[4]WRIT TAX No. - 78 of 2022

- Which means that issue of notice through electronic record completes only when such document enters a computer resource outside the control of the originator.

- Therefore, after a notice is digitally signed and when it is entered by the income tax authority in computer resource outside his control i.e., the control of the originator then that point of time would be the time of issuance of notice.

Considering the above analysis, the High Court 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 thereof to the person therein named by modes provided in the act which includes transmitting in the form of electronic record.

Accordingly, the 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 be the date and time of issuance of notice under section 148 read with Section 149 of ITA.

In the matter of Malavika Enterprises - Madras High Court:

The Hon'ble Madras High Court in the case of Malavika Enterprises[5] has distinguished the decision of Daujee by Allahabad High Court (supra). Madras High Court as well referred the same provisions of the ITA but interpreted them in different way:

- Section 282(1) of the Act provides that service of notice or summon or requisition may be made by delivering or transmitting a copy thereof to the person therein named.

- Section282A states that notice/document shall be signed and issued in paper form or electronic form.

- Rule 127A states that every notice or other document communicated in electronic form by an income tax authority under the Act shall be deemed to be authenticated in case of electronic mail/electronic mail message, if the name and office of such income-tax authority is printed on the email body and if the notice or other document is in the email body itself.

- A perusal of the notice dated 31.3.2021 shows it to have been sent through email and as per Rule 127A(1), it is deemed to be authenticated if the name and office of the income tax authority is printed on the email body or is printed on the attachment to the email.

- ***The petitioner could not bring any fact on record to show that notice under Section 148 of the Act of 1961 was not issued by the electronic mode, i.e., by email, on 31.3.2021 and, that too, when the fact regarding digital signature of the authority could not be disputed.***

- While discussing the issue, the Division Bench of the Allahabad High Court has referred to Rule 127A, which deals with communication in the electronic form and after referring to Section 13 of the Information Technology Act, 2000, it was held that despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

- Accordingly, the Allahabad High Court has held that if a notice is digitally signed by the income tax authority and it is entered by the income tax authority in computer resource outside the control, then that point of time would be the time of issuance of the notice.

[5][TS-288-HC-2022(MAD)]

- ***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.***

- ***Conclusions finally drawn by the Allahabad High Court on the facts of that case cannot be applied, rather we cannot change the language of the provision by changing the word "issuance" to that of "receipt".***

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.

Our Comments:

After analysing the above two judgments, it can be found that both the High Courts have referred the provisions of section 282A read with section 127A for the purpose of interpretation of 'issue of notice'. However, the outcome of the judgement differs each other.

Two High Courts have expressed two different views in respect of issue of notice through email. Allahabad High Court has held that mere signing of notice cannot be equated with issue of notice and date of sending email has to be taken into account for determining the date of issue of notice.

However, Madras High Court has held that as the appellant has not brought anything on record to substantiate that the notice has been issued after 01.04.2021, as the notice is generated digitally by using the DSC on 31.03.2021, such date of signing has to be considered as date of issue of notice for the purpose of section 149.

However, the fact of sending mail on 31.03.2021 is not specifically mentioned in the order which leaves some doubts regarding the date of sending email.

The appellant has argued that as the mail was received on 01.04.2021, such mail would have sent on 01.04.2021. When the email has been sent, it will be presumed to be delivered instantly to the receipt, unless there are any technical glitches.

However, High Court without discussing above aspect, taken different direction that date of receipt of cannot be equated with date of issue of notice.

Further, when the notice is issued by the income tax authority, it has to substantiate that the notice has been issued on such date. However, the Madras High Court has shifted the burden of proof to the appellant and as the appellant could not substantiate the date of sending email by the income tax authority, the High Court has held that date of signing of notice by DSC has to be considered as date of issue.

Further, one more writ has been field before the Hon'ble Delhi High Court [6] wherein the High Court has framed the following question of laws:

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

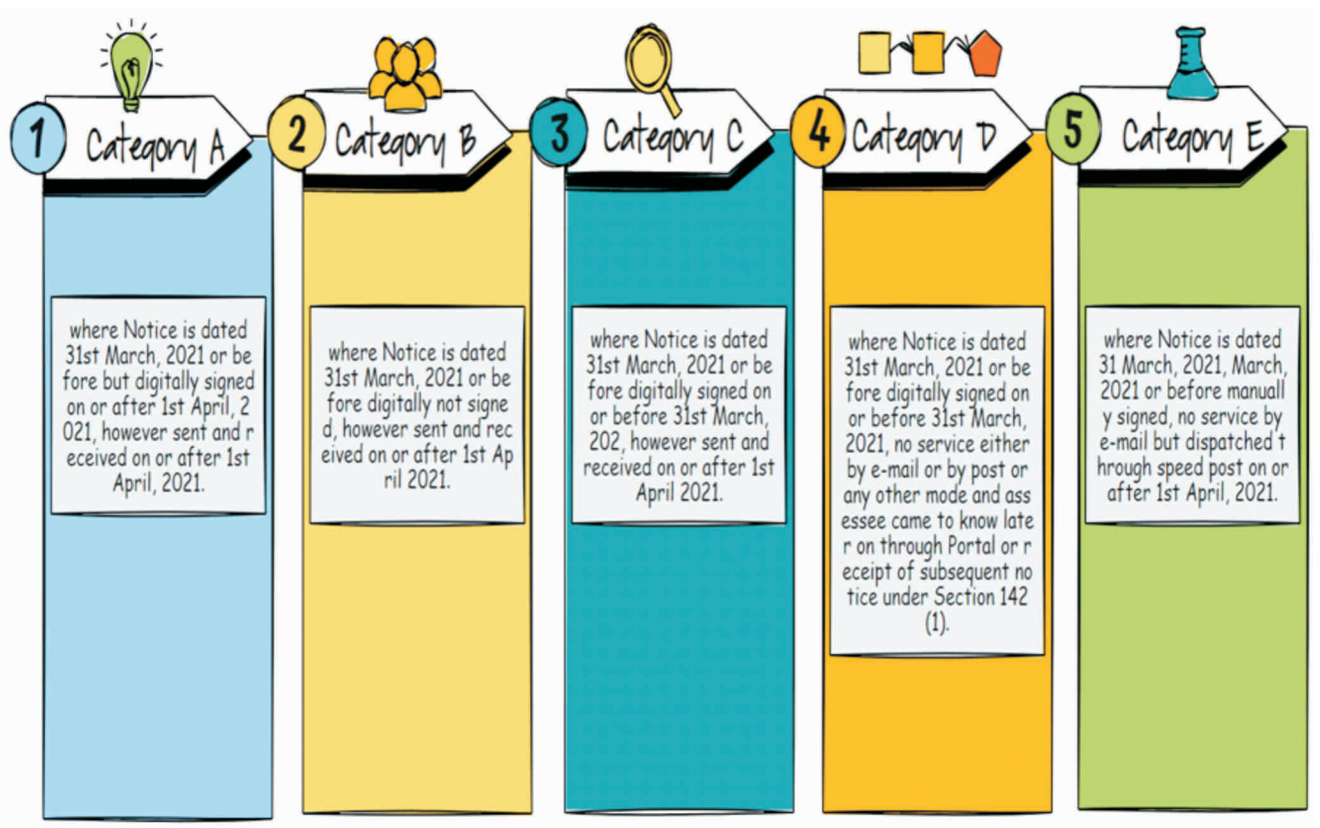
- **Category C:** is in respect of writ petitions where Notice is dated 31st March 2021or before, digitally signed on or before 31stMarch 2021, however sent and received on or after 1stApril 2021.

[6] W.P.(C) 4777/2022`

- **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 31stMarch2021or before, manually signed, no service by e-mail but dispatched through speed post on or after 1stApril 2021.

As two High Courts has not gone into depth the issue, the decision of Delhi High Court is much waited for better understanding the 'issue of notice' digitally.



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

DIRECT TAXES

TAXATION OF BENEFITS IN YOUNG INDIAN – VALUE OF ASSETS OF AJL – DELHI TRIBUNAL IN YOUNG INDIAN

Contributed by CA Sri Harsha

The recent Delhi Tribunal judgment in the matter of Young Indian[1] is the second in the series for Young Indian (for brevity 'YI'). The first was the cancellation of registration under Section 12AA of Income Tax Act, 1961 (for brevity 'ITA'). The article on that particular judgment is available at here. In this article, we deal with the recent judgment wherein the tax was levied on YI in terms of Section 28(iv) of ITA.

The judgment of tribunal is contained in 571 pages, wherein YI has challenged the Commissioner of Income Tax (Appeal)'s order on 16 counts. In this article, we are only dealing with the taxation of the income in the hands of YI and its corresponding valuation issues. We recommend the readers to read the entire judgment for a holistic understanding of the matter. The facts that are relevant to the current issue dealt in the article are narrated hereunder for the benefit of the reader.

YI was incorporated as a company under Section 25 of Companies Act, 1956. Memorandum of Association was subscribed by two directors, namely Mr Suman Dubey and Mr Satyam Gangaram Pitroda with 550 equity shares each. Post incorporation, both the shareholders transferred their shares to Mr Oscar Fernandes and Mrs Sonia Gandhi (SG). Subsequent to such transfer, Mr Suman Dubey and Mr Satyam Gangaram Pitroda were appointed as directors of a company, M/s Associated Journals Limited (AJL). Later, Mr Rahul Gandhi (RG) was appointed as director of YI and also acquired 3600 shares of YI. Simultaneously, SG has further acquired shares totalling to 3600 shares of YI and also become a director of YI.

As on 31.03.2010, AJL owes an amount of Rs 88.86 Crores to All India Congress Committee (AICC). AJL has further taken a loan from AICC totalling the outstanding to Rs 90 Crores. The share capital of AJL was Rs 1 Crore. AICC has transferred the outstanding loan of Rs 90 Crores from AJL for a consideration of Rs 50 lakhs to YI. Later, the share capital of AJL was increased to Rs 10 Crores and the additional shares were allotted to YI (99.99%) giving the maximum control of AJL to YI. The balance shares were subscribed by SG, RG and Mrs Priyanka Gandhi (PG).

[1] TS-234-ITAT-2022 – Del

The dates of the events detailed in this article is tabulated as under for easy comprehension:

Date	Event	Remarks
14.10.2010	Application for Incorporation of YI	Initial subscribers (IS) as Mr Dubey and Mr Pitroda
23.11.2010	Incorporation of YI	-
-	Transfer of Shares by IS	Transfer to Mr Oscar Fernandes & Mrs Sonia Gandhi
13.12.2010	Appointment of RG as director of YI director	RG acquired 3600 shares of YI and also became
16.12.2010	Transfer of OL to YI	AICC transferred OL due from AJL to YI for Rs 50 lakhs
21.12.2010	Appointment of IS as directors of AJL	Mr Dubey and Mr Pitroda appointed as directors of AJL
31.03.2010	Outstanding Loans (OL) in AJL	Rs 88.86 Crores from AICC as outstanding loans
22.01.2011	Appointment of SG as director of YI	SG further acquired shares and became director of YI
01.03.2011	Availment of Loan by YI – Rs 1	CroreLoan from M/s Dotex Merchandise Private Limited
01.03.2011	Payment of Rs 50 lakhs to AICC	YI has paid said amount for purchase of OL due from AJL
31.03.2011	Application of YI under 12AA	For registration as charitable institution
06.05.2011	Grant of registration - Section 12A	YI has obtained registration with effective from AY 11-12
21.03.2016	Suo moto surrender of 12AA by YI	In absence of foreseeable surpluses, YI surrendered

From the above table, it is evident that YI has acquired loan from AICC. In consequence to the loan purchase, AJL has allotted equity shares to YI, thereby AJL becoming subsidiary to the YI.

Contentions of Assessing Officer – During Reassessment:

The Assessing Officer (for brevity 'AO') contended that from the narration available in the annual report of AJL for 2010, it is evident that the loan of Rs 90.21 Crores from AICC was not disclosed in the annual report of the AJL, because as per the report, loan only included advances, loan and security deposits for construction activities from parties and from others, not from AICC. The AO has issued notices under Section 133(6) of ITA to AICC on different dates to inquire about evidence relating to time, mode, manner of advancing loans and nature of fund out of which these loans were advances. However, no clarification or evidence was submitted by AICC to substantiate the grant of loan to AJL. The AO further stated that the amount of unsecured loan of Rs 90.21 Crores does not tally with the amounts shown as per balance sheet of AJL and another important issue is the quantum of loan of Rs 90.21 Crore which was coincidentally just sufficient for allotment of 9.021 Crore shares of AJL to YI which accounted for 99% of share capital of AJL allowing takeover of AJL by YI.]

The AO also pointed out that all the rights over the above alleged loan were sold by AICC to a newly incorporated entity, YI, within 23 days after incorporation at a paltry sum of Rs 50 lakhs. The AO also stated that at the time of assignment of loan, YI did not have any money to make payment of Rs 50 lakhs and it could allegedly arranged the money to make payment of Rs 50 lakhs only in February 2011, which is after two and half months from the date of assignment of alleged loan to YI by taking a loan from Dotex Merchandise Private Limited (for brevity 'Dotex') to the tune of Rs 1 Crore. It was further stated by AO that Investigation Wing reported that AICC assigned the loan of Rs 90.21 Crores to YI for a paltry sum of Rs 50 lakhs, for the reason that AICC was not sure if AJL would be in a position to return the loan. The AO stated that since AJL and AICC has common people, it would not be correct to state that AJL is not in a position to repay the loan considering the huge properties that it has as its assets. Further, the AO stated that the takeover of AJL by YI happened prior to the payment made by YI to AICC for acquisition of loan, which would show that the entire chain of events were only done to acquire the AJL. Further, the loan taken from Dotex was not paid back by YI and that too the loan is free of interest. AO stated that the directors of Dotex are also directors of other 50 companies based out in Kolkata, which are engaged in accommodation entries. Since no interest is paid or loan is repaid, the genuineness of loan taken by YI from Dotex is also doubtful.

The AO stated that the sequence of transactions carried on by entities (AJL, AICC, YI and Dotex) are not as per normal commercial practices. The AO stated that the AICC claimed selling loan of Rs 90.21 Crores to YI in the month of December 2010 even when assignment of loan was not acknowledged and confirmed by the AJL but YI paid sale consideration to the AICC only in the month of March 2011 at the time when the AJL was already taken over YI by allotment of 99% of paid up share capital of AJL. The end results of this transactions were was takeover of AJL a real estate company having properties of several hundred crores by YI by meagre investment of Rs 50 lakhs. The AO stated that such takeover of real estate company having assets worth of more than Rs 1600 Crore the value which was taken cognizance by Metropolitan Court of Delhi at price of Rs 50 lakhs is unheard of. The takeover of AJL by YI has resulted actually in acquisition of all the immovable properties of AJL along with right to enjoy huge rental income of several crore from some of the properties. YI has not disclosed that it has purchased the loan from AICC in its P&L account for FY 2010-11 and also has not shown the investment in shares of AJL in its balance sheet, stating that the value of investment is negative.

The AO stated that since investment of Rs 50 lakhs was made with a profit motive, the above transaction was adventure in nature of trade under Section 2(13) of ITA and value of above referred properties of AJL was a benefit which represents profits and gains to YI under Section 28(iv) for FY 2010-11 and accordingly demanded tax on the amount of Rs 413.41 Crores. The AOplaced reliance on the judgments of Supreme Court and High Courts to state that the activity undertaken by YI is in the nature of trade and the benefits (benefit of underlying shares of AJL, benefit of right to enjoy the business assets of AJL, benefit of income from real estate business of AJL and benefit of rental income of several crores from letting out of business assets of AJL) arising thereof should be subjected to tax in the hands of YI in terms of Section 28(iv).

Contentions of YI:

The main contention of YI before the Tribunal has been that YI has acquired the shares of AJL with the intention to use it as launch pad for its objectives. YI claimed that their objects are similar to the objects of AJL and hence the acquisition of AJL has happened to achieve their common objectives. YI placed reliance on the judgment of Indian Medical Trust (2009) 414 ITR 296, wherein the High Court held that acquisition of shares in furtherance of its objects, then the same is regarded as genuine activities.

YI contended that the allegations of AO are without any proof and only a figment of his imagination. YI contended that even if it is assumed that the loan was a bogus entry with the intention to acquire 99% of AJL, it defies any logic why an odd figure of Rs 90.21 Crores was made up. YI stated that the loan advanced by AICC to AJL was genuine, because it was a subject matter of a petition before Election Commission in 2012, where some political rival has approached the Election Commission to de-recognize AICC in terms of Election Symbols (Reservation and Allotment Order) 1968 on the ground that party loaned more than Rs 90 Crores to AJL in violation of guidelines and rules for registration as well as recognition of political parties. The Election Commission dismissed the petition stated that under Section 29B/C of Representation of People Act, 1951, they have power to monitor as to how political parties raise funds but not how they spend. YI uses this to defend to prove the genuineness of loan advanced by AICC to AJL. YI in order to refute the allegations of AO has submitted the ledgers of both AJL and AICC from FY 2002-03 to demonstrate the genuineness of loan.

YI contended that the logic as to why the loan of AJL was assigned by AICC to YI is that latter is incorporated with objects of inculcating in the mind of India's youth, commitment to the ideal of democratic and secular society and since AICC endorses and supports the above objects of YI, which AICC has advocated. Hence, to support these objects and also keeping in the mind that AJL is not in a position to repay the loan, AICC has agreed to assign the loan for Rs 50 lakhs. YI also refuted the submissions of AO, wherein it was alleged that YI does not have amount to purchase the loan, by stating that the loan was raised from Dotex in December 2010 only because there is a delay in opening of bank account, the amount could not be paid. YI contended that AJL was stated to be a real estate business after closure of the publication business in the assessment order at various places and the same was not true because the publication business was never closed. AJL was temporarily suspended but not closed and it contended that it was never engaged in trade of its real estate properties. YI supported that it was very normal in the newspaper business to rent out the unused properties and just because AJL has rented certain properties, the same cannot be treated as real estate agency. YJ contended that that there was a full disclosure of the transactions with AJL, in the financial statements of YI vide the notes to accounts. YI contended that it is not necessary to immediately pay the consideration of Rs 50 lakhs to AICC on the date of assignment of loan itself and it is normal practice to allow credit period for payment of dues and that by

itself has no relevance to decide the genuineness of transaction. YI contended that though its registration under Section 12A stands cancelled, it is undisputed that the YI was and continues to a charitable organisation and all the restrictions applicable to a charitable company is applicable to it. If seen in this light, it would be realised that all the allegations made by AO about common office bearers, ultimate benefit, etc obtained by promoters of the YI has no relevance at all, since at the end of the day, any income of YI can be used for no other purpose except for its objects and it cannot be diverted for the benefit of any other person or for any ulterior purpose in any manner whatsoever. YI contended under no circumstance the alleged benefit of assets of AJL can percolate to any members of the YI and AO has not even made any attempt to show that any personal benefit is being taken by YI or its members and accordingly stated that order has to be set aside. YI further stated that it is trite law that by acquiring the shares of a company, shareholder does not become the owner of the assets of company and placed reliance on the decision of Mrs Bacha F Guzdar 27 ITR 1 and many others. YI contended that since they are not engaged in business, there cannot be any tax under Section 28(iv).

Ruling by Tribunal:

The Tribunal stated that during the proceedings of cancellation of registration under Section 12AA before the same Tribunal, it was clearly held that at no point of time, YI has carried out any charitable activities in furtherance of its objects and to promote its objects. The Tribunal stated that if the intention of YI was to promote its so-called charitable objects, then why not its objects were pursued through other agencies and why from an entity (AJL) which was no longer into publication and ceased its business in 2008. This is the reason for which the Tribunal has categorically held that right from the day of its inception to grant of registration under Section 12AA until the cancellation of registration by Learned CIT (Exemption), such purported objects were never pursued. The Tribunal stated that the entire contention as raised by YI that the newspaper business was started later on, which indicates that AJL was acquired only to promote the ideals enshrined in the objects of YI, belies all such intents. The Tribunal further stated that a very important fact in the entire chain of events and on the issue, is the judgment of Delhi High Court in case of AJL against the notice sent by Land Development Office for vacation of the property, wherein the High Court noted that at the time of inspection by the Land Development Office, no press activity was carried out by the AJL in the said property and in fact, the property was rented out to various commercial establishments. When the said order of single judge was challenged before the Division Bench of Delhi High Court, the Divisional Bench after considering the entire material has upheld the judgment passed by Single Judge. The Divisional Bench rejected thereliance on the judgment of Bacha F Guzdar (supra) relied by AJL by stating that it is equally settled principle of law that in public interest and for assessing the actual nature of transaction or the modus operandi employed in carrying out a particular transaction, the theory of lifting of corporate veil is permissible and a court can always apply this doctrine to see as to what is the actual nature of transaction that has taken place, its purpose and then determine the question before it after evaluating the transaction or modus operandi employed in the backdrop of public interest. Referring to various Supreme Court decisions on lifting of the corporate veil, the Divisional Bench stated that in the present case with regard to how the transfer of shares between AJL and YI took place, the take-over of right to recover a loan more than Rs 90 Crores from AICC for a consideration of Rs 50 lakhs, thereafter replaced the original shareholders of YI by four new entities and YI after acquiring 99% of shares in AJL, became the main shareholder with four of its shareholders acquiring the administrative right to administer property of more than Rs 400 Crores, it is a fit case to lift the veil. The Divisional Bench held that this was a classic case of clandestine and surreptitious transfer of lucrative interest in the premises to YI.

The Tribunal stated that if they test the arguments of YI in line with the judgments of Delhi High Court in the case of AJL and Tribunal in YI's case, the entire contention that these transactions were nothing but to promote the objects of YI has to be rejected. The Tribunal stated that on piercing of the corporate veil, it is evident that YI has acquired the underlying assets which are huge properties of AJL and to get commercial benefit derived from such properties. The Tribunal held that, it is not necessary to examine whether the benefit of acquisition of properties would have come in the form of dividend to shareholders or not is irrelevant, because what is relevant is the real intention behind the entire scheme of acquiring AJL. The Tribunal stated that if one sees from the angle of third-party scenario, whether in case of some third-party comparable instance and amongst unrelated entities, can such transaction between the parties will happen where, one party assigns the loan of more than Rs 90 Crores for a paltry sum of Rs 50 lakhs to other, and for the same paltry amount, the entire shareholding of a company who owed the debt of Rs 90 Crores is transferred to a newly formed company who is not into same or any kind of business, along with all the underlying assets of that company which is being taken over and the worth of those assets are running into hundreds of crores and that to be of a company which has suspended all the publication activities and the company whose shares are being acquired were no longer into business of publication. It was held that the chain of events leads to only one conclusion that it is nothing but a masquerade and make-believe arrangement which has been given cloak of charity and to believe that it was purely for purpose of charitable activities.

The Tribunal rejected the contention taken by YI that there cannot be any tax under Section 28(iv), since YI was not into business and only a charitable organization by stating that once the corporate veil was lifted and interested parties have been found in collusion with each other to give huge benefits of hundreds of crores of property to YI, the only inference which can be drawn is that all which has been tried to showcase the picture was phantasmagorical illusion and not real. The Tribunal held that the word 'benefit' occurring in Section 28(iv) means some kind of adventure or gain or had same value or acquire any interest in land, chattel etc and thus the benefit is nothing but any form of adventure and here the adventure is clearly getting the underlying huge properties situated all over the country by stroke of one transaction and to enjoy all those properties in future. The Tribunal rejected the contention of YI that it is a case of acquisition of shares simplicitor at a lower rate and hence cannot be brought under Section 28(iv) by stating that the above stand demolishes when seen in the entire scheme of things. The next contention that YI had that the benefit arising out of acquisition of shares was in capital field and cannot be brought to tax under Section 28(iv) was rejected by Tribunal by stating that the instant is not a case of acquisition of shares per se, albeit it is a case where YI had acquired the benefit in the interest in the immovable properties held by AJL and acquisition of shares is a merely a step in entire adventure.

The Tribunal held on valuation of properties stating that the benefit to YI was underlying value of these shares by way of right to enjoy all the benefits embodied in the commercial assets held by AJL at several locations in the country. AO has held that the value of benefit is represented by Fair Market Value (for brevity 'FMV') of the business properties, exploitation whereof would yield benefit of such assets as exist on the date of taking over of AJL by YI. Further, YI stated that since there was no separate methodology given under Section 28(iv) for valuation of benefit, the valuation methodology prescribed under Rule 11UA of Income Tax Rules, 1962 (for brevity 'IT Rules') has to be adopted and accordingly furnished a valuation report of shares of AJL prior to conversion, which was arrived at negative figure of Rs 770.09. The Tribunal rejected the said contention by stating that acquisition of shares is only a step in the entire transaction and hence the value of shares cannot be adopted. Post that, Tribunal has taken up the valuation reports issued by District Valuation Officer for each property and decided on the value of the properties and held that the same would be the value of the benefit derived by YI in terms of Section 28(iv).

Concluding Remarks:

When the entire scheme of things are seen together, what appears to be is simple strategy for taking over the assets of AJL by YI. The documentation was not water tight, the procedures was not followed, there was no commercial substance at all. It is unimaginable that a loan of value of Rs 90 Crore was assigned to YI for Rs 50 lakhs. If there is another company in place of YI, will AICC do the same thing? Further, why is AICC is bothered about Rs 50 lakhs when the loan amount of Rs 90 Crores was vanished. What would they do with a paltry sum of Rs 50 lakhs? It is clear that the entire scheme is to obtain the assets of AJL at a throw away price and to create a legal and technical link, YI has purchased the loan from AICC to see that eventually they acquire AJL. At any point in the chain of events, there was a commercial substance and if this happened in GAAR era, the tax authorities would not have strained themselves so much to bring the amount to tax under Section 28(iv). Undoubtedly, YI would approach High Court against this order and it has to be seen what further stands would YI take before the High Court since the later knows the entire story and believes what Tribunal stated is right. An interesting times for us and tough times for YI, we have to wait and watch.

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FCRA

VALIDITY OF AMENDMENTS TO FCRA - SC IN NOEL HARPER

Contributed by CA Sri Harsha

Certain amendments made to Foreign Contribution (Regulation) Act, 2010 were made vide Foreign Contribution (Regulation) Amendment Act, 2020 and the same were given effect from 29.09.2020. The Government has proposed the said amendments after taking into the consideration the rampant misusage and abuse of the Foreign Contribution (Regulation) Act, 2010 (for brevity 'FCRA').

The Government after noticing that allowing the transfer of foreign contribution by recipient to another transferee has created a huge layers of transactions, thereby found it difficult to trace and find whether the donations are being used for the reason that they were being received. Further, the current law allows utilisation of 50% of the amount received qua donation for meeting the administrative expenses. With the above two provisions in place, certain entities deployed strategies to divert the donations and expend the majority amount towards administrative expenses, leaving a miniscule amount to be spent for the ultimate purpose for which the donation was received. The amendment act proposed to prohibit the transfer of foreign contributions (donations) to another third party/transferee, thereby putting the complete onus of spending on the recipient. Further, the cap on the administrative expenses was brought down to 20% from the existing 50%. In addition to the above changes, the amendment act also proposed the persons who are willing to take registrations or prior permission for receipt of foreign contribution, to open an account with a designated bank unlike the current procedure of opening the bank account at the choice of applicant.

The above amendments were challenged on various grounds contending that the same are manifestly arbitrary, unreasonable and impinging upon the fundamental rights guaranteed under Articles 14, 19 and 21 of Constitution of India. On the other hand, the Union of India contended that the said changes are necessary in light of the experience gained and the misuse of the current framework.

The Supreme Court after tracing the history of the legislation and the experiences which resulted in the misuse of the current framework has upheld the amendments and consequently rejected the petitions. In this article, we shall analyse the said judgment. Before going to the observations of Supreme Court, a brief timeline of the subject legislation is called for, which is as under:

Event #	Period	Description	Remarks
1	1973	Birth of Foreign Contribution (Regulation) Bill, 1973	The bill was introduced to regulate the acceptance and utilisation of foreign contributions or hospitality with a view to ensure parliamentary, institutions, political associations, academic and other voluntary organisations as well as individuals working in important areas of national life may function in a manner consistent with the values of a sovereign democratic republic.
2	1974	Reference to Joint Committee of Houses	The Government felt that it was an important measure and believed the deliberations in the Joint Committee of both the Houses would enable formulation of a well-conceived bill, on the basis of informed representative public opinion desirous of securing the objectives as stated in the Bill.
3	1976	Submission of Report by Joint Committee	The Joint Committee after analysing the methodology adopted by various countries suggested that the foreign contribution can be permitted in regulated manner without completely prohibiting the inflow thereof.
4	1976	Birth of Foreign Contribution (Regulation) Act, 1976	The Bill was passed as act with the preamble stating that an act to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic.
5	1985	Amendment	Certain Important amendments were made to the FCRA. The definition of 'foreign contribution' has been expanded to include the donation or contribution received by an organisation from another organisation from out of foreign contribution received by the latter organisation. Section 6 which stated intimation regarding receipt of foreign contribution was to communicated to the Government, not being followed, the amendment proposed that receipt of foreign contribution should be only after they are registered with Central Government and accept such contributions only through a specified branch of bank. A new sub-section was also inserted to provide that an association not so registered with the Central Government shall obtain prior permission of the Central Government before accepting any foreign contribution and also give intimation to the Central Government as to the amount of contribution received by it.

6	2006	Birth of Foreign Contribution (Regulation) Bill, 2006	The statement of objects and reasons of the new bill stated that significant developments have taken place since 1984 such as change in internal security scenario, an increased influence of voluntary organisations, spread of use of communications and information technology, quantum jump in the amount of foreign contribution being received, and large scale of growth in the number of registered organisations and this has necessitated large scale changes in the existing act and therefore, it has been thought appropriate to replace the present act by a new legislation to regulate the acceptance, utilisation and accounting of foreign contribution and acceptance of foreign
7	2010	Birth of Foreign Contribution (Regulation) Act, 2010	The new bill was accepted in 2010. The preamble clearly stated that the main aim of the law is to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.
8	2016	Amendment	Amendment to the definition of 'foreign source'
9	2020	Amendment	Various amendments to the Act. The current challenge concerns only the amendments to Section 7, Section 12(1A), Section 17 and insertion of Section 12A.

Observations by Supreme Court:

The Supreme Court after hearing to the Petitioners and Union of India has held that it is well-established that rights guaranteed under Part III of Constitution and Article 19 in particular, are not absolute rights. The same are subjected to reasonable restrictions, as provided in Article 19 (2) and (6). The Court held that the Government is right when they contended that whenever the challenge is to the amended provisions, the scope of enquiry, inter alia, ought to be as to whether the same is consonance with the Principal Act, achieve the object and purpose of the Principal Act and are otherwise just, rational and reasonable. Further, there is no fundamental right vested in anyone to receive foreign contribution and that the purport of Principal Act and the impugned amendments are only to provide a regulatory framework and not one of complete prohibition.

The Court stated that Philosophically, foreign contribution (donation) is akin to the gratifying intoxicant replete with medicinal properties and may work like a nectar. However, it serves as a medicine so long as it is consumed (utilised) moderately and discreetly, for serving the larger scale of humanity. Otherwise, this artifice has the capability of inflicting pain, suffering and turmoil as being caused by the toxic substance (potent tool) –across the nation. The Court stated that, free and uncontrolled flow of foreign contribution has the potentials of impacting the sovereignty and integrity of nation, its public order and also working against the interests of the general public. It must be borne in mind that the legislation under consideration must be understood in the context of the underlying intent of insulating the democratic polity from the adverse influence of foreign contribution remitted by foreign sources.

The Court stated that many recipients had failed to adhere to and fulfil the statutory compliances – which resulted in cancellation of as many as 19,000 certificates of concerned persons/organisations during the stated period, including initiation of criminal investigation concerning outright misappropriation or misutilisation of foreign contribution. The Court held that it was increasingly reported that some of the NGOs were primarily involved in routing of foreign contributions accepted by them and not utilising the same itself for the purposes for which certificate of registration was issued and such transfer created several operational issues bordering on malpractices impacting the very intent of Principal Act. For, routing of foreign contributions entails in diverting it to another area of activity including misuse thereof. The Court noticed that there had been cases of successive transfers and creation of layered trail of money making it difficult to trace the flow and final utilisation. It was in this backdrop, to strengthen the compliance mechanism and enhancing transparency and accountability in matter of acceptance and utilisation of foreign contributions, the Parliament had to once again step in to restructure the dispensation, making it more meaningful and effective, so as to deal with the increasing impact of foreign contribution.

The Court held that it is open to a sovereign democratic nation to completely prohibit acceptance of foreign donation on the ground that it undermines the constitutional morality of nation, as it is indicative of the nation being incapable of looking after its own affairs and needs of its citizens. The third world countries may welcome foreign donation, but it is open to a nation, which is committed and enduring to be self-reliant and variously capable of shouldering its own needs, to opt for a policy of complete prohibition of inflow/acceptance of foreign contributions from foreign source and this was the first option noted by Parliament while considering the Bill concerning the 1976 Act. The Court stated that it is suffice to observe that considering the legislative history and the need for the Parliament to periodically intervene to arrest the increasing influence on the polity of the nation due to high volume of inflow of foreign contribution and large-scale improper utilisation and misappropriation thereof, as noticed by the authorities and keeping in mind the objective of the of the principle enactment being to uphold the values of sovereign democratic republic, the dispensation as altered to make it more strict compliance mechanism for ensuring that the foreign funds are accepted in the prescribed manner and utilised by the recipient itself and more so, for the purposes for which it was allowed to be received by that person, the amended provisions ought to pass the muster of reasonable restriction. The Court stated that such a change cannot be labelled as irrational much less manifestly, arbitrary, especially when it applies uniformly to a class of persons without any discrimination. The Court referred to the decisions in Rustom Cavasjee Cooper (1970) 1 SCC 248 and RK Garg (1981) 4 SCC 675, wherein it was held that it is not for Court to consider relative merits of the different political theories or economic policies including that an economic legislation may be troubled with crudities, inequities, uncertainties or possibility of abuse cannot be the basis for striking it down.

On Challenge to Amended Section 7:

The Petitioners have challenged amended Section 7, by stating that unamended provision though restricted the transfer of foreign contribution, yet it did not completely prohibit the same unlike the amended Section 7. The amended Section 7 postulates complete prohibition on the transfer of foreign contribution to other person – not even to a person having certificate of registration under the Act and make it mandatory to use the amounts only by itself and not through any person. The Petitioners stated that the change is also arbitrary and directly affects the implementation of the social upliftment schemes

of the Petitioners through foreign contribution. The blanket ban on transfer of foreign contributions, thus affecting the collaborations in developing eco-systems, especially for smaller and less viable grassroot organisations that may not meet the criteria or be able to submit detailed proposals to get access to grants from foreign countries. The Petitioners contented that grassroot organisations, in some cases, may not have the track record or meet the eligibility criteria to obtain registration under the Act and are entirely dependent on the funding/transfer by foundations, such as Petitioners. The Petitioners contended that the intermediary organisations, which provide the necessary identification, monitoring and capacity building of the smaller non-profit organisations, which would be completely jeopardised because of the smaller non-profit organisations and for the reasons, the Petitioners challenged the amended provisions as violative of the rights guaranteed under Articles 19(1)(c) and 19(1)(a) of Constitution and also urged that the amendment suffer from vice of ambiguity and overbreadth or over-governance, thereby violating Article 14 as well. The Respondents countered on the argument that the Parliament in its wisdom has decided to introduce a stricter regime in the backdrop of experience gained from the implementation of unamended Section 7 and to eradicate the mischief which had unfolded.

The Court held that, as per scheme of 2010 Act, a certificate of registration is not granted for acting as an intermediary between the donor (foreign source) and the grassroot level organisation. The amended provisions, therefore, completely rules out such transfer of foreign contribution by the person who has received/accepted the same in the first place and that does not prevent the recipient from utilising the foreign contribution 'itself' for the purposes for which he has been granted a certificate of registration or obtained prior permission under the Act. The Court held that expression 'transfer' has not been defined under the Act and the meaning of such expression in the subject enactment would presuppose giving away of the foreign contribution in whole or in part to third person without retaining any control thereon, and such change of hands is obviously without offering any services in return, namely free of costs. The third person would then be free to deal with such transferred foreign contribution in the manner he chooses to do so, whilst adhering to the conditions specified in his certificate of registration or the conditions specified in the prior permission in his certificate of registration or the conditions specified in the prior permission, as the case may be. In this scenario, it had been possible that the transferor (who had accepted the foreign contribution) may have persuaded the foreign source to donate for one permitted purpose, but without consulting the donor (foreign source) could transfer the whole or part amount (foreign donation) to third person (transferee) for being utilised for altogether another purpose, which in a given case may not be acceptable to donor and thus paving way for misutilisation of foreign contribution and the possibility of abuse thereof. The Court stated that the rationale of Section 7 as amended, inter alia, is that the donor (foreign source) is made fully aware of the definite purposes already declared by the recipient and permitted by competent authority and corresponding obligation upon the recipient regarding utilisation of funds itself for stated purposes and none else. Indeed the expression 'utilisation' has also not been defined in the Act and by adopting the ordinary meaning, it must be understood in the context of the purpose for which a certificate of registration or prior permission has been granted by Central Government. If the foreign contribution is utilised for such definite purposes, including administrative expenses, outsources its certain activities to third person, whilst undertaking definite activities itself and had to pay therefore, it would be a case of utilisation. The transfer within the meaning of Section 7, therefore, would be a case of per se (simplicitor) transfer by recipient of foreign contribution to third party without requiring to engage in definite activities of cultural, economic, educational or social programme of the recipient of foreign contribution, for which the recipient had obtained a certificate of registration from the Central Government. The Court stated that on this interpretation, the challenge to ultra vires must fail.

The Court stated that on conjoint reading of Section 7 and Section 8 (which puts a cap on usage for administrative expenses qua foreign contribution received), the legislative intent of mandating utilisation of foreign contribution by recipient itself for the purposes for which it had been permitted gets reinforced. The Court also rejected the contention canvassed by Petitioners that in certain cases, the transferee would also have a certificate of registration and prohibiting the transfer to such persons also does not intend to serve any legitimate purpose by stating that legislative intent is to introduce strict dispensation qua the recipient of foreign contribution to utilise the same 'itself' for the purposes for which it has been permitted as per the certificate of registration or permission granted. The Court stated that absent such stringent provision, some of the recipient organisations were reportedly indulging in successive chain of transfers to other organisations, thereby creating a layered trail of money and utilisation of funds towards administrative costs of successive transfers upto fifty percent leaving very little funds for spending on the purposes for which it is permitted. Hence, the Court stated that providing complete restriction on transfer simplicitor, was the just option to fix accountability of the recipient organisation and maximise utilisation for the permitted purposes. The Court stated that revoking the provision to transfer from Section 7 cannot be basis to challenge the validity of the amended provision since it is open to the Parliament to change the benchmark of restriction from higher to lower standard or vice versa on the basis of exigencies and experience.

On Challenge to Amended Section 12(1A) and Section 17(1):

Section 12(1A) has been inserted by Amendment Act, which envisages that every person who makes an application under Section 12(1) is obliged to open FCRA account in the manner specified in Section 17. The sub-section (1) of Section 17 was amended to mandate that every person who had been granted certificate or prior permission under Section 12 shall receive foreign contribution only in account designated as FCRA account in the specified bank. The unamended Section 12 and Section 17 did not impose such restriction. The Court stated that the above amendment introduced in light of the abuse under the unamended provisions cannot be struck down. The Court held that there is a force in the argument of Respondents that Section 17 came to be amended aftermath realisation of clear and discernible lacunae had cropped in due to the presence of FCRA accounts of scores of registered organisations, in different scheduled banks across the country. The challenge became more pronounced due to doubling of contributions inflow in the last decade which had impacted the efficiency of monitoring and achieving the object of Principal Act. The Court held that the fact that earlier FCRA account could be opened in any scheduled bank, cannot preclude the Parliament from legislating a law which requires inflow of foreign contribution in some other manner specified by law. Introducing change for betterment of governance is prerogative and wisdom of Parliament. The FCRA account operators cannot claim right of continuity of a deficient and flawed framework. The Court stated that ordinarily, convenience of business and persons engaged in doing business must be uppermost in the mind of Parliament to effectuate the goal of ease of doing business. However, the strict regime had become essential because of past experience of abuse and misutilisation of the 'foreign contribution'. Hence,

there has been legitimate goal for amending the subject provisions of acceptance of funds through one channel and concededly, despite the requirement of opening FCRA account in the designated bank, it is open to the organisation to utilise the amount so received in FCRA account through multiple accounts in the scheduled branches and concluded that it is a balance approach by Respondents. The Court held that in the context of law made by Parliament in the interests of sovereignty and integrity of country and security of the State, public order, as also in the interests of general public, such a provision cannot be lightly viewed much less on the specious plea of manifestly arbitrary.

GST

VARIOUS ISSUES IN PROVISIONAL ATTACHMENT - SECTION 83

Contributed by CA Sri Harsha

The powers to provisionally attach the properties of tax payer to protect the interests of revenue comes from Section 83 of CT Act[1] . The power is to be exercised by Commissioner, if he is of the opinion that it is necessary for the purposes of protecting the interest of Government. Though it was held on numerous occasions that such a power cannot be exercised without application of mind, the tax authorities continue to use in the same manner. The Honourable Supreme Court in the matter of Radha Krishna Industries vs. State of Himachal Pradesh[2] has held in detail the scope and guidelines to be followed for the exercise of power under Section 83. CBIC has also issued a circular detailing the modus operandi to use the provisions of Section 83. However, as stated earlier, the said guidelines either by Supreme Court or CBIC are not being followed and for all such actions by the tax authorities, the tax payers does not have any option except to invoke the writ jurisdiction and call for interreference of High Courts. In this article, we shall deal with various issues arising qua Section 83. Before proceeding to discuss the issues, we will deal with the guidelines prescribed by Supreme Court in Radha Krishna Industries (supra) and CBIC Circular.

Supreme Court on Provisional Attachment in Radha Krishna Industries:

The Supreme Court stated that the legitimate concerns of citizens over arbitrary exercises of power have to be protected while ensuring that the legislative purpose in entrusting the authority to order a provisional attachment is fulfilled. The petitioner before High Court has challenged the provisional attachment ordered by Joint Commissioner of State Tax of Himachal Pradesh in terms of Section 83 of CT Act and Rule 159 of CT Rules [3], wherein the receivables of Petitioner are attached. The High Court dismissing the writ petition stating that there exists an alternative remedy available under the provisions of CT Act. The petitioner has challenged the same against the Supreme Court.

The Court after setting out the facts, referred to the judgment of Raman Tech Process Engg Co and Anr vs. Solanki Traders[4] , wherein it was held that Order 38 Rule 5 of Civil Procedure Code, which deals with attachment, is a drastic and extraordinary power and such power should not be exercised mechanically or merely for the asking. Then it referred to Gujarat High Court in Valerius Industries [5,] wherein certain principles for construction of Section 83 of CT Act are laid down and noted that a provisional attachment on the basis of a subjective satisfaction, absent any cogent or credible material, constitutes malice in law. The principles enunciated by High Court are as under:

- The power conferred upon the authority under Section 83 for provisional attachment could be termed as very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds.

[1]Central Goods and Services Tax Act, 2017
[2]2021 (4) TMI 837 – Supreme Court
[3]Central Goods and Services Tax Rules, 2017
[4]2008 (1) RCR (Civil) 195
[5]2019 (9) TMI 618.- Gujarat High Court

- The power of provisional attachment under Section 83 should be exercised by the authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment and it should be exercised with extreme care and caution.

- The power under Section 83 for provisional attachment should be exercised only if there is a sufficient material on record to justify the satisfaction that the assessee is about to dispose of wholly or any part of his/her property with a view to thwarting the ultimate collection of demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective.

- The power under Section 83 should not be neither used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of assessee.

- The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 should not be equated with the attachment in course of recovery proceedings.

The Supreme Court then referred to the judgment of Gujarat High Court in Jai Ambey Filament Private Limited[6] , wherein it was held that subjective satisfaction as to the need for provisional attachment must be based on credible information that the attachment is necessary and the opinion cannot be formed on imaginary grounds, wishful thinking, howsoever laudable that may be. Then the Supreme Court made reference to another Gujarat High Court judgment in Patran Steel Rolling Mill [7], wherein the High Court cited two instances in which provisional attachment would be best fit, those being where the assessee is 'fly by night operator' and if the assessee will not be able to pay its dues after assessment. In UFV India Global Education[8] and Kaish Impex Private Limited[9] , it was held that pendency of proceedings is sine qua non for an order under provisional attachment to be issued under Section 83 and that such pendency should be in the case of assessee for whom an attachment order was issued.

The Supreme Court after referring to the provisions of Section 83 stated that before Commissioner can levy a provisional attachment, there must be a formation of 'the opinion' and that it is necessary 'so to do' for purpose of protecting the interest of government revenue. Hence, while conditioning the exercise of power on the formation of an opinion by the Commissioner that 'for purpose of protecting the interest of government revenue, it is necessary to do so', it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner and formation of opinion must bear a proximate and live nexus to purpose of protecting the interest of the government revenue. The Court stressed on the usage of phrase 'necessary' to indicate that the section postulates a more stringent requirement than a mere expediency. The Court stated that an anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statue and

[6]2021 (44) GSTL 41 (Gujarat)
[7]2019 (20) GSTL 732 (Gujarat)
[8]2020 (43) GSTL 472 (P&H)
[9](2020) 6 AIR Bom R 122

the rules. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to peril of arbitrary power. The Court referred to its own judgment in Kelvinator India Limited[10] under the Income Tax Act, 1961 in the context of Section 147 proceedings, dealing with interpretation of 'reasons to believe', wherein it was held that reasons must have live link with the formation of belief and applied the same logic here to state that the Commissioner must frame his opinion based on tangible material which indicates live link to necessity to order a provisional attachment to protect the interest of government revenue. Accordingly, the Supreme Court upheld the plea of petitioners.

CBIC has issued a circular in Circular 20/16/05/2021-GST/359 providing guidelines for provisional attachment of property under Section 83 of CT Act. After stating the procedure to be followed, CBIC provided an indicative list for proceeding with the provisional attachment, which indicates the fit cases for provisional attachment and not every case, where there is a property available for attachment. The Circular was challenged in Originative Trading Private Limited[11] , wherein the Bombay High Court stated that there was enough safeguard provided in Circular 3.1.5 and none of safeguards setout in Circular would affect the rights of petitioner as the said circular though grants power to the Commissioner to record reasons in file, however with a caution that the power must not be exercised in the routine or mechanical manner and shall be exercised only after careful examination of the facts of the case.

With this above background on the subject, we shall proceed to examine various kind of issues that have arisen and left to High Courts for interpretation, paving a way for the interpretation of Section 83.

Issue #1: Ordering of Provisional Attachment should not hamper normal business activities:

As stated by Supreme Court in Radha Krishna Industries (supra) and held by various high courts that the power under Section 83 is draconian and cannot be used in a routine manner. However, there are various occasions that the said power is used in a routine manner.

In Arya Metacast Private Limited[12] , the authorities has not only provisionally attached the stock of goods lying at the factory premise, at the same time, has also provisionally attached the demat account and current account. The High Court held that these are the valuable assets of the petitioners, more particularly, raw materials and finished goods which are otherwise necessary for running of the business. The High Court stated that, time and again, it was held that proper office to ensure their action of provisional attachment should not hamper the normal business activities of taxable person. The High Court released the stock of goods, two demat accounts, current accounts, electronic items such as mobile phone, laptop and other documents seized during the search proceedings subject to certain conditions. The High Court stressed that the power of provisional attachment under Section 83 should be exercised by authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely raised on completion of assessment and therefore to be exercised with extreme care and caution. The Court held that power under Section 83 of the act should not be used as a tool to harass the assessee nor should it be used in as manner which may have irreversible detrimental effect on business of the assessee.

[10](2010) 2 SCC 723
[11]2022 (3) TMI 262 – Bombay High Court
[12]2022 (4) TMI 407 – Gujarat High Court

In Utkarsh Ispat LLP[13] , the facts were that, the petitioner is a limited liability partnership firm engaged in business of procuring various types of scarp for manufacturing TMT bars. On 19th November 21, the GST officials undertook search proceedings at registered premises of petitioner and also at the residential premises of one of partners. The search proceedings were undertaken on the allegation that petitioner is engaged in availment of input tax credit on basis of fake invoices issued by fictitious firms without any movement of goods. During the pendency of proceedings, the authorities passed an order provisionally attaching multiple properties like the factory premises, plant and machinery and bank accounts including the fixed deposits of value of Rs 45,90,22,566. Apart from the above, the authorities have also attached the properties of one of the partners (read more about this in Issue #5 in the same article). The petitioner challenged the attachment order stating inter alia that attachment hampers the normal business activities of the petitioner. The Court after making reference to Para 3.4.5 of Circular 20 (supra) stated that it is very clear that as far as possible the authority should ensure that the attachment does not hamper normal activities of the taxable person and it has been clarified that raw materials and input required for production or finished goods should not normally be attached by the department. In the instant case, the Court has not approved the provisional attachment of goods, stocks and receivables, more particularly, when the entire stock and receivables have been pledged and a floating charge has been created in favour of third party bank.

In Mono Steel (India) Limited[14] , the petitioner's six bank accounts were provisionally attached under Section 83 immediately after issuance of show cause notices. The Gujarat High Court held that the petitioner is not a fly by night operator and has paid hundred crores in taxes during the last year and there is no rationale for the authorities to attach the bank accounts. The Court ordered for release of bank accounts subject to certain conditions.

In Mutharamman & Co[15] , the petitioner challenged the provisional order under Section 83 which was based on the search and seizure launched in terms of Section 67. The Court held that the premise upon which Section 83 operates is the 'opinion' of Commissioner that for purposes of protecting the interest of Government revenue, it becomes necessary to attach assets of taxable entity pending proceedings under specified sections and the Court stated that whether the proceedings pending in petitioner's case would justify the impugned provisional attachment and post that whether the 'opinion' of Commissioner is based upon a legitimate and legal apprehension that the interests of the revenue required to be protected. The Court rejected the provisional attachment order after referring to Valerius Industries (supra).

In Patran Steel Rolling Mill[16] , the court while deciding the fate of provisional attachment order under Section 83, it was held that petitioner is not a fly-by-night operator or that it does not have the means to pay the dues that might to assessed at the end of assessment proceedings, which at present have not even been commenced. The Court stated that there is nothing to show that the authorities would not be in a position to recover any amount that the petitioner may ultimately be held liable to pay and in such circumstances, without recording any such satisfaction, the authorities could have not formed the opinion that it was necessary to resort to provisional attachment to protect the interest of Government

[13]2022 (2) TMI 997 – Gujarat High Court
[14]2019 (22) GSTL 184 (Guj)
[15]2021 (10) TMI 523 – Madras High Court
[16]2019 (20) GSTL 732 (Guj)

revenue. The Court also held that the authorities should keep in mind that bringing the business of a dealer to a halt does not in any manner serve the interest of revenue and therefore, while taking action under Section 83 or Section 67(2), the concerned authorities should take care to ensure that equities are maintained and while securing the interest of revenue, they should attempt to see that the dealer is a position to continue with the business. The Court stated that the tax authorities should consider the background and history of the dealer as well as his financial position to ascertain as to whether or not he would otherwise be in a position to pay the dues that may be assessed upon the culmination of any assessment proceedings that may be initiated and if the dealer is a fly-by-night operator or a habitual offender or does not have sufficient means to pay the dues that may arise upon assessment, such action may be justified. The Court concluded stating the such drastic powers under Section 83 should not be exercised as a matter of course, but only after due application of mind to the relevant factors. In Jay Ambey Filament (P) Limited [17], the Gujarat High Court quashed the provisional attachment order stating that it was a result of mechanical exercise.

Issue #2 – Maximum Time for Provisional Attachment Order:

Section 83(2) states that every provisional attachment ordered under Section 83(1) shall cease to have effect after the expiry of one year from the date of the order. However, in many occasions, the provisional attachment order continued beyond the maximum period of one year and tax payers have approached High Courts seeking its intervention to lift the said order.

In BR Construction Company[18] , the Rajasthan High Court has stayed a provisional attachment order which was in effect for a period more than a year. In Futurist Innovation & Advertising[19] , the petitioner is a sole proprietary concern engaged in business of advertising and marketing and on 11 October 2019, the petitioner's bank account was frozen by Assistant Commissioner and continued after expiry of one year. The High Court held that it was not in accordance with the provisions of Section 83(2) and by following Radha Krishna Industries (supra), held that the provisional attachment order would not hold ground after expiry of one year. In Krishna Fashions[20] , the Delhi High Court also removed the provisional attachment which is in operation beyond one year.

The above rationale was held in various matters namely Jackpot Exim (P) Limited [21], KMC Constructions Limited[22] , Namaskar Enterprise [23] and Badal Shambhubhai Shah[24] .

[17][2021] 123 taxmann.com 373 (Gujarat)
[18]2022 (3) TMI 308 –Rajasthan High Court
[19]2022 (1) TMI 698 – Bombay High Court
[20]2022 (1) TMI 853 – Delhi High Court
[21][2021] 124 taxmann.com 551 (Allahabad)
[22][2021] 124 taxmann.com 276 (Telangana)
[23][2020] 118 taxmann.com 470 (Gujarat)
[24][2020] 118 taxmann.com 217 (Gujarat)

Issue #3 –Rule 86A vs Section 83:

Rule 86A deals with conditions of use of amount available in electronic credit ledger. The said rule states that the Commissioner or other delegated authority having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or ineligible in as much as under specified circumstances may for reasons in recorded in writing not allow debit of an amount equivalent to such credit in electronic credit leger for discharge of any liability under Section 49 or for claim of any refund of any unutilised amount.

An issue has arose in Dee Vee Projects Limited[25] before Bombay High Court, wherein the Court was called to analyse whether the blocking of electronic credit ledger under Rule 86A amounts to provisional attachment of property under Section 83? The Court held that power of provisional attachment of property under Section 83 can be exercised only after initiation of proceeding under Chapters XII, XIV and X and for invoking the power under Rule 86A, it is not necessary that proceeding under any of the chapters is initiated and can be exercised, when conditions prescribed are met and held that invoking power under Rule 86A is different from power under Section 83 and putting a restriction on usage of balance in credit ledger does not amount to provisional attachment.

Issue #4 –Pending Proceedings vs Section 83:

On reading of text of Section 83, it would be evident that the power to invoke Section 83 would arise only if there is a pendency of any proceedings under the Act namely under Section 63 or Section 64 or Section 67 or Section 73 or Section 74 [prior to amendment] or Chapter XII, Chapter XIV or Chapter XV [post amendment]. Hence, the pre-requisite to invoke powers under Section 83 is pendency of proceedings and without which an order under Section 83 cannot be passed. However, the tax authorities in many instances invoke powers under Section 83 despite there were no pendency of proceedings.

In Fine Exime Private Limited[26] , the Commissioner issued a provisional attachment order of the bank account on accusation of claiming of fraudulent refund. The Petitioner approached the Bombay High Court and asked for quashing of provisional attachment order stating that there is no pendency of proceedings under any of the situations mentioned in Section 83 and accordingly the order passed by Commissioner is erroneous. The High Court held that the provisional attachment was ordered on December 1, 2020, but a notice under Section 73 was issued on January 13, 2021 and hence, as on the date of provisional attachment order, there was no pendency of the proceeding and the provisional attachment order suffered from jurisdictional error. In Fine Exime Private Limited [27,] the Bombay High Court held that the order issued under Section 83 cannot be in operation after passing the order as a consequence of pending proceedings.

[25]2022 (2) TMI 569 – Bombay High Court
[26]2021 (8) TMI 519 – Bombay High Court
[27]2022 (2) TMI 242 – Bombay High Court

In Kaish Impex Private Limited[28] , the Bombay High Court has analysed, whether the authority could have proceeded to provisionally attach the property owned by a person to whom just a summons under Section 70 has been issued. The Court stated that the provisions of Section 83 does not make a reference to Section 70 and since there were no other proceedings as stated in Section 83, the provisional attachment order is not in accordance with the law. Similar in the case of Kanal Enterprises[29] , where the matter was pending in terms of Section 71, the Gujarat High Court held that there cannot be issuance of provisional attachment order under Section 83, since there was no reference to Section 71 in Section 83. In Cengres Tiles Limited[30] , the petitioner's stock and bank account were attached before issuance of notice under Section 46 and Section 62 and held such an attachment is erroneous.

In SS Offshore Private Limited [31], a provisional attachment order was passed attaching the bank account of petitioner, though there are no pendency of proceedings. The Petitioner challenged the same before Bombay High Court, wherein it was held that the said attachment order was ultra vires the provisions of Section 83, when the same was initiated in absence of pendency of proceedings. The said judgment was followed by the same court in Real Trade[32] .In Bhavesh Kiritbhai Kalani[33] , the provisional attachment order was quashed stating that there were no pending proceedings under the Act.

The above rationale that there cannot be provisional attachment order in absence of pending proceedings was held in various matters namely Anandbhavan Properties (P) Limited [34], Kushal Limited [35], Gehna Trading LLP[36] and Sterne India (P) Limited[37] .

Currency of Provisional Attachment Order:

In the matter of Usha Industries (India) [38], the Punjab and Haryana High Court held that once an order is passed under Section 74(9), proceedings under provisional attachment cannot be continued and comes to end. In Mahavir Enterprise[39] , the High Court of Gujarat has held that once an order is passed, there cannot be continuation of provisional attachment order under Section 83.

Issue of Second Provisional Attachment Order:

In the matter of Amazonite Steel (P) Limited [40], the High Court of Calcutta has held that there is nothing in Section 83(2) which prevents the authorities to issue a fresh provisional attachment order after expiry of one year, if requirements under Section 83(1) are met.

[28]WP No 3145 of 2019 dated 17 Jan 2020
[29][2020] 119 taxmann.com 114 (Gujarat)
[30][2019] 109 taxmann.com 110 (Gujarat)
[31]2021 (8) TMI 344 – Bombay High Court
[32]2021 (9) TMI 564 – Bombay High Court
[33][2021] 127 taxmann.com 199 (Gujarat)
[34][2019] 112 taxmann.com 61 (Karnataka)
[35][2020] 113 taxmann.com 622 (Gujarat)
[36][2020] 114 taxmann.com 566 (Bombay)
[37][2021] 130 taxmann.com 275 (Karnataka)
[38][2021] 128 taxmann.com 269 (P&H)
[39][2021] 132 taxmann.com 90 (Gujarat)
[40][2020] 116 taxmann.com 153 (Calcutta)

Issue #5 – Attachment of Whose Property?:

In continuation to the facts stated in Utkarsh Ispat LLP (supra), the authorities have attached the properties of one of partners of the LLP by taking reference to Section 90 and Section 137 of CT Act. The High Court held that on a plain reading of provisions of Section 83, it is evident that the property or properties which can be provisionally attached should belong to 'taxable person'. The High Court after tracing the definition of 'taxable person' stated that it is only property of taxable person can be provisionally attached under Section 83 and the partner of LLP not being a taxable person, the authorities cannot proceed to attach the properties of partner of LLP. The High Court stated that there is no requirement at that particular stage to take aid of Section 90 and accordingly quashed the provisional attachment order.

Similar situation has also arisen in the Kaish Impex Private Limited (supra), where the bank account of the person who is connected with the taxable person has been attached. The High Court rejected that such an action is erroneous and cannot be proceeded with. The High Court also referred to the CBIC Circular 20 (supra) and held that such an action of authorities in not in accordance with the law and lifted the attachment on the bank account of another person.

InRoshini Sana Jaiswal[41] , the tax authorities have passed a provisional attachment order attaching one of the directors cum share holder for proceedings against the company. The Court held that in absence of any material linking the petitioner to the company in the fake credit aspect, the bank accounts of the petitioner cannot be attached and quashed the proceedings.

Issue #6 – Can power under Section 83 be delegated?

From the bare reading of the provisions of Section 83, it is evident that an opinion is to be framed by Commissioner and in such opinion that if it is necessary to protect the interest of the Government, then he can pass a provisional order attaching the property of taxable person. The question that would often arise is, whether the power of Commissioner can be delegated to the lower authorities by Commissioner?

The above issue was analysed by Gujarat High Court in Valerius Industries (supra). In the said matter, the petitioner has challenged the provisional order of attachment passed by officer below the rank of Commissioner. The Revenue took a stand that Commissioner vide order has delegated the powers under Section 83 to Deputy Commissioner and Assistant Commissioner and accordingly they are well in power to pass an attachment order under Section 83 when read with Section 5 and Section 167 of Act.

The High Court stated that on reading of provisions of Section 168 of CT Act[42] and Section 168 of ST Act , there is a vast difference. Under the CT Act, the Commissioner specified in Section 5(3), is the Commissioner or Joint Secretary posted in Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said section with the approval of the Board. In simple words, the Commissioner of Central Tax cannot by issuance of order under Section 167 cannot delegate his powers, since the Commissioner does not have such power, the Commissioner in Board has such power. However,

[41]2021 (5) TMI 528 – Delhi High Court

[42]State Goods and Services Tax Act, 2017 (in this case, the Gujarat)

when it comes to ST Act, the Commissioner referred under Section 168, was normal Commissioner and not the Commissioner in Board. Hence, the High Court stated that since the instant order was passed under ST Act, there cannot be any issue in delegation of the power using Section 5(3) read with Section 167. However, the Court stated that though the order delegating authority is in accordance with the powers under Section 167, using the principle delegatus non potest delegare, it held that the power delegated by statute cannot be redelegated unless the intention is negatived by any contrary indications in the language, scope or object of statute should be adopted. The Court also negatived the contention of the Revenue that Joint Commissioner is well in his powers to pass an order under Section 83 when the pendency was due to proceedings under Section 67, by stating that even for purposes of Section 67, the satisfaction should be of the proper officer not below the rank of Joint Commissioner and the authorised officer is merely executing or implementing the order that may be passed by proper officer not below the rank of Joint Commissioner. Further, the Court held that Section 83 makes it abundantly clear that it is the Commissioner's opinion which is relevant and legislature in its wisdom conferred its powers upon Commissioner and hence the same cannot be delegated.

In Praful Nanji Satra[43] , the Joint Commissioner has issued a provisional attachment order attaching the bank account of petitioner. However, the petitioner is only a member connected with another entity on which search operation was conducted. The petitioner has approached the High Court asking to quash the attachment order on two counts. One, the Joint Commissioner is not a proper officer under Section 83 to issue a provisional attachment order and two, there are no proceedings pending on the petitioner as contemplated under Section 83 to issue a provisional attachment order. The Court stated that the power under Section 83 cannot be delegated and since there are no pending proceeding on petitioner, the attachment order was quashed.

In Enprocon Enterprises Limited[44] , the Gujarat High Court was seized with a question as to whether Assistant Commissioner is empowered to pass a provisional attachment under Section 83? A search and seizure under Section 67 was conducted on the petitioner and proceedings under Section 73 has been initiated. A provisional attachment order was issued by Assistant Commissioner of State Tax in exercise of powers under Section 83. The Court after making reference to Valerius Industries (supra) held that the provisional attachment order is bad in law.

Conclusion:

From the above analysis, it would be evident that the power under Section 83 cannot be invoked as a matter of routine. The Commissioner cannot delegate such power to any other person and the same has to be exercised only if he is in the opinion that it is necessary to protect the interest of Government, a provisional attachment can be ordered. The said power can only be invoked in cases where there is a pendency of proceedings and also the material indicate that there exists a situation where the tax payer would alienate or dispose properties or he would not be in a position to pay the taxes by the end of assessment. Hence, the power cannot be used in a mechanical manner and just because there exists a property for attachment. The Courts also held that the attachment should be in such a manner it would not affect the business of the tax payers and cannot be for attaching someone else's property, that is property belonging to a person other than the taxable person. May the provisional attachment orders going forward would be passed with due accordance of the law and the above jurisprudence.

[43] 2021 (5) TMI 528 – Delhi High Court

[44] State Goods and Services Tax Act, 2017 (in this case, the Gujarat)

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