

Important issues in Tax Audit

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What is the objective of Tax Audit?

Examination or review of accounts of any business or profession carried out by taxpayers



To ensure correctness of implementation and proper compliance of tax provisions envisaged under the Act



Enables the tax authority for verification and assessments

Our Responsibility

To express an opinion on the financial statements based on the audit conducted in accordance with the Standards issued by ICAI

Obtaining sufficient and appropriate audit evidence

To verify the statement of particulars required to be filed under Sec 44AB

- Form No 3CD has a significant impact in the affairs of a taxpayer
- It is a certification that tax provisions have been complied with
- It covers wide range of compliances under its scope, from disallowances to transfer pricing adjustments
- The Department relies upon the details in Form No. 3CD to perform assessment or initiate proceedings under the Act

Turnover	Applicability
Turnover > 5 Cr	Assessee is required to get his accounts audited as per section 44AB
1 Cr <=Turnover <= 5 Cr	Not Applicable in case when cash receipt and payment made during the year does not exceed 5% of total receipt or payment including amount received for sales, turnover or gross receipt during PY and amount paid for expenditure during PY, as the case may be
Turnover <=1 Cr	Section 44AD will applicable only if assessee once declared income as per 44AD and wants to declare income less than 8%/6% of turnover and a period of 5 years has not elapsed from when he first opted for 44AD and his income exceeds max. amount not chargeable to tax

If opting for presumptive scheme

- **Claim** presumptive scheme
- if in any year profits shown as per regular business (**before the end of 5 years of opting for presumptive scheme**) **presumptive benefits will not be available for the subsequent 5 years.**

Turnover (44AB/44AD) - Business

Less than 1Cr

44AB is Not Applicable

If after opting for 44AD, assessee declares income as per regular business

Then, for subsequent 5 years

If total Income exceeds maximum amount chargeable to tax

44AB will apply

More than 1Cr

Between 1 Cr to 2 Cr

Option to opt for 44AB or 44AD

Between 1 Cr to 5 Cr

Not Applicable in case when cash receipt and payment made during the year does not exceed 5% of total receipt or payment including amount received for sales, turnover or gross receipt during PY and amount paid for expenditure during PY, as the case may be

> 5Cr

44AB will apply

Gross Receipts (44AB/44ADA) - Professionals

Less than 50 lakhs

44ADA - Presumption

But if income declared, lower than 50% **“and”** total Income exceeds maximum amount not chargeable to tax

44AB will apply

More than 50 lakhs

44AB will apply

Interpretation of 5% of Total Receipts or Payments

- The 5% limit of cash receipts should be seen as a percentage of Total income during the year.
- Basically, all the cash receipts during the year should not exceed 5% of the income to be eligible for 5 crore tax audit limit.
- The 5% limit of cash payments should be seen as a percentage of Total expenditure incurred during the year.
- Basically, all the cash payment made during the year should not exceed 5% of the expenses that have been incurred during the year to be eligible for 5 crore tax audit limit.

Section 44AD: Computation of Income on Presumptive Basis

- For the purpose of this section, Eligible Assessee is a Resident Individual, Resident HUF or a Resident Partnership Firm.
- Eligible Business- The assessee should be engaged in any business (whether it is retail or wholesale or construction or any other business).
- Eligible Business does not include:
 - i. Business of Plying, hiring or leasing of goods carriages covered u/s 44AE
 - ii. Any profession referred to u/s 44ADA
 - iii. Commission or Brokerage
 - iv. Agency Business
 - v. Turnover more than 2 crores
- Income shall be computed on the following basis:
 - i. 6% of the Turnover received by account payee cheque/ bank draft or ECS during the PY or before the due date of filing the return of income
 - ii. 8% of the turnover not covered above in (a) above

How to calculate Gross Receipt or Turnover?

- As per 'Guidance Note on Terms Used in Financial Statement' published by the ICAI, the meaning of 'Turnover' shall be the aggregate amount for which sales are effected by an enterprise.
- In case of professionals "Gross receipts" include all receipts arising from carrying on a profession. If a professional collects out of pocket expenses separately, they shall not form part of gross receipts. However if these expenses are recovered collectively by way of consolidated fees, the whole amount would form part of gross receipts.
- Also, advance received for services which are yet to be rendered shall not form part of the gross receipts till the services are rendered.
- In case of Agents, Turnover shall include amount earned as commission.

How to calculate Gross Receipt or Turnover?

- If sales tax and excise duty are included in the sale price, no adjustment in respect thereof should be made for considering the quantum of turnover. Trade discounts can be deducted from sales but not the commission allowed to third parties.
- Discount allowed in the sales invoice will reduce the sale price and, therefore, the same can be deducted from the turnover.
- Cash discount otherwise than that allowed in a cash memo/sales invoice is in the nature of a financing charge and is not related to turnover. The same should not be deducted from the figure of turnover.
- Sale proceeds of fixed assets would not form part of turnover since these are not held for resale.

How to calculate Gross Receipt or Turnover?

- Turnover discount is normally allowed to a customer if the sales made to him exceed a particular quantity. This being dependent on the turnover, as per trade practice, it is in the nature of trade discount and should be deducted from the figure of turnover even if the same is allowed at periodical intervals by separate credit notes.
- Special rebate allowed to a customer can be deducted from the sales if it is in the nature of trade discount. If it is in the nature of commission on sales, the same cannot be deducted from the figure of turnover.
- Price of goods returned should be deducted from the figure of turnover even if the returns are from the sales made in the earlier year/s.
- Sale proceeds of property held as investment property will not form part of turnover.
- Sale proceeds of any shares, securities, debentures, etc., held as investment will not form part of turnover. However if the shares, securities, debentures etc., are held as stock-in-trade, the sale proceeds thereof will form part of turnover.

Gross Receipt or Turnover in respect of transactions in shares, securities and derivatives?

- **Speculative transaction**: In a speculative transaction, the contract for sale or purchase which is entered into is not completed by giving or receiving delivery so as to result in the sale as per value of contract note.
- In the case of an assessee undertaking speculative transactions there can be both positive and negative differences arising by settlement of various such contracts during the year.
- Accordingly, the aggregate of both positive and negative differences is to be considered as the turnover.

- **Derivatives, futures and options**: These are also squared up by payment of differences.
- The turnover in such types of transactions is to be determined as follows:
 - (i) The total of favourable and unfavourable differences shall be taken as turnover.
 - (ii) Premium received on sale of options is also to be included in turnover.
 - (iii) In respect of any reverse trades entered, the difference thereon, should also form part of the turnover.

- **Delivery based transactions**: The total value of sales is to be considered as Turnover.

Code of Ethics and Eligibility

- Tax Auditor is required to Communicate with the previous **Tax Auditor**
- No need to Communicate with Statutory Auditor
- A person is disqualified u/s. 288 from being appointment as a auditor if he or his relative is :
 - indebted to the Assessee. (*Relative may be indebted up to Rs.1,00,000/-*)
 - Holds security (*Relative can hold up to Rs.1,00,000/-*)
 - gives guarantee on behalf of third person (*Relative can give guarantee up to Rs.1,00,000/-*)

Ceiling Limit in tax Audit

- **Councils General Guidelines 2008:**
 - A CA not to accept more than 60 tax audit in a FY.
 - Date of Audit Report not relevant. Date of acceptance is relevant.
- **Limit reckoned qua CA**
 - Proprietor can perform 60 Audits.
 - Each partner of the Firm can perform 60 Audits.
 - Audits signed as Proprietor and also as partner not to exceeds 60 per member
- **Enforcement of Limit be strengthened for quality control**

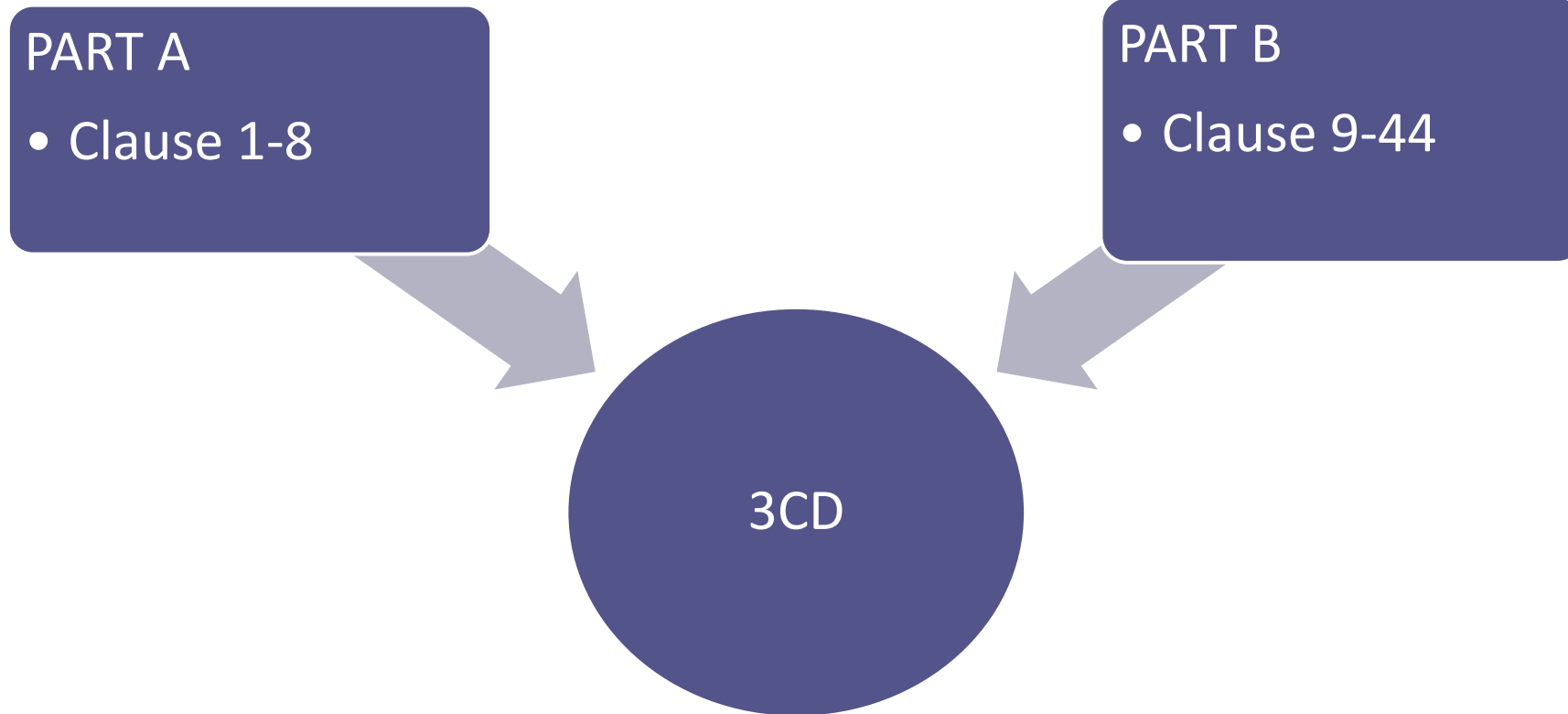
- **Accounts “not Audited” under any other law.**

- Entire audit to be conducted
- Audited Balance Sheet be annexed with Audit Report in 3CB/3CD.

- **Accounts “Audited” under any other law.**

- Only particulars in Form 3CA/3CD to be certified.
- Reliance to be placed on report of Statutory Auditor
 - (SA 600 - Using the work of another auditor).
- Co-relation of particulars given in Form 3CD with disclosures in Financial Statement (e.g. AS 18-Related Party Disclosure, CARO report, etc.)
- Auditor to note conflicting AS- ICD’S

Form 3CD - Overview





**IMPORTANT CLAUSE
TAX AUDIT FORM 3 CD**

Clause 16

Amounts not credited to the profit and loss account, being, -

- a) Items falling within the scope of Sec 28;
- b) Proforma credits, drawbacks, refund of duty of customs or excise or service tax, or refund of sales tax or value added tax where such credits, drawbacks or refunds are admitted as due by the authorities concerned;
- c) Escalation claims accepted during the PY;
- d) Any other item of income;
- e) Capital receipt, if any

- Clause 16(b) will include undisputed credits only from GST, CED, VAT and Service Tax.
- What if Assessee follows cash system of accounting:
 - If cash system is followed
 - the amount is admitted in the previous year and not credited in current year
 - Then, no reporting is to be allowed under this clause

Clause 17

Where any land or building or both is transferred during the PY for a consideration less than value adopted or assessed or assessable by any authority of State Government for the purpose of stamp duty, as per Sec 43CA or 50C

➤ Details of property - Consideration received or accrued - Value adopted/assessed/assessable

- Applicable to all types of assesses.
 - Land or Building or both is **transferred**
 - For a consideration **less than value adopted or assessed or assessable** by any authority of a State Government referred to in section 43CA or 50C.
 - The Auditor is required to in the Tax Audit Report under **Clause 17**
- Transfer of asset held **as stock in Trade** – Section 43CA
- Transfer of **Capital Asset**- Section 50C
 - Auditor is required to apply **Professional Judgment** as to what constitutes capital Assets u/s. 50C

- **In CIT v/s Greenfield Hotels and Estates Private Limited (Mumbai tribunal)**, the Tribunal was of the opinion that Section 50C of the Act would be not applicable to transfer of leasehold rights in land and buildings.
- **The Tribunal followed its decision in Atul G. Puranik vs. ITO (ITA No.3051/Mum/2010) decided on 13 May 2011** which held that **Section 50C is not applicable** while computing capital gains on transfer of leasehold rights in land and buildings
- **In Farid Gulmohamed v/s ITO(ITAT Mumbai)**, the **ITAT** was of the opinion that Section 50C does not apply to transfer of leasehold rights in land.

Clause 18

Particulars of depreciation allowable as per the Act in respect of each asset or block of assets

Whether Depreciation is eligible where a vehicle is registered in the name of a Director, however it is in possession of company?

The Hon'ble Supreme Court in *Mysore Minerals Ltd Vs. CIT(239ITR775)* held that the terms "own", "ownership" and "owned" are generic and relative terms. The term "owned" as occurring in section 32(1) of the Act must be assigned a wider meaning. Anyone in possession of property in his own title exercising such dominion over the property as would enable others being excluded there from and having the right to use and occupy the property and/or to enjoy it in his own right would be the owner though a formal deed of title may not have been executed and registered as contemplated by the Transfer of Property Act, the Registration Act, etc.

Whether Depreciation is available for the period for which the plant was not in use?

In *Swati Synthetics Case (38 SOT 208)*, it is held that condition of "use" is relevant only in which asset is purchased, thereafter it forms part of block and is passively used even if the plant is closed. Therefore depreciation is allowable in case of a closed unit too.

Computer Software: Whether Asset?

Special Bench in case of *Amway India Enterprises vs. Dy. CIT 111 ITD 112 (Del)* has laid down 3 tests to be applied to determine whether expenditure is capital or revenue i.e. Test of enduring benefit, ownership test, functional test

Routers and switches should be classified as part of computers and be eligible for 40% depreciation.

Depreciation on Intangible Assets:-

- Goodwill- ***SMIFS SECURITIES Ltd. (Supreme Court)***
- Skill and Knowhow of Labour- ***BOSCH LTD v. CIT(2009-TIOL-736-ITAT-BANG)***
- Brand Name- ***Raveendran Pillai 332 ITR 549 (Kerala HC)***
- Non Compete- ***Medicorp Tech. 21 DTR 69***
- Marketing and Commercial Rights- ***Skyline Caterers (20 SOT 266)***

Clause 19

Amounts admissible under sections 32AC to 35E

- Amount Debited to P&L
- Amount admissible as per provisions

Section 32AD: Investment in new plant or machinery in notified backward areas in certain areas

Conditions for Deductions

Deduction is available in the year in which the asset is installed

What if Asset is acquired during the year, but installed in subsequent year?

The Deduction will be allowed in the year in which the asset is installed. Asset should be acquired and installed during “01.04.2015 to 31.03.2020”

- Both acquisition and installation
- Should be within this period

Audit Considerations

- The Auditor should verify list of plant and machinery installed
- Confirm that whether it falls under the definition of New Plant & machinery
- Compute the amount of Eligible deduction u/s. 32AD

Clause 20

- Any sum paid to an employee as bonus or commission for services rendered, where such sum was otherwise payable to him as profits or dividend [Sec 36(1)(ii)]
- Details of contributions received from employees for various funds [Sec 36(1)(va)]

Tribunal in Dalal Broacha Stock Broking Pvt Ltd, Mumbai SPL Bench, 131 ITD 36

- Word “payable” does not mean that dividend should be statutorily or legally payable
- Payment of dividend is discretionary and not compulsory
- No evidence to show that the directors had rendered any extra services for payment of huge commission.
- Thus, assessee has intention to avoid payment of full taxes

Clause 21 (a)

Details of amounts debited to the profit and loss account, being in the nature of

- Capital expenditure
- Personal expenditure
- Advertisement expenditure in any souvenir, brochure, pamphlet, etc . published by a political party
- Club entrance fees and subscriptions
- Cost for club services and facilities used
- Penalty or fine for violation of any law for the time being force
- Any other penalty or fine not covered above
- Expenditure incurred for any purpose which is an offence or which is prohibited by law e.g. Bribes, Smuggling expenses etc.

Amount debited to P & L account being in the nature of capital and personal expenditure.

What if the **expenditure are club expenses** – whether disallowed u/s. 37

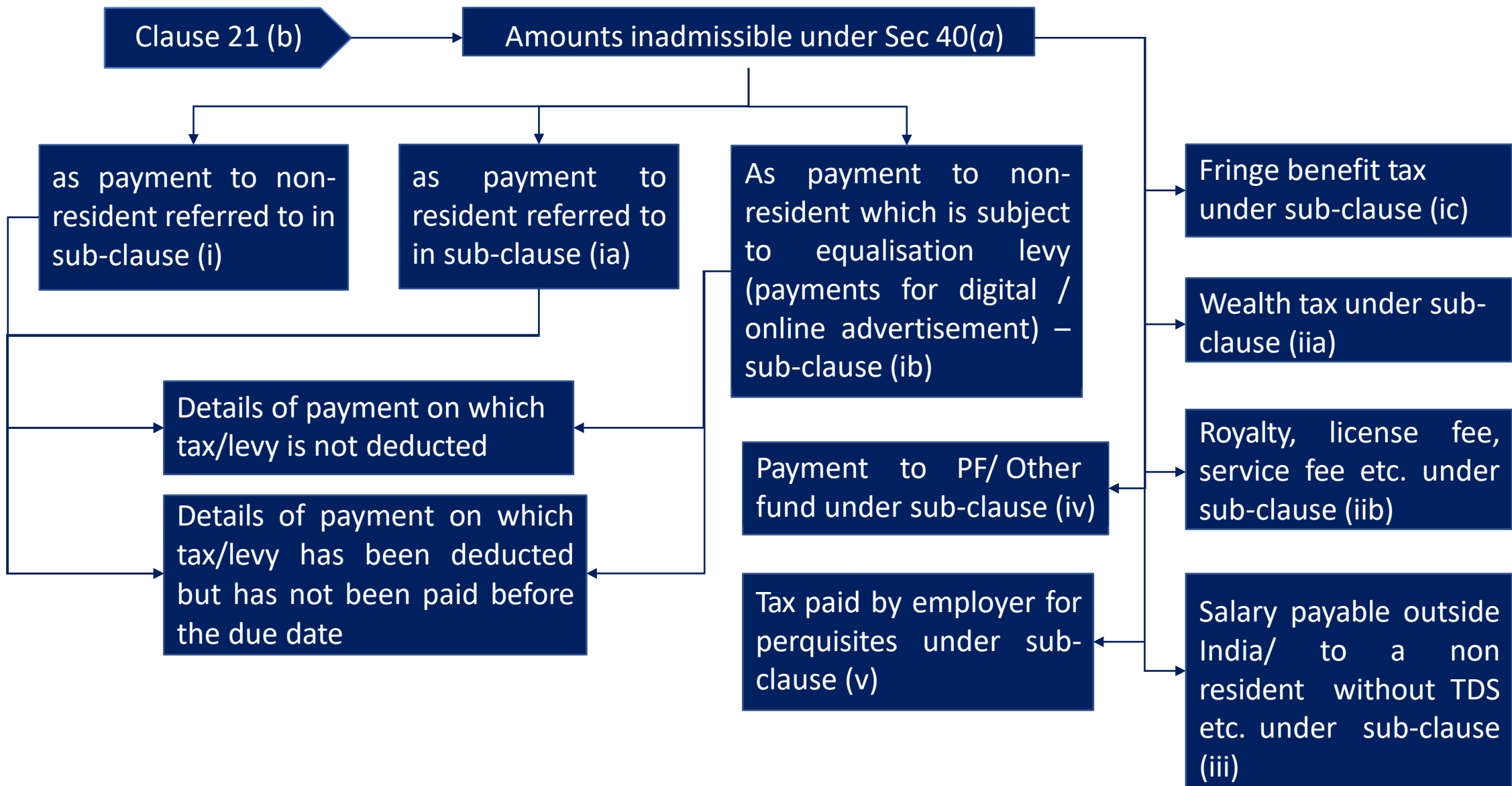
- Expenditure incurred at clubs **being entrance fees and subscriptions**
- Expenditure incurred at clubs being **cost of club services and facilities used**

Mumbai Tribunal in M/s. Vesuvius India Ltd, ITA No. 2127/kol/2013 held that the membership fees paid is representing corporate membership. The membership was taken as a corporate member. Thus, Expenditure is incurred exclusively for the purpose of business. – **allowed in favour of Assessee**

What if penalty is paid by stock broker to Stock exchange?

Tribunal in case of ACIT v/s. M/s. Arihant Capital Markets Ltd held that

- The payment of penalty made by the assessee to the Stock Exchange is a regular business expenditure
- Impugned disallowance has rightly been deleted by the learned Commissioner of Income Tax (Appeals)



Section 40(a)(ia) r.w.s. 201(1)– Clause 21

- If Assessee fails to deduct TDS, the expenses shall be disallowed and he shall be treated as Assessee in default.
- *What if payer has taken such income while Computing total Income and has paid tax thereon?*
- Thus, if Assessee complies with section 201(1), then
 - He shall not be treated as Assessee in default
 - Thus, expenses will be allowed as deduction in Computing the income

- **Conditions as per section 201(1)**

Assessee shall not be treated as Assessee in default if Payee

- has furnished return of Income
- has taken such Income for Computing income
- has paid tax due on such income

Assessee is required to furnish a certificate from accountant in Form 26A

Assessee has to pay interest @1% for month or a part of month (from the date when it was deductible till the date of furnishing return by payee)

- **CIT v. Ansal Land mark township. (P.) ltd, [2015] taxmann.com 45 – TDS shall be deemed to be deducted if payer has disclosed the income**

Clause 21 (h)

Amount of deduction inadmissible in terms of Sec 14A

Section 14A: Expenditure incurred in relation to income not includible in total income

- Satisfaction of assessing officer must as to correctness of claim of assessee
- No disallowance of interest where sufficient own funds & non-interest bearing funds are available – Investments made from own funds. Interest attributable to borrowings relatable to taxable income to be excluded.
- Net interest to be considered for disallowance under rule 8D
- Investments from which no exempt income has been earned should be excluded while computing disallowance as per Rule 8D
- No disallowance can be made if no exempt income earned /Disallowance cannot exceed exempt income of the relevant year

Clause 26

Any sum referred to in Sec 43B (deduction only on actual payment)*, the liability for which:

pre-existed on the first day of the PY but was not allowed in the assessment of any preceding PY and was:

paid during the PY

not paid during the PY

was incurred in the PY and was:

paid on or before the due date for furnishing the return of income of the PY under Sec 139(1)

not paid on or before the aforesaid date

State whether sales tax, customs duty, excise duty or any other indirect tax, levy, cess, impost, etc., is passed through P&L a/c

* Certain Deductions to be allowed only on actual Payment

- a) Payable by way of tax, Cess, duty or fee
- b) Payable by the assessee as employer i.e. Contribution to PF, Superannuation, Gratuity fund or any other fund
- c) Sum referred in 36(i)(ii)
- d) Payable as interest on loan/borrowing from PFI/state financial corporation
- e) Payable as Interest to Scheduled bank
- f) Payable as employer in lieu of salary
- g) Payable to Indian railways

Explanation

Sum payable to Indian railways for use of railway assets is to be reported under this clause and will be disallowed u/s 43B if not paid up to the date of filing return.

Payment for the use of asset is considered.

What if rail freight is paid to Indian Railways?

- Freight is for service of transport and not for “Use of Asset”
- Payments for the **use of railway assets** would not include basic rail freight

What if payment is made for Advertisement?

- Payment made by:
 - Advertisement Agency - Considered as Use of Asset
 - Advertiser - Considered as payment for the services

Excess payments of GST lying in Electronic Cash Ledger

Whether can be claimed as deductible u/s 43B?

Amount deposited in the ECL although not adjusted against the Tax Liability and lying as a Balance as at 31.03.2019 amounts to payments of tax.

Whether it can be claimed as deduction u/s. 43B?

The above Issue arose during the excise regime. Hon'ble ITAT in case of *M/s. Modipon Ltd vs ITO*, New Delhi held that Assessee has claimed unutilized balance in Cenvat Credit as an Expenditure. The said balance has been written off in Books. There is no hope for recovery of above amount.

Thus, the unutilized balance is allowed as a deduction. In case, refund is received it shall be accounted as taxable income.

Clause 29

- Whether during the PY the assessee received any consideration for issue of shares which exceeds the fair market value of the shares as referred to in Sec 56(2)(viib) – Yes/No
- If yes, Details to be furnished

Applicability of Sec 56(2)(viib)

Company – Public are substantially interested

- Public limited Company – Listed
- Public Limited Company which is subsidiary of Listed Public Ltd Company.
2(18)(b)(B)
- Private Limited Company which is subsidiary of Listed Public Ltd Company.
- Public Limited Company – Not listed

Sec 56(2)(viib): Exemptions

Investor being

- Non resident investor

If investee is VCU then investor being;

- Venture Capital Fund
- Venture Capital Company
- Alternative investment Fund- Cat 1/Cat 2/ ~~cat 3~~

Investee being;

- Start Up Companies – If recognised by DIP.

56(2)(viib) – Rule 11U & 11UA

- Valuation report to be issued by merchant banker
- Permitted methods – Adjusted book value /Discounted cash flow
- Can Assessing officer challenge Valuation report?
Cinesttan Entertainment (P) Ltd , Delhi ITAT, 106 taxmann.com 300
- What if projections not achieved?
Rameshwaram Strong Glass (P.) Ltd., JP ITAT ,96 taxmann.com 542
- Buyback of shares covered?
Vora Financial Services P. Ltd., Mum ITAT, ITA No. 532/Mum/2018

Clause 29A

- Whether any amount is to be included as income chargeable under the head 'income from other sources' as referred to in clause (ix) of sub-section (2) of Sec 56 – Yes/No
- If yes, details to be furnished – Nature of Income and Amount

Section 56(2)(ix)

- Any sum of money received as an advance in course of negotiation for transfer of Capital asset is **forfeited**, such amount is taxable.

Compliance

- The **reporting arises only on forfeiture** i.e. advance received and is outstanding, then there is no reporting.
- Advance towards **sale of stock in trade not required to be reported**

Reporting Requirement

Reporting not required if:

It is in respect of personal capital asset where, neither asset, nor advance nor forfeiture is recorded In Books of accounts of business.

However, if personal capital asset are recorded in Books of Accounts of business. Then, on forfeiture – reporting required.

A mere notice of forfeiture may not amount to forfeiture. If no amount is written back by the Assessee, reporting is not required. Thus, reporting is required only in case when the amount is written back in books of account.

Audit Considerations

The Auditor should refer to the terms of the contract. If Contract contains right to forfeit on **some conditions**

- Conditions not occurred - No reporting
- Condition occurred - Reporting required

What if Assessee contends that the amount has not been forfeited?

- Auditor to look at totality of development
- Obtain Management representation – “even though contract permits forfeiture on some conditions and conditions have occurred, but the Assessee has not forfeited any amount”

What if assessee has forfeited the amount without right to forfeit and there is no action by the other party

- Such amount forfeited will become **income** of the Assessee.

Disclosure

- Nature of Income
- Amount thereof

Clause 29B

- Whether any amount is to be included as income chargeable under the head 'income from other sources' as referred to in clause (x) of sub-section (2) of Sec 56 – Yes/No
- If yes, details to be furnished – Nature of Income and Amount

Section 56(2)(x): Where a person receives

- Any sum of money which exceeds Rs.50,000/- without consideration
- Any immovable property

Without Consideration	Stamp duty value > 50,000/- <ul style="list-style-type: none">• The Stamp duty value is chargeable to tax
With Consideration	Consideration < Stamp duty value <ul style="list-style-type: none">• The difference amount is Chargeable to tax in case it exceeds 50000/-

- Property other than Immovable property

Without Consideration	Fair market value > 50,000/- <ul style="list-style-type: none">• FMV of such property is chargeable to tax
With Consideration	Fair market value > Consideration <ul style="list-style-type: none">• FMV shall be chargeable to tax

- From **AY 2019-20, in case of Immovable property**
 - Where Stamp duty value is **up to 105% of Consideration**
 - **No addition** can be made hence no reporting may be required

DETERMINATION OF FMV

In case of immovable property

- FMV is to be determined as per the valuation Report.

What if assessee has disputed the stamp duty value before the stamp authorities?

The tax auditor should state such fact –

“the stamp duty value adopted by the stamp authorities as well as the stamp duty value claimed by the Assessee to be the correct value in such dispute.

- In case of Other assets:
 - In case of Shares and Securities: Value determined as per Rule 11U and 11UA
 - FMV of quoted shares is determined as follows:

If shares are received	Transaction Value
- By transaction through Recognized Stock Exchange	FMV of such shares/securities
- By transaction other than through Recognized Stock Exchange	Lowest price of shares on RSE - on date immediately preceding date the valuation date (when such shares are traded on Stock exchange)

- FMV of un-quoted shares is determined as follows:
 - $(A+B+C+D-L) * (PV)/(PE)$

A	All asset	Book value as reduced by <ul style="list-style-type: none"> • Income tax paid - income tax refund claimed
B	jewelry, artistic work -	Price that such asset will fetch <ul style="list-style-type: none"> • If sold in the open market
C	Shares and securities <ul style="list-style-type: none"> • Company not listed on RSE 	Price that it will fetch <ul style="list-style-type: none"> • If sold in the open market • $(A-L)/(PE)*(PV)$ <p>A= Book Value of asset L= Book Value of liabilities PE= amount of paid up Equity Capital PV= paid up value of equity shares</p>
D	Immovable property	Value assessed/adopted for payment of Stamp Duty
L	Liabilities	Book Value of liabilities

In case of dispute, it is advisable to:

- Obtain Valuation report from registered value
- The report of tax auditor may then be based on such Valuation report.

Clause 30A

- Whether primary adjustment to transfer price, as referred to in sub-section 1) of Sec 92CE, has been made during the PY – Yes/No
- If yes, following details to be furnished:—
 - Clause of sub-section (1) under which of Sec 92CE primary adjustment is made
 - Amount (in Rs.) of primary adjustment
 - Whether the excess money available with the associated enterprise is required to be repatriated to India as per the provisions of sub-section (2) of Sec 92CE - Yes/No
 - If yes, whether the excess money has been repatriated within the prescribed time Yes/No
 - If no, the amount (in Rs.) of imputed interest income on such excess money which has not been repatriated within the prescribed time

Section 92CE- Concept of Secondary Adjustment in certain cases

- where there has been **any primary transfer pricing adjustments** under various circumstances (viz. suo moto by the assessee, by the assessing officer, as per safe harbour rules, etc.),
- the assessee is required to **make a secondary adjustment** provided:
 - Such primary adjustment is more than 1 crore; and
 - The adjustment pertains to assessment year on or after 1 April 2016
- Secondary Adjustment is not required
 - When primary adjustment related to AY 2016-17 or earlier Assessment years
 - amount of primary adjustment made in any previous year does not exceed Rs. 1 crore.
- **Increase in Income/reduction of loss** due to Primary adjustment
 - Excess money to be repatriated to India
 - If not repatriated, then
 - Deemed to be an advance
 - Interest to be computed on such advance

Rule 10CB provides time limit for 90 days for repatriation of such excess money

Disclosure under Clause 30A to be made

- In respect of each and every primary adjustment made
- Irrespective of the year to which such adjustment pertains.

Eg: An assessment order related to FY 2014-15 is passed during FY 2017-18 wherein AO has made a primary adjustment, and the same is accepted by Assessee

Thus, reporting is required in in tax audit report of FY 2017-18.

Where such amount is not recovered

- Such balance shall be treated as advance made to associated enterprise
- Interest on such advance shall be computed in a manner as may be prescribed

Furnish the following details

- Reference of relevant section
- Amount of primary adjustment
- Where repatriation is required to be made in India as per section 92CE and if the same is made within prescribed time
- Computation of interest income on such excess money not repatriated to India

Interest to be Computed on the basis of relevant SBI/LIBOR rate.

- Whether interest income imputed
 - Till the end of the year or
 - Date of furnishing Tax audit report

Since the reporting is for the year ended. Thus, advisable to report interest income imputed till the end.

However, if reporting made till the date of furnishing Tax audit report, it is advisable to provide the break up of

- Income computed till end of year, and
- Post the end of the relevant year.

Explanation

- Primary and Secondary Adjustments to Income made due to Transfer Pricing Audit and as required by Section 92 CE(2) are to be reported under this head.
- **International Transfer Pricing** Audit is applicable international transaction are entered with Associated enterprises.
- **Domestic Transfer Pricing** Audit is applicable if domestic transactions entered with Associated enterprises exceeds Rs. 20 crores.

Clause 30B

- Whether the assessee has incurred expenditure during the PY by way of interest or of similar nature exceeding one crore rupees as referred to in sub-section (1) of Sec 94B—
Yes/No
- If yes, following details to be furnished:—
 - Amount (in Rs.) of expenditure by way of interest or of similar nature incurred:
 - Earnings before interest, tax, depreciation and amortization (EBITDA) during the PY (in Rs.)
 - Amount (in Rs.) of expenditure by way interest or of similar nature as per (i) above which exceeds 30% of EBITDA
 - Details of interest expenditure brought forward as per sub-section (4) of Sec 94B
 - Details of interest expenditure carried forward as per sub-section (4) of Sec 94B

- This section is applicable to a Company having
 - Non-resident Associated Enterprise
 - Debt is issued **by a lender and AE provides guarantee for such debt**

- Where Assessee pays interest to a non resident associate enterprise in excess of Rs.1 Crore, the interest allowance shall be restricted to :

- The excess Interest is lower of
 - Total Interest paid or payable, or
 - 30% of EBIDTA will be allowed as a deduction

- The interest expenditure disallowed shall be **carried forward for a period of 8 Assessment years.**

- **Disclosure**
 - i. Expenditure by way of Interest
 - ii. EBIDTA
 - iii. 30% of EBIDTA
 - iv. Interest expenditure brought forward
 - v. Interest expenditure carried forward

Clause 31

- **Section 269ST – Mode of undertaking transactions**
 - No person shall receive an amount of **two lakh rupees or more**
 - In aggregate from a person in a day
 - In respect of single transaction or,
 - In respect of transactions related to one event

Otherwise than by A/c payee cheque or A/c. payee bank draft or Electronic clearing system through a Bank Account

What if payment is for to more than one transaction but pertains to a single transaction

Eg: in a function, Catering and a flower decoration contract is given to same person.

- The aggregate for above payment amount to Rs.2,00,000/-
- Since it relates to same occasion provisions of 269ST is attracted

What if Purchase and sale transactions are made with the same party?

- The amount payable is set off against amount receivable .
- Such set off is not a receipt.
- Thus, if the set off exceeds 2,00,000/- the provisions of 269ST is attracted

Clause 36A: Section 2(22)(e) - Deemed Dividend

Applicable in case of:

- Advance or Loan by Company to **Shareholder** ($\geq 10\%$ of Voting Power)
- Advance or Loan by company to **concern** where share holder has substantial interest (20%)
- Payment on behalf or for **individual benefit** of the shareholder

The above advances and payments are considered as Deemed Dividend “**to the extent of accumulated profits**”.

Difficulties

- How to find out **accumulated profit** of the payer company.
- **Possession** of Accumulated Profits on the date of transaction.
- Difficulty in **identifying the payments** made on behalf of the shareholder.
- Accumulated profits which can be distributed and which cannot be distributed –
Bifurcation to be made.

Audit Considerations

- Auditor to obtain certificate from Assessee
 - Containing list of closely held Companies.
 - Particulars of loan/advances received by concern where Assessee is substantially interested.
- Auditor to verify from Form 26AS to know TDS deducted by closely held Company
- If the payment made is considered as a part of remuneration
 - Such payment shall not be considered as Dividend and not required to be reported.

Issues

1. Who is to be taxed – Registered share holder or beneficial share holder
 - The **Supreme Court** of India in case of **Gopal and Sons HUF [2017] 77 taxmann.com 71** held that
 - Although, HUF is a Beneficial Shareholder but cannot be a Registered shareholder.
 - The Share Certificates are issued in the name of Karta.
 - The Loans/advances received by HUF and Shareholder is a member of HUF and he has a substantial Interest.
 - Therefore, it shall constitute **Deemed Dividend in the hands of HUF** as per **Explanation 3** to Section 2(22)(e)

Issues

2. Who is to be taxed – In case of deemed dividend occurring due to transaction between two corporates

- Transaction between company 'A' and 'B' covered in deemed dividend due to common shareholding of 20:10 (More than 20% in A and More than 10% in B). In whose hands the same will be taxable.
- Company 'A' or Company 'B' or 'Common Shareholder' ?
- If common shareholders are more than 1 , than what ?
- Scenario Post 1150 amendment – Tax on Company distributing

3. Loans Vs. Deposits

- Inter corporate deposits are not loans – not subject to 2(22)(e)
 - Bombay Oil Industries Ltd. Vs. DCIT 28 SOT 383 (Mum.)

4. Advances made in the ordinary course of business

“Cannot be treated as a Loans/advances u/s. 2(22)(e)”

- CIT Vs. Ambassador Travels P. Ltd. (Del.)
- CIT Vs. Creative Dyeing & Printing P. Ltd. 318 ITR 476 (Del.)
- NH Securities Ltd. V. DCIT 11 SOT 302 (Mum.)

Other Judgements:

“Transaction in the nature of Current Account – Provisions of Section 2(22)(e) are not applicable”

- ITO Vs. Gayatri Chakraborty 45 ITR 197 (Kol.)(Trib.)
- CIT Vs. India Fruits Ltd. 274 CTR 67 (AP)
- CBDT Circular No. 19/2017 Dt. 12-6-2017



THANK YOU