

A COMPLETE ANALYSIS OF THE FINANCE ACT, 2013

PART - VI

(Chapter XIII & XIV of the IT Act)

*Prepared by Advocates of
M/s Subbaraya Aiyar, Padmanabhan & Ramamani (SAPR) Advocates*

13. CHAPTER XIII – Income Tax Authorities

a. Section 132B: Clarification of the term ‘Existing Liability’

Amendment:

In section 132B of the Income-tax Act, the Explanation shall be numbered as Explanation 1 thereof and after Explanation 1 as so numbered, the following Explanation shall be inserted with effect from the 1st day of June, 2013, namely:—

‘Explanation 2.—For the removal of doubts, it is hereby declared that the “existing liability” does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII.’

Analysis:

The existing provisions contained in section 132B of the Income-tax Act, inter alia, provide that seized assets under section 132 or requisitioned under section 132A may be adjusted against any existing liability under the Income-tax Act, Wealth-tax Act, the Expenditure-tax Act, the Gift-tax Act and the Interest-tax Act and the amount of liability determined on completion of assessments pursuant to search, including penalty levied or interest payable and in respect of which such person is in default or deemed to be in default

It is proposed to amend the aforesaid section so as to clarify that the existing liability does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII of the Act. The provision is applicable w.e.f. 01.06.2013.

Why was there a need to amend section 132B of the Act?

Various Courts have taken a view that the term "existing liability" includes advance tax liability of the assessee. In the following cases, it was held that amount of cash seized from assessee in search proceedings under section 132 can be adjusted against his advance tax liability:

(1) Nikka Mal Babu Ram v. Asstt. CIT [2010] 41 SOT 407 (Chd.)

(2) Ram S. Sarda v. Dy. CIT [2012] 25 taxmann.com 455 (Rajkot)

(3) Satpaul D. Agarwal (HUF) v. Asst. CIT [1998] 62 TTJ (Mum.) 98

(4) CIT v. Ashok Kumar [2011] 334 ITR 355 (P&H).

To overrule these decisions the proposed amendment clarifies that Existing liability would not include advance tax payment.

Cases referred:

1. Nikka Mal Babu Ram v. Asstt. CIT [2010] 41 SOT 407 (Chd.)

The expression 'existing liability' in s. 132B(1)(i) cannot be read to exclude a particular tax liability, if it can be shown to have existed on a particular date. If the liability to pay advance tax had arisen, it would certainly constitute a part of the 'existing liability' used in s. 132B(1)(i).

2. Ram S. Sarda v. Dy. CIT [2012] 25 taxmann.com 455 (Rajkot)

The department has to adjust the seized amount towards the advance-tax from the date when it was seized and accordingly directed the assessing officer to adjust the seized cash from the date of seizure.

3. Satpaul D. Agarwal (HUF) v. Asst. CIT [1998] 62 TTJ (Mum.) 98

Cash seized has to be treated as payment towards advance tax of the same year, and liability to pay interest under ss. 234A, 234B and 234C should be determined accordingly.

4. CIT v. Ashok Kumar [2011] 334 ITR 355 (P&H).

After adjustment of cash seized against advance tax payable, there being no tax liability remaining payable, no interest was chargeable under s. 234B and 234C.

[SECTION 34 OF THE FINANCE ACT, 2013]

b. Section 138: Disclosure of information respecting assesseees

Amendment:

In section 138 of the Income-tax Act, in sub-section (1), in clause (a), in subclause (i), for the words, figures, brackets and letter “section 2(d) of the Foreign Exchange Regulation Act, 1947 (7 of 1947)”, the words, brackets, letter and figures “clause (n) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)” shall be substituted.

Analysis:

The Foreign Exchange Regulation Act has been substituted by the Foreign Exchange management Act 1999. The amendment is only to give effect to the change in name.

[SECTION 35 OF THE FINANCE ACT, 2013]

14. CHAPTER XIV - Assessment Procedure, Penalties

a. Section 139: Non-payment of self-assessment tax is a defective return of income

Amendment:

In section 139 of the Income-tax Act, in sub-section (9), in the Explanation, after clause (a), the following clause shall be inserted with effect from the 1st day of June, 2013, namely:—

“(aa) the tax together with interest, if any, payable in accordance with the provisions of section

140A, has been paid on or before the date of furnishing of the return;”.

Analysis:

The existing provisions contained in Explanation to Section 139 amended which provides that subject to conditions to sec 139 of the Income Tax Act is not fulfilled, may render the return of income furnished by the assessee defective.

It is proposed to amend the aforesaid Explanation so as to provide that the return of income shall be regarded as defective unless the tax together with interest, if any, payable in accordance with the provisions of section 140A has been paid on or before the date of furnishing of the return.

It has been noticed that many assesseees file return of income without payment of self-assessment tax. To overcome this issue, the amendment provides that self-assessment tax is to be paid before fling of return

b. Section 142: Scope of special audit under section 142(2A) widened

Amendment:

In section 142 of the Income-tax Act, in sub-section (2A), for the words “the nature and complexity of the accounts of the assessee and”, the words “the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the assessee, and” shall be substituted with effect from the 1st day of June, 2013.

Analysis:

Apart from nature and complexity of the accounts and interests of revenue, special audit also proposed in case of volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions or specialised nature of business activity of the assessee.

Under the existing provisions, section 142(2A) of the Act provides that before the stage of proceedings before the Assessing officer with regard to the nature and complexity of the accounts of the assessee and the interest of the revenue, the previous approval of chief commissioner or commissioner is required to, direct the assessee to get his accounts audited by an accountant and to furnish a report of such audit. This amendment will take effect from 1st June 2013

The expression “nature and complexity of accounts” has been interpreted by the various Courts in a very restricted manner. In the following cases Courts have taken divergent views on what will constitute nature and complexity for the AO to direct a special audit under section 142(2A).

(1) In **Delhi Development Authority v. Union of India [2012] 25 taxmann.com 234 (Delhi)**, the High Court held that the accounts do not become complex merely because there are large number of entries. Numerousness of entries by itself does not lead to ‘complexity of accounts’

(2) In **V. VishnudasKini v. Dy CIT [2000] 109 Taxman 15 (Ker.)**, the High Court justified the special audit as gross receipts and expenses claimed under various heads were more than two crores, volume of vouchers and bills were large and correctness of expenses could not be verified without a laborious task.

(3) In **ATS Infrastructure Ltd. v. Asst. CIT [2013] 30 taxmann.com 361 (All)**, the High Court confirmed the special audit as the assessee had opted for dubious method of accounting.

(4) In the following cases the term 'complexity of accounts' has been defined:

- **Swadeshi Cotton Mills Co. Ltd. v. CIT [1987] 32 Taxman 271 (All)**
- **Sahara India (Firm) v. CIT [2008] 169 Taxman 328 (SC)**

Cases referred:

1. Delhi Development Authority v. Union of India [2012] 25 taxmann.com 234 (Delhi)

The High Court laid down following important principles to be followed by the Assessing officer while directing the special audit:

- a) Conditions of 'complexity of accounts' and 'interest of the revenue' are cumulative and have to be satisfied to justify ordering of special audit under section 142(2A) by Assessing officer;
- b) Notes of accounts may be the basis to ask queries and examine the accounts, however, it couldn't be the basis for forming opinion of complexity of accounts;
- c) Numerousness of entries by itself does not mean that the books of accounts are complex and only a chartered accountant can verify it;
- d) Section 142(2A) is not meant for delegation of Assessing officer's powers and functions to special auditor; and
- e) Assessing officer should indicate his tentative view on why the legal issue as mentioned in directions under Sec. 142(2A) requires examination of accounts by the specialist.

2. V. VishnudasKini v. Dy CIT [2000] 109 Taxman 15 (Ker.)

As the gross receipts of assessee are more than Rs. 2 crores and the volume of vouchers and bills must be very large, CIT was justified in ordering special audit under s. 142(2A).

3. ATS Infrastructure Ltd. v. Asst. CIT [2013] 30 taxmann.com 361 (All)

The petitioner companies are engaged in large scale tax evasion, and for that purpose it was adopting dubious methods in maintaining the accounts, which were examined and were found to be complex by the Assessing Officer.

4. Swadeshi Cotton Mills Co. Ltd. v. CIT [1987] 32 Taxman 271 (All)

The requirement of sub-s. (2A) must first be satisfied in every case with the objective assessment of the assessee as to its nature and complexity. Without there being any such finding, special audit ought not to be directed.

5. Sahara India (Firm) v. CIT [2008] 169 Taxman 328 (SC)

Before dubbing the accounts to be complex or difficult to understand, there has to be a genuine and honest attempt on the part of the AO to understand accounts

maintained by the assessee; appreciate the entries made therein and in the event of any doubt, seek explanation from the assessee. But opinion required to be formed by the AO for exercise of power under the said provision must be based on objective criteria and not on the basis of subjective satisfaction.

[SECTION 37 OF THE FINANCE ACT, 2013]

c. Section 144BA: Invoking Chapter X-A - Reference to Commissioner in certain cases

Amendment:

Section 144BA of the Income-tax Act (as inserted by section 62 of the Finance Act, 2012) shall be omitted with effect from the 1st day of April, 2014.

After section 144B of the Income-tax Act, the following section shall be inserted with effect from the 1st day of April, 2016, namely:—

“144BA. (1) If, the Assessing Officer, at any stage of the assessment or reassessment proceedings before him having regard to the material and evidence available, considers that it is necessary to declare an arrangement as an impermissible avoidance arrangement and to determine the consequence of such an arrangement within the meaning of Chapter X-A, then, he may make a reference to the Commissioner in this regard.

(2) The Commissioner shall, on receipt of a reference under sub-section (1), if he is of the opinion that the provisions of Chapter X-A are required to be invoked, issue a notice to the assessee, setting out the reasons and basis of such opinion, for submitting objections, if any, and providing an opportunity of being heard to the assessee within such period, not exceeding sixty days, as may be specified in the notice.

(3) If the assessee does not furnish any objection to the notice within the time specified in the notice issued under sub-section (2), the Commissioner shall issue such directions as he deems fit in respect of declaration of the arrangement to be an impermissible avoidance arrangement.

(4) In case the assessee objects to the proposed action, and the Commissioner after hearing the assessee in the matter is not satisfied by the explanation of the assessee, then, he shall make a reference in the matter to the Approving Panel for the purpose of declaration of the arrangement as an impermissible avoidance arrangement.

(5) If the Commissioner is satisfied, after having heard the assessee that the provisions of Chapter X-A are not to be invoked, he shall by an order in writing, communicate the same to the Assessing Officer with a copy to the assessee.

(6) *The Approving Panel, on receipt of a reference from the Commissioner under sub-section (4), shall issue such directions, as it deems fit, in respect of the declaration of the arrangement as an impermissible avoidance arrangement in accordance with the provisions of Chapter X-A including specifying of the previous year or years to which such declaration of an arrangement as an impermissible avoidance arrangement shall apply.*

(7) *No direction under sub-section (6) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interests of the revenue, as the case may be.*

(8) *The Approving Panel may, before issuing any direction under sub-section (6),—*
(i) *if it is of the opinion that any further inquiry in the matter is necessary, direct the Commissioner to make such inquiry or cause the inquiry to be made by any other income-tax authority and furnish a report containing the result of such inquiry to it; or*
(ii) *call for and examine such records relating to the matter as it deems fit; or*
(iii) *require the assessee to furnish such documents and evidence as it may direct.*

(9) *If the members of the Approving Panel differ in opinion on any point, such point shall be decided according to the opinion of the majority of the members.*

(10) *The Assessing Officer, on receipt of directions of the Commissioner under sub-section (3) or of the Approving Panel under sub-section (6), shall proceed to complete the proceedings referred to in sub-section (1) in accordance with such directions and the provisions of Chapter X-A.*

(11) *If any direction issued under sub-section (6) specifies that declaration of the arrangement as impermissible avoidance arrangement is applicable for any previous year other than the previous year to which the proceeding referred to in sub-section (1) pertains, then, the Assessing Officer while completing any assessment or reassessment proceedings of the assessment year relevant to such other previous year shall do so in accordance with such directions and the provisions of Chapter X-A and it shall not be necessary for him to seek fresh direction on the issue for the relevant assessment year.*

(12) *No order of assessment or reassessment shall be passed by the Assessing Officer without the prior approval of the Commissioner, if any tax consequences have been determined in the order under the provisions of Chapter X-A.*

(13) *The Approving Panel shall issue directions under sub-section (6) within a period of six months from the end of the month in which the reference under sub-section (4) was received.*

(14) *The directions issued by the Approving Panel under sub-section (6) shall be binding on—*

(i) the assessee; and

(ii) the Commissioner and the income-tax authorities subordinate to him, and notwithstanding anything contained in any other provision of the Act, no appeal under the Act shall lie against such directions.

(15) The Central Government shall, for the purposes of this section, constitute one or more Approving Panels as may be necessary and each panel shall consist of three members including a Chairperson.

(16) The Chairperson of the Approving Panel shall be a person who is or has been a judge of a High Court, and—

(i) one member shall be a member of Indian Revenue Service not below the rank of Chief Commissioner of Income-tax; and

(ii) one member shall be an academic or scholar having special knowledge of matters, such as direct taxes, business accounts and international trade practices.

(17) The term of the Approving Panel shall ordinarily be for one year and may be extended from time to time up to a period of three years.

(18) The Chairperson and members of the Approving Panel shall meet, as and when required, to consider the references made to the panel and shall be paid such remuneration as may be prescribed.

(19) In addition to the powers conferred on the Approving Panel under this section, it shall have the powers which are vested in the Authority for Advance Rulings under section 245U.

(20) The Board shall provide to the Approving Panel such officials as may be necessary for the efficient exercise of powers and discharge of functions of the Approving Panel under the Act.

(21) The Board may make rules for the purposes of the constitution and efficient functioning of the Approving Panel and expeditious disposal of the references received under sub-section (4).

Explanation.—In computing the period referred to in sub-section (13), the following shall be excluded—

(i) the period commencing from the date on which the first direction is issued by the Approving Panel to the Commissioner for getting the inquiries conducted through the authority competent under an agreement referred to in section 90 or section 90A and ending with the date on which the information so requested is last received by the Approving Panel or one year, whichever is less;

(ii) the period during which the proceeding of the Approving Panel is stayed by an order or injunction of any court:

Provided that where immediately after the exclusion of the aforesaid time or period, the period available to the Approving Panel for issue of directions is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of six months shall be deemed to have been extended accordingly.”

Analysis:

This bill seeks to omit sec 144BA of the Income-Tax Act (it was inserted by sec 62 of the finance Act, 2012) relating to reference to Commissioner in certain cases. This amendment will take effect from 01/04/2013 and new section 144BA shall be w.e.f. 01/04/2016

The government has received number of representations from the industry against the provisions relating to GAAR. So an expert committee has been formed under the chairmanship of Dr. Parthasarathi Shome. The recommendations of the expert committee which have been accepted by the Government require amendment in the provisions of chapter X-A and section 144BA.

This bill seeks to insert a new section 144BA in the Income Tax Act by which, if, the Assessing Officer, at any stage of the assessment or reassessment proceedings before him having regard to the material and evidence available, considers that it is necessary to declare an arrangement as an impermissible avoidance arrangement and to determine the consequence of such an arrangement within the meaning of Chapter X-A, he may make a reference to the Commissioner in this regard.

Most of the new clauses have been inserted to regularize the procedural aspects. Such as:

- At the stage of assessment or reassessment to invoke Chapter X-A the matter shall referred to commissioner.
- Before approving it he may seek objections from the assessee within a period not exceeding sixty days.
- If the assessee does not make any reply to the notice the commissioner may approve to invoke chapter X-A.
- If the assessee objects to insert provisions of chapter X-A after hearing and if he not satisfied he shall refer the matter to Approving Panel. And if he thinks fit this case is not fit to invoke Chapter X-A he may by order communicate to assessing officer and assessee.
- The powers of Approving panel had been explained such as it may issue directions and it may give an opportunity of hearing.
- It may give directions within a period of Six months in which the reference received by it.
- The approving panel directions are final and binding on both the parties.
- Constitution of one or more approving panel the term of which shall be for one year and may be extended from time to time to a period of three years and it shall consist of a chairman and two members.

This amendment will take effect from 1st April 2016 accordingly apply in relation to AY 2016-17 and subsequent to that.

[SECTIONS 38 & 39 OF THE FINANCE ACT, 2013]

d. Section 144C: Alienation of procedures u/s 144C to be followed in completing the assessment or reassessment from the GAAR procedures

Amendment:

In section 144C of the Income-tax Act,—

(a) Sub-section (14A) shall be omitted;

(b) After sub-section (14), the following sub-section shall be inserted with effect from the 1st day of April, 2016, namely:-

“(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Commissioner as provided in subsection (12) of section 144BA.”.

Analysis:

This clause proposes to delete the earlier sub-section 14A of Section 144C and substitute it with new sub-section 14A which basically postpones the applicability of this provision from 01.04.2013 to 01.04.2016.

The new sub section 14A of Section 144C has been inserted to avoid the provisions from becoming redundant. This sub-section deals with the procedural aspect of GAAR. Since the applicability of GAAR provisions have been postponed to 01.04.2016, the procedures applicable to GAAR have also been postponed to 01.04.2016.

Sub-section 14A of section 144C alienates the procedures to be followed in completing the assessment or reassessment u/s 144C from the GAAR, thereby allowing GAAR procedures to stand on its own.

[SECTION 40 OF THE FINANCE ACT, 2013]

e. Section 153: Exclusion of certain period for the purpose of calculating limitation for the completion of assessment or reassessment u/s 143 or 144

Amendment:

In section 153 of the Income-tax Act, in Explanation 1,—

(a) for clause (iii), the following clause shall be substituted with effect from the 1st day of June, 2013, namely:—

“(iii) the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and—

(a) ending with the last date on which the assessee is required to furnish a report of such audit under that sub-section; or

(b) where such direction is challenged before a court, ending with the date on which the order setting aside such direction is received by the Commissioner, or”;

(b) for clause (viii), the following clause shall be substituted with effect from the 1st day of June, 2013, namely:—

“(viii) the period commencing from the date on which a reference or first of the references for exchange of information is made by an authority competent under an agreement referred to in section 90 or section 90A and ending with the date on which the information requested is last received by the Commissioner or a period of one year, whichever is less,”;

(c) clause (ix) shall be omitted;

(d) in clause (viii), at the end, the word “or” and after clause (viii), the following clause shall be inserted with effect from the 1st day of April, 2016, namely:—

“(ix) the period commencing from the date on which a reference for declaration of an arrangement to be an impermissible avoidance arrangement is received by the Commissioner under sub-section (1) of section 144BA and ending on the date on which a direction under subsection

(3) or sub-section (6) or an order under sub-section (5) of the said section is received by the Assessing Officer,”.

Analysis:

Through this clause, the Finance Minister increases the time-limit (limitation) of the Assessing Officer to complete the assessment or reassessment u/s 143 or 144 by amending

- *Clause (iii) and*
- *Clause (viii) of Explanation 1 to Section 153.*

The original clause (iii) of the Explanation 1 excluded the time which starts after the AO has directed the assessee to get his account audited and ending on the date on which

assessee is required to furnish that audit report for the purpose of calculating limitation to complete the assessment or reassessment.

Through this Finance Bill, the leave period would get extended until the day on which order of setting aside the AO's direction is communicated to the Commissioner if the assessee had preferred an appeal against the AO's direction.

The new clause (viii) of the Explanation clause proposes to exclude the time which starts after a reference has been made u/s 90 or 90A and ending with the day on which the last information is received by the Commissioner or a period of one year, whichever is less.

The original clause (ix) of the Explanation 1 to Section 153 dealt with the exclusion of a period which starts after a reference u/s 144BA received by the Commissioner and ends with the day when the AO receives the Commissioner's order or direction u/s 144BA of the Act. The above provision was originally to take effect from 01.04.2013 but the Finance Bill, 2013 proposes to postpone the applicability of the section to 01.04.2016.

[SECTION 41 OF THE FINANCE ACT, 2013]

f. Section 153B: Exclusion of certain period for the purpose of completing assessment or reassessment u/s 147 or 148 of the Act.

Amendment:

In section 153B of the Income-tax Act, in the Explanation,—

(a) for clause (ii), the following clause shall be substituted with effect from the 1st day of June, 2013, namely:—

“(ii) the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and—

(a) ending with the last date on which the assessee is required to furnish a report of such audit under that sub-section; or

(b) where such direction is challenged before a court, ending with the date on which the order setting aside such direction is received by the Commissioner, or”;

(b) for clause (viii), the following clause shall be substituted with effect from the 1st day of June, 2013, namely:—

“(viii) the period commencing from the date on which a reference or first of the references for exchange of information is made by an authority competent under an

agreement referred to in section 90 or section 90A and ending with the date on which the information requested is last received by the Commissioner or a period of one year, whichever is less,”;

(c) clause (ix) shall be omitted;

(d) in clause (viii), at the end, the word “or” and after clause (viii), the following clause shall be inserted with effect from the 1st day of April, 2016, namely:-

“(ix) the period commencing from the date on which a reference for declaration of an arrangement to be an impermissible avoidance arrangement is received by the Commissioner under sub-section (1) of section 144BA and ending on the date on which a direction under subsection

(3) or sub-section (6) or an order under sub-section (5) of the said section is received by the Assessing Officer,”.

Analysis:

While clause 41 dealt with excluding certain period for the purpose of calculating limitation for the completion of assessment or reassessment u/s 143 or 144 of the Act, Clause 38 proposes to exclude the same period for the purpose of completing assessment or reassessment u/s 147 or 148 of the Act.

[SECTION 42 OF THE FINANCE ACT, 2013]

g. Section 153D: Approval from the Commissioner for passing orders u/s. 144BA

Amendment:

In section 153D of the Income-tax Act, the following proviso shall be inserted with effect from the 1st day of April, 2016, namely:—

“Provided that nothing contained in this section shall apply where the assessment or reassessment order, as the case may be, is required to be passed by the Assessing Officer with the prior approval of the Commissioner under sub-section (12) of section 144BA.”.

Analysis:

This clause has been proposed to basically cut down the unnecessary delay in the procedures involved in completing the assessment. Clause 30 proposes to insert a clause in the Section 153D which required the AO to obtain approval from the Commissioner for assessment in cases of search or requisition.

This clause proposes to do away with the procedure of getting prior approval from the Commissioner for the assessment under Section 144BA as the sub-section (12) of Section 144BA itself mandates the AO get prior approval from the Commissioner.

[SECTION 43 OF THE FINANCE ACT, 2013]