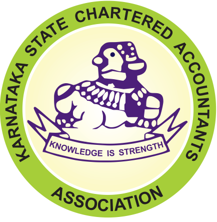

KSCAA NEWS BULLETIN

English Monthly
for Private Circulation only

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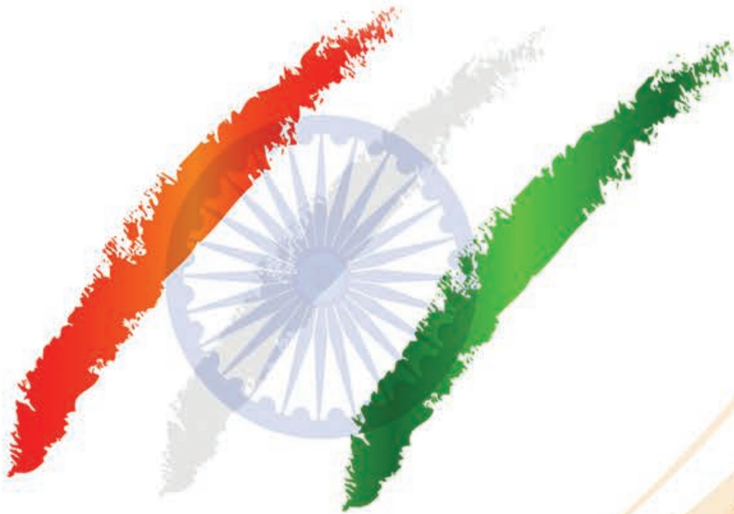
In a democracy, the well-being, individuality and happiness of every citizen is important for the overall prosperity, peace and happiness of the nation.

- Dr. APJ Abdul Kalam

KSCAA conveys deepest condolences on the sad demise of a great visionary scientist His Excellency Dr. A P J Abdul Kalam, Hon'ble past President of India



15th August
Independence Day

President's Communique

Dear Professional Colleagues,

India has lost a great personality Dr. APJ Abdul Kalam who made phenomenal contributions to our country in Defense Technology. He was referred to as people's President a leader admired by people of all walks of life especially the youth of India. His life & work will be remembered for generations to come.

Recently we have seen changes & challenges to our profession. New set of accounting standards for Income –ICDS is introduced. With changes in ITR filing pattern & amendments brought in companies Act, 2013 we have to equip ourselves to face these new challenges.

Greece Crisis has remembered the saying - Lay your legs according to the length of the cot.

With the postponement of Filing of Income Tax Returns from 31st of July to 31st of August we are all busy with the task of adherence to due dates.

KSCAA is hosting CPE study circle meeting on 17/08/2015 & 05/09/2015 organised by Basavanagudi CPE Study Circle. The details are published elsewhere in the newsletter. I request the members to attend these study circle meetings.

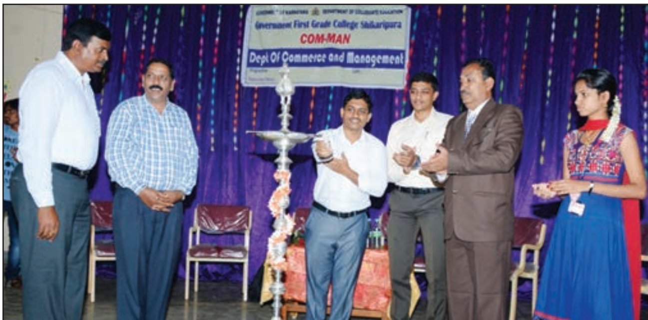
Directorate of Municipal Administration has made payment of Security deposit of Rs.50,000/- (Rupees Fifty Thousand only) as pre-condition for participation in tender for allotment of audit work. The last date for applying is 20/08/2015. KSCAA has given representation letter requesting to waive the above condition. The letter is hosted in our website www.kscaa.co.in.

I wish all the members Happy Independence Day & Varalakshmi Festival.

In service of the Profession,

CA. Dileep Kumar T M
President

Career Counseling at Govt. First Grade College, Shikaripura on 25-07-2015



Co-opted EC Member
for the year 2015-16

CA. Sujatha Raghuraman

KSCAA
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Disclaimer

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KSCAA welcomes articles & views from members for publication in the news bulletin / website.

email: info@kscaa.co.in

Website: www.kscaa.co.in

BASAVANAGUDI CPE STUDY CIRCLE

has arranged a

CPE workshop on

"TAX AUDIT – ISSUES AND SOLUTIONS AND DEEMED SALES UNDER KVAT ACT 2003"

on **Saturday, 05.09.2015**

at **3.00 PM to 7.15 PM**

at **Maharaja Hall, The Bangalore City Institute,**
No.8, Pampa Maha Kavi Road, Opp. Makkala Koota, Bengaluru – 560 004

Speakers :

CA. Prashanth G S.
CA. Raghavendra T N.

*Followed by **Interactive session**.*

Reg. Fee: **Rs.200/-** payable by cash/cheque drawn on BASAVANAGUDI CPE STUDY CIRCLE.

Registration is restricted to first 100 members.

For Registration : send confirmation mail
basavanagudicpe@gmail.com

Contact Persons:

CA Dileep Kumar - 98453 30800, CA Maddanaswamy - 93412 14962

Delegates can send their Queries by e-mail.

BASAVANAGUDI CPE STUDY CIRCLE

has arranged a

CPE workshop on

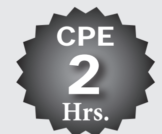
"OVERVIEW OF INCOME COMPUTATION AND DISCLOSURE STANDARDS(ICDS)"

on **Monday, 17.08.2015** at **5.00 PM to 7.00 PM**

at KSCAA – AMARLAL HALL,
7/8, 2nd Floor, Soukath Building, SJP Road, Bangalore – 560002.

Speaker :

CA. Prashanth Kumar N



*Followed by **Interactive session.***

Registration is restricted to first 50 members.

For Registration : send confirmation mail
basavanagudicpe@gmail.com,

Entry Free

Contact Persons:

CA Dileep Kumar - 98453 30800, CA Maddanaswamy - 93412 14962

Delegates can send their Queries by e-mail.

ICDS - Income Recognition

CA. S. Krishnaswamy

CBDT has released 11 standards one of which is on Income recognition. This will be effective from 01.11.2015 Standards under Companies Act now labelled Ind AS have also been notified.

The CBDT has notified Income computation and disclosure standards.

The fundamental principle of mercantile method of accounting remains but whenever it is uncertain, income cannot be recognised; in special contexts like income from contracts and services there are specific standards(AS7).

1. The major recommendations are;

- Revenue from service transactions to be recognised only on percentage completion method;
- AS 9 issued by ICAI recognises "completed service contract method" as well as "percentage of completion method" for revenue recognition;
- ICDS does not deal with revenue recognition of specified industry, such as insurance companies.
- Postponement of revenue recognition due to uncertainty restricted only to claim for price escalation and export incentive. But on first principle income that is uncertain cannot be recognised.

2. What has not been addressed by ICDS are;

   On real estate transactions

- ICAI has came out with a guidance note (Not covered by AS7)

  'Further, where individual contracts are part of a single project, although risks and rewards may have been transferred on signing of a legally enforceable individual contract but significant performance in respect of remaining components of the project is pending, **Revenue in respect of such an individual contract should not be recognised until the performance on the remaining components is considered to be completed on the basis of the aforesaid principles.**
- In a transaction involving the sale of goods, the revenue shall be recognised when the seller of goods has transferred to the buyer the property in the goods for a price or all significant risks and rewards of ownership have been transferred to the buyer and the seller retains no effective control of the goods transferred to a degree usually associated with ownership.

ICDS

Revenue

- Unlike in AS 9, the ICDS does not require revenue to be measurable or collectible at the time of sale (there is an exception for price escalation claims and export incentives). As such, revenue will have to be recognised when other conditions of revenue recognition per ICDS are met. A corresponding bad debt expense deduction can be claimed in accordance with the provisions of the Act.
- Unlike AS 9, the ICDS requires revenue recognitions for all services based on percentage of completion method. As such, completed contract method as per AS 9 is no longer permitted under ICDS. Though the ICDS does not clarify whether expected losses on onerous service contracts should be recognised on a proportionate basis or in their entirety, given the provisions in the ICDS on construction contracts and accounting policies, it is likely that such expected losses cannot be provided.
- The ICDS specifically provides that a prior period expense shall not be allowed as deduction in the current year.
- According to judicial decisions if a prior period expense has crystallized during the year if could be recognised in the year.

Definition in ICDS

AS9

Sale of Goods

- Revenue shall be recognised when there is reasonable when certainty of its ultimate collection.
- Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim for escalation of price and export incentives, revenue recognition in respect of such claim shall be postponed to the extent of uncertainty involved.

Rendering Of Services

- Revenue from service transactions shall be recognised by percentage completion method. Under this method, revenue from service transactions is matched with the service transactions costs incurred in reaching the

stage of completion, resulting in the determination of revenue, expenses and profit which can be attributed to the proportion of work completed. Income computation and disclosure standard on construction contract also requires the recognition of revenue on this basis. The requirements of that standard shall **mutatis mutandis** apply to the recognition of revenue and the associated expenses for a service transaction.

The Uses of Resources by Others Yielding Interest, Royalties or Dividend

- Interest shall accrue on the time basis determined by the amount outstanding and the rate applicable. Discount or premium on debt securities held is treated as though it were accruing over the period of maturity.

AS9 – Revenue

Explanation

Revenue recognition is mainly concerned with the timing of recognition of revenue in the statement of profit and loss of an enterprise. The amount of revenue arising on a transaction is usually in the transaction determined by agreement between the parties involved. When uncertainties exist regarding the determination of the amount, or its associated costs, these uncertainties may influence the timing of revenue recognition.

Rendering of Services

Revenue from service transactions is usually recognised as the service is performed, either by the proportionate completion method or by the completed service contract method.

1) Proportionate completion method---Performance of the execution of more than one ac. Revenue is recognised proportionately by reference to the performance of each act. The revenue recognised under this method would be determined on the basis of contract value, associated costs, number of acts or other suitable basis. For practical purposes, when services are provided by an indeterminate number of acts over a specific period, revenue is recognised on a straight line basis over the specific period unless there is evidence that some other method better represents the pattern of performance.
2) Completed service contract method---Performance consists of the execution of a single act. Alternatively, services are performed in more than a single act, and the services yet to be performed are so significant in relation to the transaction taken as a whole that performance cannot be deemed to have been completed until the execution of those acts. The completed service contract method is relevant to those patterns of performance and accordingly revenue is recognised when the sole or final act takes place and the service becomes chargeable.

Effect of Uncertainties on Revenue Recognition

1) Recognition of revenue requires that revenue is measurable and that at the time of sale or the rendering of services it would not be unreasonable to expect ultimate collection.
2) Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim, e.g., for escalation of price, export incentives, interest etc., revenue recognition is postponed to the extent of uncertainty involved. In such cases, it may be appropriate to recognise revenue only when it is reasonably certain that the ultimate collection will be made. Where there is no uncertainty as to ultimate collection, revenue is recognised at the time of sale of rendering of service even though payments are made by instalments.
3) When the uncertainty relating to collectability arises subsequent to the time of sale or rendering of service, it is more appropriate to make a separate provision to reflect the uncertainty rather than to adjust the amount of revenue originally recorded.
4) An essential criterion for the recognition of revenue is that the consideration receivable for the sale of goods, the rendering of services or from the use by others of enterprise resources is reasonably determinable. When such consideration is not determinable within reasonable limits, the recognition of revenue is postponed.
5) When recognition of revenue is postponed due to effect of uncertainties, it is considered as revenue of the period in which it is properly recognised.

Disclosure

ICDS

Following disclosures shall be made in respect of revenue recognition;

A. In a transaction involving sale of goods, total amount of claim raised for escalation of price and export incentives but not recognised as revenue during the previous year along with nature of uncertainty about such claims.
B. The amount of revenue from service transactions recognised as a revenue during the previous year; and
C. The methods used to determine the stage of completion of service transactions in progress.
D. For service transactions in progress at the end of previous year;
i. Amount of costs incurred and recognised profits (less recognised losses) up to end of previous year;
ii. The amount of advances received; and
iii. The amount of retentions.

(Contd. on page 7)

Cenvat Credit on Outdoor Catering Services

CA. Madhukar N Hiregange & CA. Mahadev R.

Service providers / manufacturers avail various input services such as catering services, travelling services, insurance etc., which would be consumed by the employees. Such services would not be eligible for Cenvat credit when they are primarily consumed for personal purpose. However, consumption of these services purely for personal purpose would be rare and often these services are in relation to business of providing services or final dutiable products. In such cases, Cenvat credit shall not be denied.

After the amendment of definition of 'input service' in Cenvat credit Rules 2004 with effect from 01.04.2011, many of the assessee registered under Service tax and Central excise law started to forego Cenvat credit of service tax paid on major input services such as Construction / Works contract services, Rent-a-cab services, motor vehicle insurance service and outdoor catering services etc.

Even though services such as construction services and rent-a-cab services are restricted outright, there are many services like insurance, travel benefits and outdoor catering which are restricted only when they are ***primarily used*** for personal use or consumption of the employees. However, proving what is primarily used for personal use or consumption of the employees is not an easy task for assessee, especially during visits by departmental audit team.

For the benefit of the readers, the restriction provided in definition of input service Rule 2(l) clause (c) as contained in Cenvat Credit provisions is reproduced below:

'**Input service** means any service,

i) *Used by a provider of output service for providing an output service; or*

ii) *Used by a manufacturer, whether directly or indirectly, in or in relation to manufacture of final products and clearance of final products upto the place of removal, and includes…………………………………………*

But excludes

(A) ...

(B) ...

(BA) … ...

*(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are **<u>used primarily for personal use or consumption of any employee;</u>***

Based on the restriction clause and regular audit objections, majority of the assessees do not avail the Cenvat credit on input services such as outdoor catering services, travelling services and employee group insurance, mediclaim etc based on the understanding that such services are restricted for Cenvat credit. In many instances, even if the credits have been availed, the department has been instructing the assessee to reverse the credit on these services.

Recently, the Mumbai Tribunal in case of ***Hindustan Coca Cola Beverages (P) Ltd. Vs. CCE* 2014-TIOL-2460 *CESTAT Mumbai*** has held that service tax paid on Outdoor Catering services which are used for business purpose is eligible for Cenvat credit. The period involved in this case was for period December 2011 to December 2012 during which the new definition was in existence.

In this case, the appellant argued that the outdoor catering services are used in relation to carrying out business of manufacturing excisable goods and the services are not for personal use of the employees. The reliance was also placed on the board circular no. Circular No.943/04/2011-CX dated 29.04.2011 wherein it was clarified that Cenvat credit is not allowed only when any goods and services are used *primarily for personal use or consumption* of employees.

Considering the arguments, the Tribunal held that Outdoor catering service is used in relation to business activities of the appellant and the service is used by all employees in general. The Tribunal also considered the argument of the appellant that the cost of outdoor catering services is borne by the appellant and not by the employee. As a result such cost forms part of the cost of the final product which would be cleared on payment of duty.

Therefore, the assessee based on the judgment as discussed above would be eligible to avail the Cenvat credit on Outdoor catering services especially when he could prove that such services are essential for business and forming part of cost of final goods or output services provided.

However, it shall be ensured that the credit is not availed on portion of the amount which would be recovered from the employees. In case of *Cema Electric Lighting Products India P. Ltd. Vs CCE 2015 (37) S.T.R. 718 (Guj.),* the High court held that assessee would not be entitled to Cenvat credit on such amount which has been recovered from employees. This view is logical as well as the intention of Cenvat credit is to avoid cascading effect of tax. When the assessee has not incurred the service tax, he should not be given the benefit of such tax. For instance, when Rs.30/- is being recovered from employee out of Rs.100/- payable to caterer, the employer would be eligible to take Cenvat credit of service tax paid only on Rs.70/- and not on entire Rs.100/-.

Whether catering services exempted from service tax?

Mega exemption notification no.25/2012 was amended through notification no.14/2013-ST dated 22.10.2013 to insert the following entry after serial no. 19. It reads:

"19A. Services provided in relation to serving of food or beverages ***by a canteen maintained in a factory*** *covered under the Factories Act, 1948 (63 of 1948), having the facility of air-conditioning or central air-heating at any time during the year"*

From the wordings in the above entry, it could be interpreted that the exemption is available to services provided by canteen to staff/ employees of factory and charges are directly recovered from staff and the exemption is not available when the services are provided by outdoor caterer to factory.

However, the intention of introducing the exemption seems to be to provide relaxation from service tax for the food supplied to employees. As the words used in the exemption entry is 'Services provided in relation to.....', the exemption should be available even for the services provided by outdoor caterer to the factories. Presently, different views are adopted by the outdoor caterers and service tax exemption being claimed by few caterers. The option of exemption could be explored by the assessee who does not wish to claim the Cenvat credit.

Conclusion: Based on the decision of the Tribunal, the Cenvat credit could be claimed on catering services (for the past 1 year if not claimed earlier). Where the amount of credit is significant a speed post letter intimating revenue that the credit is being availed based on the decision cited above maybe sent. The letter may also seek confirmation. This would go to prove bona fide belief.

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ICDS - Income Recognition

(Contd. from page 5)

AS9

In addition to the disclosures required by accounting standards 1 on 'Disclosure of Accounting Policies' (AS 1), an enterprise should also disclose the circumstances in which revenue recognition has been postponed pending the resolution of significant uncertainties.

DISCLOSURE IN PUBLISHED ACCOUNTS

Reliance industries ltd

Revenue is recognised only when risks and rewards incidental to ownership are transferred to the customer, it can be reliably measured and it is reasonable to expect ultimate collection. Revenue from operations include sale of goods, services, service tax, excise duty and sales during trial run period, adjusted for discounts (net), and gain/loss on corresponding hedge contracts.

Infosys annual report 2014-2015

Revenue is primarily derived from software development and related service and form the licensing of software products. Arrangements with customers for software development and related services are either on a fixed-timeframe or on a time-and-materials basis.

Revenue on time-and-material contracts are recognised as the related services are performed and revenue from the end of the last billing to the balance sheet date of recognised as unbilled revenues. Revenue from fixed-price and fixed-timeframe contracts, where there is no uncertainty as to measurement or collectability of consideration, is recognised based upon the percentage-of-completion method. When there is uncertainty as to measurement or ultimate collectability, revenue recognition is postponed until such uncertainty is resolved. Cost and earnings in excess of billings are classified as unbilled revenue while billings in excess of cost and earnings are classified as unearned revenue. Provision for estimated losses, if any, on uncompleted contracts are recorded in the period in which such losses become probable based on the current estimates.................................

Author can be reached on
e-mail: skcoca2011@yahoo.in

Indirect Taxes Update – July 2015

CA. C.R. Raghavendra, *B.Com, FCA, LLB, Advocate* and
CA. J.S. Bhanu Murthy, *B.Com, FCA, LLB, Advocate*

A. Notifications and Circulars

A) Detailed manual scrutiny of returns

Central Board of Excise and Customs (CBEC) has issued procedure for detailed manual scrutiny of service tax returns. The purpose of detailed manual scrutiny of returns, as spelt out in the circular, is to ensure the correctness of the assessment made by the assessee.

In terms of the circular the focus of detailed manual scrutiny of the returns would be on the returns of those assessees which are not being audited and whose total tax paid (in Cash as well as CENVAT) for the FY 2014-15 is below Rs 50 lakhs.

[Source: Circular No. 185/4/2015-S.T., dated 30-6-2015]

Similar scrutiny procedure for manufacturers is also prescribed vide circular No. Circular No. 1004/11/2015-CX dt. 21.7.2015

B) Conditions, safeguards and procedures for issue of invoices, preserving records in electronic form and authentication of records and invoices by digital signatures:

Conditions and safeguards are as below:

1) Every assessee proposing to use digital signature shall use Class 2 or Class 3 Digital Signature Certificate duly issued by the Certifying Authority in India.

2) (i) Every assessee proposing to use digital signatures shall intimate the following details to the jurisdictional Deputy Commissioner or Assistant Commissioner of Central Excise, at least fifteen days in advance:-

   a) Name, e-mail id, office address and designation of the person authorised to use the digital signature certificate;

   b) Name of the Certifying Authority;

   c) Date of issue of digital certificate and validity of the digital signature with a copy of the certificate issued by the Certifying Authority along with the complete address of the said Authority:

   Provided that in case of any change in the details submitted to the jurisdictional Deputy Commissioner or Assistant Commissioner, complete details shall be submitted afresh within fifteen days of such change.

   (ii) Every assessee already using digital signature shall intimate to the jurisdictional Deputy Commissioner or Assistant Commissioner of Central Excise the above details within fifteen days of issue of this notification.

3) Every assessee who opts to maintain records in electronic form and who has more than one factory or service tax registration shall maintain separate electronic records for each factory or each service tax registration.

4) Every assessee who opts to maintain records in electronic form, shall on request by a Central Excise Officer, produce the specified records in electronic form and invoices through e-mail or on a specified storage device in an electronically readable format for verification of the authenticity of the document and the request for such records and invoices shall be specified in the letter or e-mail by the Central Excise Officer.

5) A Central Excise Officer, during an enquiry, investigation or audit, in accordance with the provisions of section 14 of the Central Excise Act, 1944 and as made applicable to Service Tax as per the provisions contained in section 83 of the Finance Act, 1994, may direct an assessee to furnish printouts of the records in electronic form and invoices and may resume printouts of such records and invoices after verifying the correctness of the same in electronic format; and after the print outs of such records in electronic form have been signed by the assessee or any other person authorised by the assessee in this regard, if so requested by such Central Excise Officer.

6) Every assessee who opts to maintain records in electronic form shall ensure that appropriate backup of records in electronic form is maintained and preserved for a period of 5 years immediately after the financial year to which such records pertain.

[Source: Notification No. 18/2015-Central Excise (N.T.) dt. 06.07.2015]

B. Important Decisions

1. CCE Vs M/s Global Health Care Products Partnership Firm and Ors 2015-TIOL-157-SC-CX

Issue: Whether close-Up whitening dental cleaner is to be classified as 'toothpaste' or as other form of dental hygiene

Held: Supreme Court held that Close-Up Whitening dental cleaner is not a 'toothpaste' but is other form of dental hygiene on the basis of the findings that though

the ingredients of the product in question are similar to that of a tooth paste, the instant product has additional ingredient which makes it a dental cleaner.

While deciding the above issue, referring to the decision in the case of Camlin Limited v. Commissioner of Central Excise, Mumbai 2008-TIOL-165-SC-CX observed that if the entries under HSN and the entries under the Central Excise Tariff are different, then reliance cannot be placed upon HSN Notes for the purposes of classification of goods under Central Excise Tariff. In such case, the issue, therefore, has to be decided dehors HSN Notes.

2. **Shabina Abraham Vs CCE & C 2015-TIOL-159-SC-CX**

   Issue: the issue before the Supreme Court was whether an assessment proceeding under the Central Excises Act, 1944, could be continued against the legal representatives/ estate of a sole proprietor/manufacturer after the assessee is dead.

   Held: Holding that the no recovery could be made from a legal heir or representative, the Supreme Court observed that while interpreting the provisions of the Central Excises Act, legal heirs who are not the persons chargeable to duty under the Act cannot be brought within the ambit of the Act by stretching its provisions. The Apex court observed that there is in no separate machinery provided by the Central Excises and Salt Act to proceed against a dead person when it comes to assessing him to tax under the Act.

   While coming to the above concluding the Apex Court observed that "in interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency".

3. **Madras Cements Ltd Vs ADDL CCE 2015-TIOL-1682-HC-KAR-CX**

   Issue: Whether assessee is eligible to avail cenvat credit of service tax paid on outward transportation activity for the period from 01.04.2008

   Held: The High Court held that as long as the sale of the goods is finalized at the destination, which is at the door step of the buyer, the change in definition of 'input service' which came into effect from 01.04.2008 would not make any difference. A perusal of invoices makes it clear that the goods were to be delivered and sale completed at the address of the buyer and no additional charge was levied by the assessee for such delivery. From these facts it is clear that the sale was completed only when the goods were received by the buyer.

   The Court observed that as per the Circular dated 20.10.2014, the place of removal has to be ascertained in terms of Central Excise Act, 1944 read with the provisions of the Sale of Goods Act, 1930 which has been dealt with in detail in the said Circular. According to the provisions of the Sale of Goods Act, 1930, the intention of the parties as to the time when the property in goods has to pass to the buyer is of material consideration. The record clearly shows that the intention of the parties was that the sale would be complete only after goods are delivered by the seller at the address of the buyer

4. **India Cements Ltd. Vs. CCE, 2015 (321) E.L.T. 209 (Mad)**

   Facts: The assessee availed availed cenvat credit on MS Rod Sheets, M.S. Chennel, M.S. Plates, Flats etc. used in the fabrication of fly ash hooper, fly ash bin, fly ash handling system & kiln brick laying work to bold refractories. The credit was disputed by the department and relying on the decision of the Larger Bench of the Tribunal in the case of Vandana Global, Tribunal denied the credit.

   Held: High Court relying upon the decision of the Supreme Court in the case of Rajasthan Spinning & Weaving Mills Ltd., reported in 2010 (255) E.L.T. 481) allowing the credit observed that without these structurals, the machinery could not be erected and would not function and therefore, the same would qualify to be capital goods.

5. **M/s Mercedes Benz India (P) Limited Vs. CCE. 2015-TIOL-1550-CESTAT-MUM**

   Facts: Assessee is engaged in the business of manufacture and sale of motor vehicles as well as import and trading of motor vehicles. Though assessee availed credit on common input services neither maintained separate records nor pay amounts as required under Rule 6(3). However, on suo moto, assessee computed proportionate credit attributable to exempted activity (trading) and reversed the same along with interest. Contention of the department is that the assessee is not eligible reverse proportionate credit, instead are liable to pay 5% of value of trading turnover as the assessee has not complied with the condition and procedure laid down under Rule 6(3)(ii) read with rule 6(3A) of CCR, Rules.

   Held: The Tribunal holding that the assessee is not required to pay 5% of the value of trading turnover, observed that the assessee while paying the proportionate credit, has informed the department about the option and thereby has fulfilled the procedural requirement of intimidating

the department of its excise of option. Further, the Tribunal held that there is no time limit prescribed in the rule for such intimation under Rule 6(3A).

The Tribunal further observed that three options have been provided under rule 6(3) and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. Further, Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods.

6. **M/s Oil & Natural Gas Corporation Ltd Vs CCE, C & ST, 2015-TIOL-1571-CESTAT-MUM**

   Issue: Issue before the Tribunal was whether offices which are registered as input service distributor (ISD) could avail and distribute credit of input services received prior to registration as ISD.

   Held: the Tribunal observing that the provisions of Rule 9 of CCR does not provide any restriction clause that the credit is not allowed in respect of invoices issued by input service distributors in respect of service received by them prior to registration as input service distributor, held that credit is eligible on such input services received prior to registration of ISD also.

7. **CCE Vs Dalmia Cements (bharat) Ltd 2015-TIOL-1539-HC-MAD-CX**

   Facts: The assessee availed cenvat credit on Capital goods, inputs and input services used for setting up of power plant. After setting up the said power plant was given on lease to another company for operation and maintenance and power produced from such plant is to be supplied to the assessee. The contention of the department is that the assessee has removed that inputs and capital goods on which credit is availed, and hence are liable to reverse the credit in terms of Rule 3(5) of the CENVAT Credit Rules, 2004.

   Held: High Court held that on facts, the Tribunal went in detail into the lease deed, the terms and conditions of the lease and the various clauses to come to the conclusion that there was no removal of goods as such from the premises of the assessee and, therefore, held that the order of the adjudicating Commissioner is bad. The reasoning of the Tribunal, is a well considered reasoning and there is no reason to differ with the view of the Tribunal

   The Court further observed that, in the present case, there is no removal of goods under cover of invoice as provided under Rule 9 of the Cenvat Credit Rules, 2004 and there is nothing in Rule 3 (5) of the Cenvat Credit Rules, 2004 to invoke the deeming fiction as insisted by the adjudicating authority. The language of Rule 3 (5) is plain and simple. When the inputs or capital goods on which cenvat credit has been taken are removed as such from the factory, then subject to compliance of other requirements, the credit availed in respect of inputs on capital goods shall be paid. This situation has not arisen in the present case, as no invoice has been issued for removal of the goods from the factory premises and, therefore, the said rule is not applicable to the case of the assessee.

8. **Linkwell Telesystems Pvt Ltd Vs CCE, C & ST 2015-TIOL-1373-CESTAT-BANG**

   Facts: Assessee engaged manufacture of both dutiable and exempted goods, were directed to reverse 4.30 Lakhs as credit attributable to exempted goods, which was reversed. Subsequently, on conclusion of the investigations it was found that the amount required to be reversed by them was to the tune of Rs. 15.12 Lakhs, and the same was also reversed. However, on realising that they have reversed Rs. 4.30 lakhs excess, availed suo moto credit, which department contended that the assessee has to apply for refund and cannot take credit on its own.

   Held: The Tribunal held that suo motu credit of CENVAT reversed earlier does not require filing of refund application as it is nothing but correction of entries in the accounts maintained by the assessee which does not involve any 'lis' and any legal issue requiring the department to interfere.

9. **Agarwal Foundries Vs. CCE 2015 (321) E.L.T. 267 (Tri. – Bang)**

   Facts: The assessee engaged in manufacture of MS Angles availed cenvat credit of duty paid on air-conditioner used in control panel room and furniture used inside the factory and the department disputed the credit availment.

   Held: Tribunal based on the fact that the goods are used within the factory and also relying on the circular No. 943/4/2011-CX., dated 29-4-2011 held that the credit is eligible on air-conditioner and furniture. In the above referred circular, it was clarified that furniture used in relation to manufacturing business would qualify as inputs.

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Latest Updates under the Commercial Tax Laws

CA. G.B. Srikanth Acharaya & CA. Annapurna Kabra

Vide ***Notification No FD 71 CSL 2015 dated 01.8.2015*** the Government of Karnataka with reference to powers conferred by sub section (1) of section 5 of KVAT Act hereby exempts with immediate effect the tax payable by the dealer under the said Act on the sale of Solar PV panels and Solar Inverters.

Vide ***Notification No FD 71 CSL 2015 dated 28.7.2015*** the Government of Karnataka with reference to powers conferred by sub section (1) of section 5 of KVAT Act hereby exempts with immediate effect, the tax payable by the Bank Note Paper Mill India Private Limited Bangalore under the said Act on the sale of Bank Note paper and other security paper.

Vide ***Notification No FD 127 CSL 2014 dated 30.5.2015*** the Government of Karnataka with reference to powers conferred by sub section (1) of section 5 of KVAT Act hereby exempts with immediate effect, the tax payable under the said Act on the sale of Biogas produced and sold by units using municipal solid waste and bottled in cylinder subject to the condition that such units are notified by the Government on the recommendation of the BBMP (Bangalore Bruhath Mahanagar Palike).

Vide Notification No FD 01 CLT 2015 dated 19.06.2015 wherein it states that with reference to section 12-A of the Karnataka Tax on Luxuries Act 1979 , the Government of Karnataka being of the opinion that it is necessary in the public interest so to do, hereby exempts with immediate effect the tax payable under the said Act by Home stays, Yatri Niwas, youth Hostels/dormitories for a period of ten years from the date of commencement of operations or the date of commencement of this notification whichever is later on actual room charges of Rs. 5000 or below per day.

For the purpose of this Notification Home stays, Yatri Niwas, youth hostel /dormitories means a new tourism unit recognized by the Director of Tourism, Government of Karnataka as a "New tourism unit" eligible for the concessions under G.O No TD 81 TTT 2014 Bangalore dated 26/03/2015.

The provisions shall not be applicable to the units whose investments are for expansion, modernisation and diversification of an existing tourism unit or to an unit established in a different name after the closure of another unit which existed prior to 1st June 1997 and the unit which ceases to be tourism unit from the date of it ceasing to be so and the charges for lodging on which tax is collected by the eligible units under the provisions of Karnataka Tax on Luxuries Act 1979.

Vide Notification No FD 03 CET 2015 dated 9.06.2015 wherein it states that with reference to section 11-A of the Karnataka Tax on Entry of Goods Act 1979, the Government of Karnataka being of the opinion that it is necessary in the public interest to do so with effect from 26th March 2015 exempts the tax payable under the said Act on the entry of plant and machinery and capital goods for use into a local area caused by a dealer which is a new Tourism unit for a period of three years from the date of commencement of its project implementation. It also exempts the tax payable on the entry of any goods for use as raw materials, inputs, component parts and consumables (excluding petroleum products) into a local area caused by a dealer which is a new tourism unit for a period of five years from the date of commencement of commercial production and on entry of plant and machinery and capital goods for use into a local area caused by a dealer which is a mega project and a tourism unit for a period of five years from the date of commencement of its project implementation.

Vide the new Circular 07/2015-2016 there is an extension of revision option under E-Upass module for all tax periods from May 2014 to January 2015 enabled for all the targeted dealers till 31/8/2015. As per Notification No CCW/CR/44/2013-14 dated 29.04.2014, all dealers, whose total turnover is Rs.50 lakhs and above for the year ending on 31.03.2014 or in any subsequent financial year, are required to electronically upload the purchase and sales details on to the departmental portal for each tax period before 20th of the succeeding month commencing from the tax period of May 2014. The **ITC Matching Module** under electronic Uploading of Purchase and Sales Statements (e-UPaSS) has been deployed in dealer's login with effect from 27th March 2015 as per CCT Circular No. 23/2014-15 dated 27/03/2015 to facilitate the targeted dealers to correct the invoice details mismatches and to make any corrections under ITC Matching Module.

The dealers are unable to rectify the mistakes made while entering the data under e-Pass within the stipulated period as the dealers were unable to comply in total because of the practical and technical problems. In some of the cases, dealers have to make correction of more than 5000 to 6000 Invoices per month, for which the dealer has to delete the invoice details individually and to upload the revised data through XML file.

(Contd. on page 15)

Levy of Sales Tax on the Transfer of Right to Use Trademarks

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Introduction.

On January 20, 2015, in Tata Sons v. State of Maharashtra, (2015) 80 VST 173 (Bom.), a Division Bench of the Bombay High Court held that tax under the provisions of the Maharashtra Sales Tax on the Transfer of Right to Use any Goods for any Purpose Act, 1985 ("the Maharashtra Transfer of Right to Use Goods Act"), is leviable on the consideration received by the Petitioner for permitting its group companies to use intangibles such as its brand name and trademark. The High Court held that the Petitioner is transferring the right to use the trademarks, which is exigible to tax under the Act. This article briefly delves into the law relating to the levy of sales tax on the transfer of right to use goods and, more specifically, intangible goods such as trademarks.

Background.

Before discussing and analyzing the Bombay High Court's judgment in Tata Sons, it would be useful to note the evolution of the law relating to the levy of sales tax on transfer of right to use intangible goods.

In A.V. Meiyappan v. Commissioner of Commercial Taxes, (1967) 20 STC 115 (SC), the Supreme Court was called upon to decide whether amounts received for lease of a film for a period of 49 years could be brought to tax under the Madras General Sales Tax Act. The State contended that the agreement to lease the film for 49 years was, in effect, an outright sale of the film and, therefore, exigible to sales tax. The Court rejected the argument and held that, "since no element of sale is involved, the taxing provisions of theSales Tax Act have no application at all. In short, the Court held that the lease transaction in question therein did not connote a sale at all and, accordingly, was not exigible to sales tax.

As a result of the Supreme Court's judgment referred to above, sales tax was not leviableon the lease of goods. In order to rectify the problem and ensure that parties are not able to avoid payment of sales tax by entering into lease agreements instead of sale agreements, the Law Commission recommended that the definition of "sale of goods" under the Constitution of India be enlarged so as to include goods transferred by way of lease agreements. Article 366 was, therefore, amended by inserting clause (29-A) which defined "tax on the sale or purchase of goods" to include, among other things, a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

Article 366(29-A) further clarified that such transfer or delivery of goods shall be deemed to be a sale of those goods by the person making the transfer or delivery. Therefore, by a legal fiction, the transfer of right to use any goods pursuant to a lease or other similar agreement was deemed by the Constitution to be a sale for the purpose of levy of sales tax.

After the insertion of Article 366(29-A), the States amended their sales tax laws so as to levy tax on the transfer of right to use goods. A number of States also provided for the levy of sales tax on intangible goods such as trademarks. For instance, in Karnataka, Section 5-C was inserted into the Karnataka Sales Tax Act, 1957 ("KST Act"), with effect from April 1, 1986. The said provision stated that every dealer shall be liable to pay sales tax on the turnover relating to the transfer of right to use goods at the rates specified in the VII Schedule to the Act. Therefore, the KST Act included a separate Schedule that specified the rates at which tax would be leviable on the transfer of right to use goods specified therein. The Schedule contained a residuary clause under which the transfer of right to use intangibles was brought to tax. The Karnataka Value Added Tax Act, 2003 ("KVAT Act"), on the other hand, does not contain a separate Schedule specifying rates of tax for the transfer of right to use goods. Nevertheless, it is beyond any doubt that tax was leviable under the KVAT Act on the transfer of right to use intangible goods.

Unlike in Karnataka, after the 46th Amendment, the State of Maharashtra enacted a separate law providing for the levy of tax on the transfer of right to use goods. The Act was called the Maharashtra Transfer of Right to Use Goods Act, and it contained a Schedule specifying the goods that were taxable under the Act and the rate at which they were taxable. Pertinently, Entry 7 of the Schedule specifically included trademarks and, therefore, there was no doubt that the Maharashtra State, too, contemplated the levy of sales tax on the transfer of right to use intangibles such as trademarks.

Similarly, other States, too, amended their sales tax laws to provide for the levy of sales tax on the transfer of right to use goods. In sum, after the 46th Amendment and the insertion of Article 366(29-A), the States consistently levied tax on the transfer of right to use intangible goods.

Facts and Issues in Tata Sons' Case.

With a view to develop, promote, and enhance its brand equity, Tata Sons ("the Petitioner") entered into an agreement with its group companies. The agreement, known as the Tata Brand Equity and Business Promotion Agreement ("the agreement"), provided, inter alia, detailed guidelines for use of the Tata name and its trademarks in the course of business by the subscribing companies. The Maharashtra sales tax authorities levied tax under the provisions of the Maharashtra Transfer of Right to Use Goods Act on the consideration received by the Petitioner from the subscribing companies on the ground that the Petitioner was transferring the right to use trademarks.

Challenging the orders passed by the authorities in writ petitions filed before the High Court of Bombay, the Petitioner submitted that the agreement was executed in order to make a cooperative effort to promote a unified brand, which would meet the common and standardized code of conduct in all their dealings with other companies. The Petitioner, accordingly, contended that the agreement only permitted the group companies to use the trademark and no right to use them had been transferred. Pertinently, the Petitioner contended that it retained effective control over the trademarks and, therefore, the agreementcould not be construed to mean that the Petitioner was transferring the right to use trademarks to its group companies and that, at best, the agreement could be said to be a license.

The Petitioner further relied heavily on the judgment of the Supreme Court in Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 145 STC 91 (SC), wherein it had been held in paragraph 98 that in order to attract the levy of sales tax, (a) the transfer of right to use the goods must be to the exclusion of the transferor and (b) the owner of the goods cannot transfer the right to use the goods to more than one person. The Petitioner contended that the ingredients required to constitute a transfer of right to use goods, as specified in Bharat Sanchar, were not satisfied in Tata Sons' case as, under the terms of the agreement, the permission granted to the subscribers to use the trademark was not exclusive. In this regard, it was submitted that the right contemplated under the agreement was a non-exclusive one as there were 113 entities who had been allowed the facility to use the Tata trademark and brand name. The Petitioner also argued that, as per the terms of the agreement, it continued to exercise rights over the trademarks and, therefore, applying the tests specified inBharat Sanchar, the Petitioner cannot be said to have transferred the right to use the trademarks.

The State supported the levy of tax by relying primarily on the judgment of the Bombay High Court in the case of Commissioner of Sales Tax v. Duke & Sons, (1999) 112 STC 370 (Bom.). In the said case, the assessee manufactured concentrates for aerated beverages and sold them to bottlers in the State of Maharashtra and in other states. As per the terms of the agreement entered into between the parties, the purchasers of concentrates were permitted to market their beverages by using the trademark of the assessee. The assessee would charge royalty for use of the trademarks. The question that arose of the Bombay High Court's consideration was whether the royalty charges collected by the assessee were taxable on the ground that the assessee was transferring the right to use the trademarks to its bottlers.

The Bombay High Court proceeded to determine the question on the basis that incorporeal rights such as trademarks were undoubtedly goods. The assessee contended that it is merely permitting its bottler to use the trademark and that there was no transfer of any right to use it. Upon examining the terms of the agreement, the Court rejected the assessee's contentions and held that the assessee transferred the right to use the trademarks to its bottlers for which it received payment by way of royalty. Pertinently, the Court observed that, "for transferring the right to use the trade mark, it is not necessary to hand over the trade mark to the transferee or give control or possession of the trade mark to him," and that "it can be done by merely authorizing the transferee to use the same." Furthermore, the Court held that, "the right to use the trade mark can be transferred simultaneously to any number of persons."

The State relied heavily on the above observations of the High Court in Duke & Sons to support the levy of tax on Tata Sons on the ground that it had transferred the right to use trademarks to its group companies. The State further contended that, while in the case of tangible goods transfer of physical control or possession is necessary, in the case of intangible goods there is no possibility of physically controlling or possessing the same.

The Bombay High Court's Judgment.

The High Court rejected the arguments of the Petitioner and held that Tata Sons had transferred the right to use its trademark. The Court, therefore, held that the transactions were exigible to tax under the provisions of the Maharashtra Transfer of Right to Use Goods Act. The relevant observations of the High Court are as under:

(a) "Upon a conjoint reading of the provisions of the Act we are of the opinion that in the case of intangible/incorporeal goods the right to use them is capable of being transferred and if transferred it may be subject to tax."

(b) "The Act does not give any indication as is rightly urged before us that the right to use the incorporeal/intangible goods should be exclusively transferred in favour of the transferee."

(c) "It is clear from the clauses of the agreement that the proprietor continues to control even the limited right conferred by the above clauses in favour of the subscribers. We are of the opinion that so long as the agreement transfers the right to use intangible goods which are the trademarks in this case, then, there is no question of the petitioners escaping the consequences of the enactment."

(d) "The enactment and the definitions which we have referred together with the substantive provisions does not envisage exclusive and unconditional transfer of the above right."

(e) "Going by the plain and unambiguous language of the Act of 1985 we cannot read into it the element of exclusivity and a transfer contemplated therein to be unconditional."

(f) "Thus, there can be a transfer of the right to use these goods and it need not be exclusive and unconditional. The transferor may simultaneously use it and during the period of an agreement transfer the right to use it."

The Court further rejected the contention of the Petitioner that the ratio of the judgment in Duke & Sons was no longer good law in light of the Supreme Court's judgment in Bharat Sanchar. The Court distinguished Bharat Sanchar by stating that the facts and circumstances prevalent in the said case were very different from the case on hand and, therefore, the observations of the Supreme Court in paragraph 98 cannot be extended to apply to the facts of this case. The High Court further noted that far from being no longer good law, Duke & Sons has been followed by the High Courts of Andhra Pradesh and Kerala in Nutrine Confectionery Co. Pvt. Ltd. v. State of Andhra Pradesh, (2011) 40 VST 327 (AP), and Kreem Foods Pvt. Ltd. v. State of Kerala, (2009) 24 VST 333, respectively. The High, therefore, approved the findings in Duke & Sons and followed the same in holding that Tata Sons was liable to pay tax on the transfer of right to use trademarks to its subscribers/group companies.

Discussion.

In Bharat Sanchar, Justice A.R. Lakshmanan, who passed a separate judgment concurring with the majority, categorically observed that, in order to constitute a transfer of right to use goods, "the transferee should have a legal right to use the goods" and "for the period during which the transferee has such legal right, it has to be to the exclusion of the transferor." The Hon'ble Justice further observed that "having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

In Tata Sons, the Bombay High Court has held that there can be a transfer of right to use goods even if (1) the transfer is conditional and not exclusive, and (2) the transferor continues to retain limited control over the goods. These observations are directly opposed to the Justice Lakshmanan's observations in Bharat Sanchar. The Bombay High Court has, feebly, tried to explain why the decision in Bharat Sanchar is not applicable to the facts of this case. According to the Court, in Bharat Sanchar, "the focus never shifted from the principal issue, namely, imposition of sales tax in the light of article 366(29-A)(d) on different activities carried on by the telecommunications service provider" and, therefore, "the findings and conclusions must be confined" to the prevalent facts in that case and cannot be extended to the facts of this case. In my opinion, this reasoning is flawed. The Supreme Court's observations regarding Article 366(29-A)(d) and the law relating to taxability of a transfer of right to use goods was after a detailed analysis of the subject. These observations, particularly relating to the transfer of control to the exclusion of the transferor, were generic in nature and not specific to only services provided by telecom operators. In such circumstances, it cannot be said that the Supreme Court's observations must be restricted only to telecom service providers. In short, the Bombay High Court ought to have examined the contract between Tata Sons and its subscribers in light of the observations of the Supreme Court in paragraph 98 of Bharat Sanchar.

In this regard, it is also relevant to note the detailed observations of the Karnataka High Court in Indus Towers Ltd. v. DCCT, (2012) 56 VST 369 (Kar.). In the said case, the assessee owned telecommunication sites, infrastructure, and equipment, and agreed to share its infrastructure with various telecom service providers. The Karnataka High Court, after referring to, inter alia, the judgments of the Supreme Court in Bharat Sanchar, State of Andhra Pradesh v. RashtriyaIspat Nigam Ltd., (2002) 126 STC 114 (SC), and 20th Century Finance Corporation Ltd. v. State of Maharashtra, (2000) 119 STC 182 (SC),struck down the levy of tax by the State on the consideration received by the assessee for sharing its infrastructure with telecom operators. Upon examining the terms of the agreement, the Karnataka High Court found that the parties contemplated sharing of the equipment, and such sharing was by way of permission to use and not by way of transfer of right to use the equipment. The Court observed that the mere right to use the goods is not sufficient to justify the levy of tax and that there must be a transfer of the right to use the goods. The Court further observed that if an agreement gives only a right to use a property in a particular way under certain terms, while it remains in the control and possession of the owner thereof, it will be a license and not a transfer of right to use goods for the purpose of Article 366(29-A)(d). In essence, the Karnataka High Court held that unless the owner completely parts with possession and control over goods, the

transaction cannot be said to be a transfer of right to use goods. In my opinion, this judgment lays down the correct position of law as regards transfer of right to use goods, and is in full accordance with the law laid down by the Supreme Court in cases such as Bharat Sanchar and RashtriyaIspat.

The Bombay High Court, in Tata Sons, would have been well-served if it had relied well-reasoned and exhaustive judgment of the Karnataka High Court. Also, more recently, a judgment of the Kerala High Court in the case ofMalabar Gold Private Ltd. v. Commercial Tax Officer, (2013) 63 VST 497 (Ker.), throws much light on the specific issue of transfer of right to use trademarks. In the case before the Kerala High Court, the assessee was taxed on the royalties received from franchises for use of its trademark on the ground that the assessee had transferred the right to use the same. The Kerala High Court held that, on examining the agreements entered into by the assessee with its franchisees, it could be seen that it was only a license to use the trademark and the transfer of its use was not to the exclusion of the transferor. The Court found that even while the agreement was in force, the assessee could use the trademark on its own and enter into franchise agreements with other parties. The Court, accordingly, found that the assessee retained effective control over the trademark and, therefore, there was no transfer of right to use the said trademark.

However, inVitan Departmental Stores v. State of Tamil Nadu, (2014) 68 VST 70 (Mad.), the Madras High Court has taken a contrary view and held that in a franchise agreement, the assessee had transferred the right to use the trademark exclusively to its franchisee. The Court, accordingly upheld the levy of tax on the franchise commission received by the assessee from the franchisee. Pertinently, though, the Madras High Court arrived at its conclusion after determining the question of effective control over the trademarks. Therefore, unlike the Bombay High Court, the Madras High Court did not state that the question of effective control was irrelevant in the case of intangible goods.

Conclusion.

In conclusion, it is fair to state that the question of taxability of transfers of right to use trademarks is highly vexed, and the law on the aspect appears to be in a constant state of flux. The issue is further complicated by the fact that no two agreements are the same and, therefore, it is very easy for the Revenue to distinguish a precedent laid down by the High Court or the Supreme Court in another assessee's case.

In my opinion, the Bombay High Court has erred by not adequately addressing why the observations of the Supreme Court in Bharat Sanchar are not applicable to transfers of right to use intangibles such as trademarks. Also, the Court ought not to have held that in the case of intangibles, it not necessary to transfer effective control over the goods to the transferee. The Karnataka, Kerala, and Madras High Courts in the above mentioned judgments, decided the issues before them based on the question of effective control over the goods. Therefore, the Bombay High Court ought to have examined the agreement and determined whether effective control over the trademarks had been retained by Tata Sons. It is possible that by applying the correct legal standard, the Bombay High Court would have found that Tata Sons had not transferred the right to use its trademarks.

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Latest Updates under the Commercial Tax Laws

(Contd. from page 11)

Further, to match the Invoice details, both the seller and buyer have to upload the correct data in the Departmental portal.

In view of the request of the dealers / stake holders / Auditors and Tax Practitioners, it is considered necessary to extend the time for revision option. Accordingly, in continuation of CCTs Circular No. 04/2015-16 dated 27.06.2015 issued by the undersigned, the time for revision option for the Tax Periods from May 2014 to January 2015 has been further extended **upto 31st August 2015**. The dealers shall make use of this extended time facility for Revision option to make any corrections under ITC Matching Module for the Tax Periods from **May 2014 to January 2015.**

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KSCAA WELCOMES NEW MEMBERS - AUGUST 2015

	Name	Place
1	Alok Kumar Das	Bangalore
2	Nagaraj Mutt Rachaiah	Bangalore
3	Kuber V. Hundekar	Bangalore
4	Harsha S. Patel	Bangalore
5	Nandisha S.	Bangalore

Recent Decisions of the Income Tax Appellate Tribunal

CA. K.S. Satish, *Mysore*

CHARITABLE TRUST

The Chennai 'B' Bench has in Maha Avatar Trust v. ITO (2015) 152 ITD 31 (Chn) held that when the objects of the charitable trust and genuineness of its activities are not questioned, registration under section 12AA cannot be refused by the Commissioner on the ground that the trust had not carried out any charitable activities.

SECTION 14A

Where the assessee had not earned or received exempt income during the relevant previous year, section 14A was not applicable and, therefore, disallowance of expenditure could not be made thereunder ruled the Chennai 'B' Bench in ACIT v. M. Baskaran (2015) 152 ITD 844 (Chn).

REVENUE EXPENDITURE

In ACIT v. Shimoga District Milk Producers Societies (2015) 152 ITD 882 (Bang) where the assessee-society engaged in manufacturing and marketing of milk products gave grants to various milk producer co-operative societies to construct their own buildings for purposes of collecting and testing milk, the Bangalore 'B' Bench expressed the view that the said expenditure constituted revenue expenditure since it did not bring into existence any capital asset to the assessee-society and the milk collected being handed over to the assessee-society helped it to carry on its business more efficiently.

ESTIMATION OF INCOME

Where the assessee could have manufactured a maximum of 22,50,000 bricks as per the total capacity of the kiln and the assessee had shown production of 22,40,000 bricks, estimation of the bricks manufactured at 35,00,000 without bringing on record any material to substantiate suppression of sales by the assessee was very excessive opined the Jodhpur Bench in ITO v. Bharat Int Udyog (2015) 152 ITD 85 (Jodh).

CAPITAL GAINS

The Pune 'B' Bench has in Subhash Vinayak Supnekar (2015) 152 ITD 389 (Pune) held that the assessee who invested a part of the advance money received on an agreement to sell his property in Bonds of Rural Electrification Corporation Ltd. before the date of sale was entitled to the exemption under section 54EC in respect of such investment.

SET OFF OF LOSSES

In Clariant Chemicals (I) Ltd. v. Addl. CIT (2015) 152 ITD 191 (Mum), the Mumbai 'C' Bench has taken the view that section 74 cannot be read or interpreted so as to give the benefit of set off and carry forward of losses under the head 'capital gains' in the case of amalgamation and demerger in the absence of any specific provision therein.

CHAPTER VI-A

The Bangalore 'B' Bench has in ACIT v. Subhash Kabini Power Corporation Ltd. (2015) 152 ITD 150 (Bang) held that the unabsorbed depreciation relating to the eligible power generation unit carried forward from the earlier years had to be set off first against the income of the assessee from the said eligible unit for the relevant year for the purpose of computation of deduction under section 80-IA.

PENALTY

Where the assessee, after a survey in his business premises, filed a revised return of income admitting an additional income towards commission received in cash, the revised return could not be termed as a voluntary return and the assessee was liable to penalty under section 271(1)(c) for concealing the particulars of his income opined the Mumbai 'E' Bench in ACIT v. Suryaprakash Agarwal (2015) 152 ITD 578 (Mum).

TAX DEDUCTION AT SOURCE

In ADIT v. Sunit Gupta (2015) 152 ITD 533 (Jp) where the assessee paid commission on export sales to non-residents in foreign currency outside India for services rendered by them outside India and the non-residents did not have permanent establishment in India, the Jaipur Bench held that no income had accrued or arisen to the non-residents under section 9 in India and, therefore, the assessee was not liable to deduct tax at source under section 195 on the commission paid.

WEALTH TAX

The Mumbai 'I' Bench has in S.T. Holding (P) Ltd. v. ACWT (2015) 152 ITD 837 (Mum) opined that as the security deposit received from a tenant resulted in a corresponding asset to the landlord, it is not a debt owed under section 2(m).

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Directors 'Personal Guarantee' and Their 'Unlimited Liability' under Companies Act

CS. Gopichand Rohra, *FCS* **& CA. S. Prabhudev Aradhya,** *FCA, LLB, DBA, DISA*

1. Background:

Generally, the FIs/Banks sanction term loan or any loan against the security of the Assets of a company. In addition to having a lien over the Primary Security, they have additional legal protection to secure themselves for the loans given by them, in the form of State Finance Corporation Act 1951, Recovery of Debts due to Banks and Financial Institution Act 1993, Securitization and Reconstruction of Financial Assets and Enforcement of Security Act 2002. Importantly, the Companies Act also gives them the benefit of the unlimited liability of the director, if so provided by the Memorandum of a limited liability company.

1.1 The FIs/Banks enjoy the status of State under Article 12 of the Constitution of India. With such status, they owe a sacred duty to the people who borrow, to also care for their welfare. It is the welfare of such people that will contribute to the growth of the national economy. They must always keep in mind, "*Yatha Raja Thatha Praja*" which means "As the King, so the subject". The state should set a model of partnership with the people, on the foundation of mutual trust by discharging its collateral obligations and duties.

1.2 Having said so, it is worthwhile to quote the recent observations of the Honorable High Court of Karnataka:

A Division Bench comprising Justice R Gururajan and Justice Jawad Rahim were dealing with a case in which the Technology Development Board filed an appeal against a firm which had not repaid the loan. The Bench observed: "Corporation is an instrument of the State dealing with public money. The approach must be public-oriented. While a Corporation is expected to act fairly in matter of disbursement of loans, there is a corresponding duty cast upon the borrowers to repay installments in time, unless prevented by insurmountable difficulties."

The court also observed: "regular payment is the rule, while non-payment due to extenuating circumstances is an exception. A Corporation is not supposed to grant loan and then write-off as bad debt and ultimately to go out of business. The loan amount has to be repaid in terms of the schedule as otherwise it will disturb the equilibrium of the financial management of the Corporation." (Source: Sunday Vijay Times dated 5th November 2006 last column page no.2)

2. Personal Guarantee vis-à-vis Tripartite Agreement (Sec.126 of The Contract Act).

All of us know that the personal guarantee of the directors is a collateral agreement and therefore comes within the purview of The Contract Act. It means that a contract of guarantee has, necessarily, to be made out in accordance with the provisions of that Act.

2.1 Section 126 reads: "A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'. The person in respect of whose default the guarantee is given, is called the principal debtor and the person to whom the guarantee is given is called the 'creditor".

From the foregoing definition of 'guarantee' it follows that the 'guarantee' contract is a collateral agreement and there should be co-existence of THREE COLLATERAL AGREEMENTS as between them:

(i) Creditor and the principal debtor: It is the basis and foundation of the tripartite contract entered into between the primary parties namely the creditor and the principal debtor.

(ii) Principal debtor and the surety: This is the contract by which the Principal debtor expressly or impliedly requests the surety to act as surety. However by this consent the principal debtor agrees to indemnify the surety, in case the surety pays to the creditor, in the event of default by the principal debtor.

(iii) Surety and creditor: This is the contract by which the surety guarantees to pay the debt of the principal debtor, in case the principal debtor fails to do so.

The necessity of the tripartite agreement flows from S.127, also which specifies the manner of the consideration to the surety and without such consideration the contract is void.

A contract of guarantee in the form of tripartite agreement conforms to the **Doctrine of Privity.** According to this doctrine, a contract cannot confer any rights on one who is not a party to the contract, even though the very object of the contract may benefit him. In other words a stranger to the contract cannot sue. The leading case on privities of contract is *Dunlop Tyres Co. vs Selfridge & Co. (1915 A C 847).*

It may be summarized that a contract of guarantee invokes three parties, namely – the creditor, the principal debtor and the surety. All the three parties are privy to the contract of guarantee. Their express participation or implied assent to have such a contract (tripartite agreement) must be proved by the person, who wants to rely on it *(H Mohammed*

Khan by LR's and others v Andhra Bank) 1983 Kav 73 & 76. Without tripartite agreement, it is not possible to work out the liabilities of the surety *(Suresh Naraian v Akhanni (1957) BB 256) (Janwatraj V Jethmal. A Raj 343 (1958) 8 Raj 975).* The contract of guarantee, not executed in the tripartite agreement form, within the meaning of S.126, is void.

2.2 Judiciary view on collateral security:

The court views collateral security differently because of Sec.29 of SFC Act, Sec.31 of TP Act, Sec.31 of SFC Act and Sec.29 TP Act, whereby it is felt that the enforcement of a guarantee against the surety is not favoured. We have the historic case of N Narasimahaiah & Ors. V/s Karnataka State Financial Corporation, where the Karnataka High Court by reason of the impugned judgement while upholding the said contention directed:

(i) The impugned orders passed by the Karnataka State Financial Corporation under Sec.29 of the State Financial Corporations Act authorizing its officers to taker possession of the properties of petitioners are quashed.

(ii) The Karnataka State Financial Corporation is directed not to proceed against the property of the surety, mortgaged / hypothecated in its favour, under Sec.29 of the State Financial Corporations Act.

The said order of the Karnataka High Court was challenged in the Supreme Court which dismissed the appeals (Supreme Court Appeal (civil) no. 610-612 of 2004) by the Hon'ble Supreme Court, in KSFC vs N Narasimahaiah and Ors)

2.3 Duties of creditor to surety

The duties of the creditor, though not defined in the Act, have emerged from the judicial pronouncements, obligations, inter-dependent performances, etc.

Briefly, they are :-

(i) to disburse the loan amount strictly in accordance with the terms and conditions laid down in the sanction letter / agreement or hypothecation or mortgage.

(ii) to ensure that the loan is utilized, for the purpose it was given.

(iii) to ensure that the assets purchased out of the loan amount are recorded in the Register of Assets and to ensure the register is periodically shown by the principal debtor.

(iv) to make periodical inspection visits for checking the availability and usage of the hypothecated or mortgaged assets.

(v) to have periodical interaction with the principal debtor in respect of the company's health in general, production, sales, & planned profitability in particular.

(vi) to take appropriate action immediately in the event of default by the principal debtor in the manner as provided in the agreement of hypothecation / mortgage.

(vii) to exercise right of the secured creditor in respect of assets within the reasonable time.

(viii) to sell assets at the proper value, preferably market value, as gross under-value sale of the assets is considered negligence of duty.

to invoke S.29 of **SFC** Act / S.13 of **SARFAESI** ACT 2002, in time if so desired and delay in that action is likely to impair the value of the assets.

2.4 Effect of Impairing of surety's remedies-Negligence–legal connotation:

'Negligence' in law signifies 'coming short of the performance of duty'. Want of attention to what ought to be done or looked after, lack of proper care in doing something, omission to do something which a reasonable person guided upon the considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable person would not do. Negligence is the absence of proper care, caution and diligence of such care, caution and diligence, as under the circumstances reasonable and ordinary prudence would require to be exercised (Aiyar's Concise Law Dictionary).

The following essential ingredients of the negligence flow:-

* there must be a duty to take care.
* there must be failure to perform that duty.

It may not be out of place to state that the non-fulfillment of the terms and conditions / obligations / inter-dependent performances set out in the agreement of hypothecation / mortgage tantamount to negligence of duty, as envisaged in S.139 *of The Contract Act.* For instance, an in-action of the creditor after any default by the principal debtor in terms of agreement of hypothecation / mortgage or an action of the creditor, not keeping in with the letter and spirit of the agreement of hypothecation / mortgage, making omission or commission of any act / duty expected of the creditor, falls within the scope of section 139.

Case study of negligence by the creditor:

In the Debt Recovery Appellate Tribunal at Chennai dated 13.1.2006 No. RA 27/2004 (OA 609/1995: DRT, Bangalore) between M/s.Muraj Enterprises, a partnership firm, Mr.Gerard Devdas, Mr.Jude Devdas, Mrs.M Dorothy (sureties) and Canara Bank & Corporation Bank – consortium (creditors). The creditor had filed a suit against the sureties and others in OS-1111/1991 before the city civil court at Bangalore for recovery of a sum of Rs.42,52,000/- together with interest thereon at the rate of 15½ % per annum, compounded half yearly. After the formation of DRT, the suit was transferred to the DRT, Bangalore and it was taken on file as OA-609/1995 and the sureties resisted the claim of the creditor. But ultimately the OA came to be decreed by order dt.18.8.2003, directing the sureties to pay personally to the creditor back jointly and severally an amount of Rs.42,52,000/- with subsequent interest at 15½% p.a. compounded half yearly from the date of suit till the date of realization less Rs.12.5 lakhs with counter interest at the same rate from the date of sale of the fishing vessel 'Dev Maru' till the date of realization of the debt and the same was under challenge in the appeal. Briefly,

the facts of the case are:- Dev Fisheries Pvt. Ltd. Co. of which the aforesaid individual sureties were directors, obtained loan from the consortium Plaintiff Banks, working capital credit and discounting of bills for acquiring deep sea vessel from M/s. FE Japan & Co. Ltd, Japan. They had hypothecated a vessel 'Dev Maru' in favour of the Plaintiff Banks and furnished the equitable mortgage of immovable property belonging to the firm surety namely Muraj Enterprises and the sureties gave continuing personal guarantee also and pledged their personal shares in the company. The company became commercially insolvent. Therefore, the Plaintiff Banks filed company petition no.113/1989 before the High Court of Karnataka at Bangalore, for winding up of the Company and for appointing Official Liquidator to take charge of the Company's assets including fishing vessel 'Dev Maru'. The Company Court, by its order dated 10.09.1990 appointed Provisional Official Liquidator to take possession of the Vessel 'Dev Maru' and the plaintiff banks were directed to deposit a sum of Rs.50,000/- with the Official Liquidator to meet the expenses of the proceedings. On the report filed by the Official Liquidator the court gave further direction to the Creditor banks to deposit Rs.95,000/- with the Official Liquidator for the purchase of mooring ropes for replacing the damaged mooring ropes. The Official Liquidator was directed to find out the feasibility of selling the ship 'Dev Maru'. On account of unforeseen circumstances beyond his control, the Official Liquidator found it very difficult to manage the property and filed an application to discharges him of the duties assigned to him under the order dated 10.09.1990, and the company court by its order dated 5.7.91 discharged the official liquidator from his duties and responsibilities. In its wisdom the court advised both the parties i.e. the banks and the company to take appropriate action in the matter. Finally, the company was ordered to be wound up by the company court by its order dt. 8.7.1993 and the Official Liquidator were directed to take charge of all the properties and to take all steps to recover the amount due. The Directors of Ports, Trivandrum sold the vessel for Rs.25 lakhs on July 7, 1993 at a scrap value and appropriated Rs.12.5 lakhs towards their dues and remitted Rs.12.5 lakhs to Plaintiff Banks. This amount was remitted to the banks only in the 1998 after nearly five years from the date of the sale of the vessel. The Banks had not taken any action to get the sale money immediately and to give credit towards loan account, even though the very sale value was very low and it was sold as a scrap. It was therefore, argued that the banks had completely failed and neglected to take care of the ship, which was under their care and custody, and thereby caused impairment to the value of the ship, and therefore the sureties were entitled to claim discharge under Ss.139 & 141 of the Contract Act. It was further argued that the combined reading of Ss.139 & 141 would make it clear that the banks were grossly negligent in not having brought the vessel for sale in time and therefore their, remedy to recover the amount from the applicants (sureties) is impaired and the applicants are discharged from their liability. The appeal was allowed and the order and decree dated 18.8.2003 passed by the DRT, Bangalore was set aside and the banks were not entitled to claim any amount from the sureties.

2.5 Effect of Operation of Law on winding up of a Company:

The expression 'operation of law' means by the action or working of law. The following circumstances are, generally hit by 'operation of law'.

(i) The Surety becoming insolvent by due process of law.

(ii) When the enforcement of liability becomes time barred under Limitation Act.

(iii) By invoking S.29 of SFC's Act or S.13 of SRFAESA as the case may be.

(iv) When the principal debtor company is in liquidation

The first and the second circumstances do not require any elaboration.

When the Company goes into Liquidation, the Tripartite status among the Creditor, Debtor and the Surety stands extinguished, thereby making it impossible for the Creditor to proceed against the Surety. For, the default in payment of the dues to the Creditor has not happened; and even if it has happened, the rights of surrogation u/s 140 of The Contracts Act can not be invoked by the Surety against the Debtor, in view of the fact that the Debtor Company is under liquidation

2.6 Personal Guarantee – a void agreement-On the face of it, the agreement of Personal Guarantee is void because of:

2.6.1.Absence of execution of Tripartite Agreement (Sec.126)

This will be situation where a Tripartite Agreement is not at all entered into and hence no contract is available.

2.6.2. Defeating the provisions of any law (Sec.23 (2))

Sub section (2) of S.23 refers to the cases where, there being no express statutory prohibition against a particular type of contract, the nature of the contract is such that it would be against the spirit of a particular law, whether enacted or otherwise.

Under the Companies Act, the liability of the shareholders is limited to the extent of face value and premium amount, if any, of the shares held by them. Most importantly The Companies Act provides for the unlimited liability of the directors under S.322.

Under such situation, the agreement of the Directors Guarantee obtained for the purpose of converting limited liability into unlimited one, is not compatible with the basic structure of the limited liability, envisaged in The Companies Act, thereby the provisions of The Companies Act stand defeated. This makes the contract of guarantee invalid.

2.6.3. Forbidding the surety from exercising his rights under the Act (Sec.28).

Sec.28 states, "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings

in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent".

This section applies to agreements which wholly or partially prohibit the parties from having recourse to Court of Law if, for instance a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, u/s.28 be void.

2.6.4. Creation and registration of a charge in violation of Sec.125 of the Companies Act, on the personal properties of the Directors, which are not owned by the Company.

Sec.125 of the Companies Act, 1956 is reproduced for ready reference:

CERTAIN CHARGES TO BE VOID AGAINST LIQUIDATOR OR CREDITORS UNLESS REGISTERED: (1) subject to the provisions of this part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty days after the date of its creation.

3.0 The Companies Act – Unlimited Liability of Directors (Ss.322, 323 & 427)

3.1 The legal provision for the directors with unlimited liability is available in S.322 of the Companies Act. Sub section (1) of the said section reads: "In a limited company, the liability of the directors or of any directors or manager may, if so provided by the memorandum, be unlimited". Further S.323 of the Companies Act provides the procedure for making the liability of the directors unlimited. It now rests with the creditors to take benefit of such statutory provisions.

When the Company is in liquidation, section 427 relating to the unlimited liability of the directors, operates against any director or manager, whether past or present. Under the provisions of the Act, such director/s or manager shall be required to contribute to the liability of the company in two ways, first as a shareholder of the company and secondly as a director of an unlimited company. However, a past director, if he has ceased to hold office for a year or more before the commencement of the winding up, stands statutorily discharged from any liability to the company. Conversely, a past director within a year of the commencement of winding up, is liable to be roped into the unlimited liability.

3.2 Enforcement of unlimited liability

The unlimited liability of the director may be enforced as and when the default occurs. This practice will check the credibility of the director. This right to enforcement can be exercised by the creditor himself.

Where the company is in liquidation, the liquidator will have the right to enforce the unlimited liability of the past director(s) if any, within one year of the commencement of winding up, when the funds available are not sufficient to meet all the liabilities. The director with the unlimited liability will be required to share the deficiency, if any, equally to discharge all the liabilities of the company.

4. CONCLUSION:

It is time that FIs and Banks realize and recognise the legal infirmities about the need and documentation of the personal guarantees and take a serious view of the remedy provided above. If the FIs/ Banks act fairly as an instrument of the State in matters of disbursement and due performance of their duty, they can surely expect and demand fairness from the borrowers in regular repayment of loans. Fairness is bound to create fairness, even in case of unfairness of the borrowers also. It means when a default in repayment has continued beyond a reasonable time, there should be no hesitation in initiating recovery proceedings. It is timely action by the FCs / Banks that counts fairness.

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Congratulations

CA. N. Nityananda
has been elected to the Managing Committee of FKCCI for the year 2015-16 and has been nominated as the Chairman of the Committee of Central Taxes and Corporate Laws Committee.

Congratulations

CA. Raghavendra Puranik

and

CA. Bhavya Parvathi

on completing LLB Course

Epic Women from Epics

CA. Roopa Venkatesh

Dear Professional Colleagues,

It may seem a trifle strange to see an article on a subject which is not considered "core" to most Chartered Accountants. However, kudos to the team at KSCAA who have decided that while focus on professional subjects is important, it is equally important to widen the canvas, and include other subjects, which touch our lives (in different ways, in different phases). The following will be a series of articles looking at gender issues – diversity, women and Epics. Actually it is about the Epic women from our Epics.

It is true that the Epics – Ramayana and Mahabharata, between them, cover almost every story ever told. It tackles all emotions, all reasons, excuses, imaginations, symbolisms, philosophies and everything else in between. How have women been portrayed in these epics? Have they been relegated to being showpieces? Do they display attributes we can learn from, in today's time and corporate world – that is a question, I strive to answer through these articles. There will be five such articles – each devoted to one epic woman – her role and lessons we can learn.

Women have certain traits which make them great leaders. Though we feel that women at the workplace are quiet, happy to stay in the background, but we know for a fact, that they are still fiercely protective of their own area/ children/ turf.

When you drive a car, it is important to look in the rear view mirror, so also in life, we must look at history, at mythology, at past lessons, to understand what we can learn from there to make our present better, smarter and effective. Today our life is different from the past, but yet the human emotions are still the same. There is intrigue, jealousy, kindness, guilt, desire, ambition etc.

If we look at our mythology, we find that the Ramayana and Mahabharata is full of women – beautiful women, apsaras, powerful women, queens, mothers, wives, rishis etc.

These women stand out for their abilities, attitudes and accomplishments in trying circumstances.

One shining example of this particular trait was KUNTI

Born as Pritha, she was adopted by a relative, a king (king of Kuntibhoja), and was brought up as a princess and rechristened Kunti. The folly of youth spares no one, and she became an unwed mother (thru her own curiousity), and had to give up the child. Of course she was emotionally shattered, but she decided that bringing up the child in the circumstances was not a choice she had, so she did what she had to do, displaying her emotional strength.

When she married Pandu, the scion of the very prestigious family of the Kurus she almost became the queen of Hastinapura, which was a very large and influential kingdom in the whole of Aryavarta (The texts refer to Aryavarta as all those regions between the current Baluchistan, undivided India and certain parts of Far East Asia – Kamboja etc)

However, because of her husband's decision she had to live in the forest. She had 3 children and agreed to bring up the 2 children (twins) of the other wife of her husband Pandu. On the death of Pandu, she came to Hastinapura to claim the throne for her eldest son – Yudhistira. She was a brave woman. She came to her married home, knowing fully well that the paternity of the children will be challenged, her name maligned, and people will snigger behind her back. Yet imagine the kind of focus she had …….she was determined that her children should be brought up in the royal household, as princes should. She cared little for herself, but she wanted to secure the future of her sons.

She knew of the rivalry between the cousins – the sons of Dhritarashtra (Pandu's brother) and her sons. However, she was forever working out ways to ensure harmony in the household. As a royal, she knew that broken homes can only fan fury and jealousy.

She insisted on trying to keep relationships and values intact – instilling a sense of value of respect for elders amongst her sons. She always ensured that her children pay respect to the elders in the family – however badly they might treat them.

She could have insisted that as they were the rightful heirs to the throne they should get their due, yet she decided to time her demand. Neither did she give up her demand – she ensured that her children did not just give up – as Yudhistira wanted to do many a time…..instilling a sense of purpose in her sons at the same time giving them a responsibility to do things without hurting relationships as far as possible. She was the knave of the Pandava wheel. She kept them all together, moving towards a purpose, but without bitterness and rancour, nor martyred emotions.

She is constantly with them, encouraging them to do good, reminding them of their kingly duties of sacrifice and war, of fighting on behalf of the weak and powerless, yet being humble enough to accept advice from whichever quarter it came. All her children were different – each with unique skills and strengths – she always ensured that each of them got their due recognition and was trained in the skill they naturally possessed. However, she also ensured that as royals they had the basic training in warfare, defence and use of arms.

The Eldest –Yudhistira, was a gentle soul, forgiving to a fault, almost saintly, with a great sense of fairness. But he was destined to be king. She kept the purpose alive in him and pushed and prodded when necessary to ensure that he did not forsake his duty to his country or his brothers. She also ensured that he got the necessary training in the Dharma Shastras, participated in debates of right and wrong.

Bheema—powerful, simple, easy to anger and appease, she ensured that he was kept in good humor and that the respect for the older brother was kept intact, else she knew that his power and anger, could easily overtake everything else. Bheema was constantly challenged to bouts of wrestling and Kunti even engaged Balarama, the most well known trainer of wrestling (mull vidya), to be his trainer.

Arjuna – brave, crafty, skilful archer and slightly vain, she was aware of his faults as well. She made allowances for his transgressions, but ensured that Bheema used his "big brother" attitude on him to keep him in check. She knew he was competitive and slightly insecure, but she kept her advice with Guru Dronacharya to keep Arjuna on his feet.

Nakula – simple, gentle and non ambitious, Kunti had a rough time, ensuring that he was motivated to stay the course. And she also had to ensure that though the twins were not her own children, they never felt uncared for (Kunti indeed had her hands full). She sensed Nakula's ability to work with animals and ensured that he spent a lot of time in the stables caring for breeding horses procured all the way from Madra (Baluchistan)

Sahadeva – a gentle, melancholy soothsayer he was. With an ability to see into the future, Kunti had to ensure that this was not used by the other brothers as an excuse to not take action, nor as a basis for decisions. Though not portrayed so much, I personally think this was really a great point. Do we all not wish for the desire to see the future, when we are in a big dilemma? To resist the temptation to rush to the " in house Nostradamus" must have taken some effort.

And most importantly, Kunti knew when to give up – once the daughter-in-law – Draupadi comes into the lives of her sons, she slowly moves to the background – available for advice, yet not forcing her decision on any one.

She is so focussed on ensuring that the focus of her sons does not waver. When war is announced and she knows that her first born child (the one she abandoned) – Karna will be fighting and possibly killing one her other sons – she goes and extracts a terrible promise.

She is diabolical. She is a master of human nature -- she knows that the knowledge that Karna is her own son, will weaken the resolve of Karna – defeating him emotionally even before the war. But smartly, she does not share this terrible secret with her own sons – the Pandavas. The Pandavas fight with Karna as an enemy not as an older brother. Thus they are not emotionally handicapped, but he is.

Kunti is a woman who lives life on her own terms. Once the war is over, she retires to the forest, along with Dhritarashtra and Gandhari – the brother-in-law and sister-in-law whose children were the cause of the humiliation, the suffering, war and destruction and death.

Is it not a lesson that we must hate the sin, not the sinner?

Kunti comes across as a leader with a leadership style which is subdued, advisory, behind-the-scenes and very factual (not emotional). She is focussed on results with values. She is politically wise and very savvy with royal politics. She knows the value of networking with power and the powerful. She is a great student of human nature and is able to exploit the same to benefit. But she is unattached to any material or emotion. She is able to give up all trappings of royalty. She does not gloat on her son's success, but grieves with those who lost all their children (Gandhari). She is humane too. She is truly an EPIC Woman.

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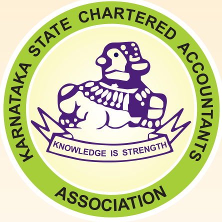

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- KSCAA shall be the trusted and value based knowledge organisation providing leadership and timely influence to support the functional breadth and technical depth of every member of CA profession;
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- KSCAA shall in the public interest, be a proactive catalyst, offering a reliable and respected source of public statement and comments to induce effective laws and good governance;
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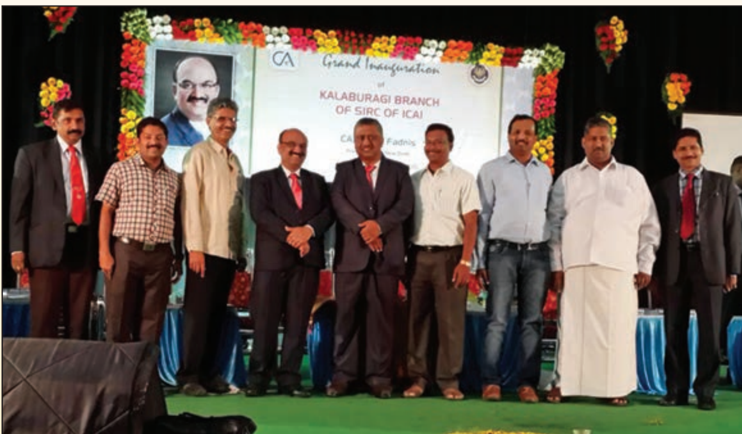

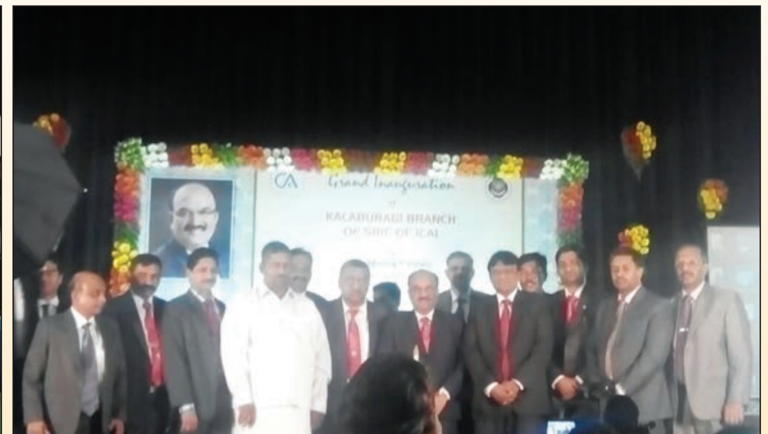

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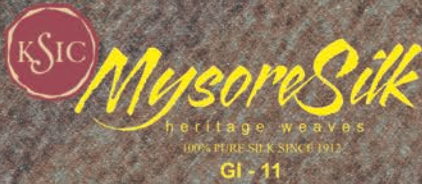

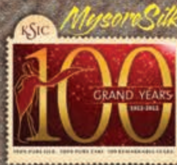

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