

Indore Branch of Central India Regional Council
of The Institute of Chartered Accountants of India



NEWSLETTER

► July - 2020



CA Day
Celebration



Chairman's Communiqué



Respected members

Wish you a very happy CA Day, the day we cherish as the foundation of the elite profession was laid down in parliament with passing of CA Act 1949.

This occasion marked the presence of our honorable Member of Parliament Shri Shankar Lalwani. We celebrated virtually through running cycling plantation all virtually.

From this month we will be hosting CPE webinar VCM to help members to update knowledge while sitting at home.

Goods and service tax (GST) collections for June 2020 clocked Rs 90,917 crore at gross levels, 9% lower than the same month last year.

The collections are higher than those recorded in April and May – the peak months of lockdown due to the Covid 19 pandemic – where GST collection for April was Rs 32,294 crore and Rs 62,009 crore for May.

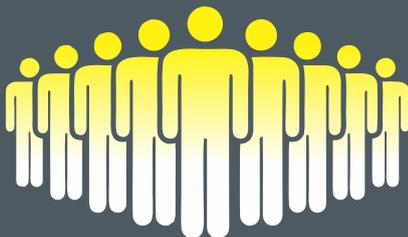
It gives us hope that economy is recovering and we hope for very speedy V share recovery..

Thank you

Stay Home Stay Safe

CA. Harsh Firoda (Chairman)

chairman_indore@icai.org



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THE SUPERIORITY OF NOMINATION OR TESTAMENTARY WILL



CA. Jayesh Shah

There is a long drawn controversy between superiority of Nomination vis-à-vis Wills made to transmit the beneficial interest of bequeathed property. In this article we have discussed the issue from perspective of various statutes and the legal position therein to clarify the confusions existing and enable us to advise a smooth succession.

Insurance Act, 1938

Attention is invited to Section 39 of the Insurance Act which provides that a person holding a life insurance policy can nominate the person to whom the sum assured should be paid in the event of his death however Supreme Court in the case of Smt. Sarbati Devi v. Smt. Usha Devi ((1984) 1 SCC 424), has after considering Section 39 held that a mere nomination made therein did not have the effect of conferring on the nominee any beneficial interest in the amount payable under the Life Insurance Policy on the death of the assured. It was observed that the nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a discharge of its liability under the policy and the amount can be claimed by the heirs of the assured in accordance with law of succession governing them.

Employees Provident Fund Act, 1952

Sub-para (1) of para 61 of the Employees Provident Fund Scheme provides that each member shall make in his declaration in Form 2, a nomination conferring the right to receive the amount that may stand to his credit in the Fund in the event of his death before the amount standing to his credit has become payable, or where the amount has become payable before payment has been made. Further, section 10(2) of Employees Provident Fund Act, 1952 provides that the amount standing to the credit of a member in the fund at the time of his death and payable to his nominee shall vest in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member or of exempted employee and shall also not be liable to attachment under any decree or order of any court. However here also the Bombay High Court in the cases of Antonio Joao Fernandes v. Assistant Provident Fund Commissioner 2010 (4) Bom. CR 208 and in the case of NozerGustadCommesariat held that

the nominee would have a stand subordinate to that of the legal heir.

Government Savings Certificate Act, 1959 ("GSC Act")

Interestingly Section 6(1) of the GSC Act deals with nomination by holders of saving certificates, and provides that

"Notwithstanding anything contained in any law for the time being in force, or in any disposition, testamentary or otherwise in respect of any savings certificate, where a nomination made in the prescribed manner purports to confer on any person the right to receive payment of the sum for the time being due on the savings certificate on the death of the holder thereof and before the maturity of the certificate, or before the certificate having reached maturity has been discharged, the nominee shall, on the death of the holder of the savings certificate, become entitled to the savings certificate and to be paid the sum due thereon to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner."

A plain reading of above appears to confer better title to nominee over the legal heir however when we read section 8 of the GSC Act it provides an exception to save the interests of the heirs or the legatees of a person. The Supreme Court in the case of Shri Vishin N. Khanchandani & Anr v. VidyaLachmandaskhanchandani(6 SCC 724) (Khanchandani case) examined the provisions of nomination under the GSC Act and upheld that ultimately it is the legal heir that is entitled to the proceeds of the savings certificate, and not the nominee.

Banking Regulation Act, 1949 ("the Banking Act")

Section 45ZA(2) of the Banking Act, reads as under:

"Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount to deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons,

unless the nomination is varied or cancelled in the prescribed manner.”

Therefore, under the Banking Act, section 45ZA(2) provides that the nominee has the right to receive the deposit, over that of the legal heir. However, in this regard, there have been conflicting views by judicial authorities. In *Amma Narayani v. Saraswathi Amma* (70 CompCas 354), the Karnataka High Court held that the nomination to the fixed deposit with the bank does not deprive the legal heirs of their right to claim the amount. The Calcutta High Court however took a contrary view in the case of *Ramachakravarthy vs Punjab National Bank* (AIR 1991 Cal 128). Therefore, though the same may not be free from litigation, on the basis of the text of section 45ZA(2) of the Banking Act it may be said that it is the nominee who shall receive the deposit.

Companies Act

Section 109A of the Companies Act, 1956 provided that Nomination would override the vesting of shares under any other law. The position is carried forward in the Companies Act, 2013 in the form of section 72 of the Companies Act, 2013 r.w. Rule 19 of the Companies (Share Capital and Debentures) Rules, 2014. The legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death, is carried out by way of his will, which is governed by the provisions of the Indian succession Act, 1925. However, it is pertinent to note that sub-section (3) of section 109A of the Companies Act begins with a non-obstante clause. It is settled law that in case there is any inconsistency between the non-obstante clause and another provision, it is the non-obstante clause which would prevail over the other clause. Therefore, a nomination under the Companies Act, 1956 is quite different from nomination with respect to say, insurance policies. Attention is invited to the case of *Mrs. HarshaNitinKokate Vs. Saraswat Co-operative Bank Limited* (2010 (112) Bom. LR 2014)(“Kokate case”), wherein it was contended before the Bombay High Court by the widow of the deceased that she was entitled to the ownership of the shares held by her deceased husband in dematerialized form with Saraswat Co-operative Bank, since she was the legal heir to his property as Mr. Kokate had died without preparing a Will. Mr. Kokate had however appointed his nephew as nominee in respect of the shares held in the aforesaid demat account.

The Court held that upon the death of a shareholder, the shares would vest in the nominee since section 109A of the Companies Act provides that the nominee shall be entitled to all the rights attached to the shares to the exclusion of all others regardless of anything else stated in any other disposition, testamentary or otherwise.

Further, the judgement of the Bombay High Court in the case

of *Jayanand Jayant Salgaonkar vs. Jayshree Jayant Salgaonkar* (2015 SCC Online Bom 1221) “JaynteJayant case” has held the decision in the Kokate case was per incuriam and held that legal heirs and not the nominees will get the ownership rights of share certificates, considering the provisions of Section 109A of the Companies Act, 1956, and Bye-Law 9.11 under the Depositories Act and stating they do not displace the law of succession. The Court also discussed the purpose of nomination under Section 39 of the Insurance Act and various Supreme Court cases where it has been laid down that although the insurance company would pay the amount due on insured's death to the nominee, they would hold it in “trust” and ultimately only the legal heirs of the deceased could claim the property. Disagreeing with the views of Kokate judgment, the Court observed that it had failed to consider many binding judgments of the Supreme Court including the judgment of *Sarbati Devi*(supra). The Court held that that the rights of a nominee to shares of a company cannot override the rights of legal heirs of deceased and therefore the amount received by the nominee can be claimed by the legal heirs of the deceased.

Therefore, as per the most recent judgement of the Bombay High Court, the rights of the legal heir would override the rights of a nominee, and the nominee would only hold the securities in trust and as a fiduciary for the legal heirs under succession law. However, a legal issue in the above decision of the Bombay High Court is that a single judge of the high court is bound to follow the judgement of a single judge of the same high court. Holding the Kokate judgement as per incuriam may not be legally correct as the judgement did not consider the applicable provisions though only a reference to the provision in the Depositories Act was incorrect. If he is not in agreement with the same, the proper procedure is to refer the binding decision and direct the papers to be placed before the Chief Justice to be placed before a larger bench to examine the question. (See *CIT v. Thana Electricity Supply Limited* (202 ITR 727)(Bom)) Therefore the issue is yet unresolved and latest position is that rights of legal heir would prevail over nominee.

Conclusion

Therefore for a smooth succession one should make a will and merely nomination would not help. In absence of will the natural law of succession would prevail and result in long drawn litigations and hardship. In non metro cities there is no legal requirement of obtaining probate and thus the ideal action should be to make nomination and bequeath in will in the name of person to whom the property is intended to be given. Hope this article would help the members to advice in this core area considering the position in allied laws and enable a smooth succession.

PROSECUTION - HAUNTING THE TAXPAYERS



No law will be respected or obeyed unless sanction accompanies such law. The same applied to income tax which enforces by providing threefold liability i.e. interest, penalty and lastly prosecution. While interest is levied to compensate the loss due to delay in payment of taxes, penalty is to deter the assessee by threat of punishment and realize him of serious pecuniary liability

MENS REA

On the other hand the intention of prosecution is to give message not to the assessee but to public at large. We all know that for imposing criminal liability of prosecution 'mens rea' or guilty mind is mandatory which means the intention behind the act has to be seen. It is well settled principle of common law that 'mens rea' is an essential ingredient of criminal offence. A statute can exclude that element, but it is a sound rule of construction to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excludes 'mens rea'. Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

Section 278E of Income tax provides for presumption of mens rea and also provides for shift of burden of proof from revenue to the assessee.

According to this the accused is required to prove that there is no "mens rea" and sub-section (2) therein requires the accused to prove the absence of 'mens rea' beyond reasonable doubt. The section further provides that the mere proof by a preponderance of probability would not be sufficient. This provision is unreasonable, illogical and too harsh. The provisions of section 278E would lead to unintended and dangerous consequences.

PROCEDURE

Income tax Act does not give any procedure for prosecution proceedings therefore the complaint is to be filed before a Magistrate and the procedure to be followed is the general procedure followed by the Criminal Courts, which is laid down by the Code of Criminal Procedure, 1973.

Section 292 of the Income-tax Act, 1961, provides that only the Metropolitan Magistrate or a Magistrate of the First Class has jurisdiction to try and convict a person of an offence under the Act.

POINTS TO PONDER

If penalty is cancelled prosecution proceedings will have to be quashed on this basis itself.

- (G.L. Didwania vs. I.T.O. 224 ITR 687 (S.C.).

Bar of limitation specified in section 468 of the Code of Criminal Procedure, 1973 would not apply to a prosecution under the Income-tax Act.

- Economic Offences (Inapplicability of Limitation) Act, 1974.

Late payment of tax can still trigger the provision of section 276B

- Madhumilan Syntex Ltd. vs. UOI [290 ITR

199(SC)].

Where the amount involved is insignificant, prosecution proceedings cannot be sustained

- [BeeGee Motors & Tractors vs. ITO, 218 ITR 155(P&H)]

To justify the offence, paucity of funds and financial stringency are considered as reasonable causes for delayed payment of TDS

- [ITO vs. Roshni Cold Storage (P.) Ltd. 245 ITR 322 (Mad.)].

Non-availability of Director to sign the cheque to make payment of tax deducted at source could not be accepted as reasonable cause for quashing prosecution

- [ITO vs. Rayala Corpn. (P.) Ltd. 206 ITR 381 (Mad.)].

Quashing of penalty is sufficient ground for quashing prosecution proceedings

- [Harkawat and Co. vs. UOI, 302 ITR 7 (MP)].

Prosecution must be launched within reasonable time

- [Vinar & Co. vs. ITO (193 ITR 300 Cal.)]

Prosecution need not normally be initiated against persons who have attained the age of 70 years at the time of commission of offence

- (Instruction F. No. 285/160/90-IT(Inv), dated 7-2-1991)

Changing times, what lies ahead...

Rampant issuance of prosecution notices, in recent times, have made this subject very important for consideration by all professionals. The Central Board of Direct Taxes has been issuing Guidelines from time to time with respect to selection of cases for prosecution and compounding of offences. Two Circulars, dated 09.09.19, have recently been issued on both the matters. Circular 24/2019 lays down procedure for identification and processing of cases for initiating prosecution. With the laudable intention of limiting initiation of prosecution to

deserving cases, it has relaxed the earlier Guidelines. The second Circular 25/2019 provides a one-time relaxation to the assesseees to file a compounding application beyond the limitation period till 31.12.2019. The compounding procedure as prescribed by the earlier Guidelines dated 14.06.19 remains unchanged.

HALF-HEARTED RELAXATION

In normal circumstances, cases below the threshold limit of Rs 25 lakhs (amount sought to be evaded/ tax on under-reported income) will not be prosecuted. However, if the Sanctioning Authority feels that these are deserving cases warranting prosecution, then the previous administrative approval of the Collegium of 2 CCIT/DGIT rank officers will need to be taken.

Further the latest Guidelines state that prosecution u/s 276CC (1) can only be launched after the ITAT confirms the order of penalty which again confirms various decisions and is pretty logical.

Though the above relaxation will apply to all pending cases where complaint is yet to be filed but is not made to apply to cases already filed. This is highly discriminatory and unfair to the assesseees in whose cases complaints have already been filed. Since this is a curative amendment it has to be given retrospective effect as held in case of Allied Motors (P) Ltd v. CIT (1997) 224 ITR 677 (SC)

Elizabeth Fry, an English prison reformer said that "Punishment is not for revenge, but to lessen crime and reform the criminal".





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For details please visit indore@icai.org



JULY 2020 Virtual CPE Meetings Schedule

10 July	Standards on Auditing in Day to Day Practice ▶ CA Aniket Sunil Talati (CCM) ▶ CA Kemisha Soni (CCM) ▶ 4pm to 7pm
12 July	Retail & SME Funding after stimulus package ▶ Shri Manoj Kumar (Regional Head - Union Bank of India) ▶ Shri Subodh Sahay (DGM - Bank of India, Indore) ▶ Shri Shailesh Parekh (DGM - Bank of Baroda) ▶ CA Dinesh Jain (Secretary - CIRC) ▶ 12pm to 2pm
15 July	Issues in valuation of properties for bank finance ▶ Pumesh Baheti ▶ Arvind Agrawal ▶ 4pm to 6pm
18 July	Sharing Study results on Financial Policies in Major Economies & it's Impact on Markets ▶ CA Anuj Goyal (CCM) ▶ CA Kemisha Soni (CCM) ▶ 4pm to 6pm
20 July	1 Excel learning with Macros & Pivot Tables and Pivot charts 2 Use of VLookup, Index, Match, Offset functions in conducting audit. ▶ CA Sadiq Ali (Yash Technology) ▶ CA Akshat Baheti ▶ 4 pm to 6pm
22 July	Discussion on Issues in MSME sectors with MSME Dept. ▶ Sp. Guest : Shri Shankar Lalwani (MP) ▶ 4 pm to 6pm
25 July	Professional opportunities for CA in the wake of Covid-19 ▶ CA C.S. Nanda (CCM) ▶ CA Manoj Fadnis (Past President-ICAI) ▶ 4 pm to 6pm
28 July	Issues in search of properties for bank finance ▶ Adv. Rounak Choukse (High Court Advocate) ▶ 4 pm to 6pm
31 July	Taxation of Partnership Firms ▶ Adv. Ashish Goyal ▶ 4 pm to 6pm

*Hurry up !! CPE will be allotted on
First Come First Serve Basis login*

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CA Day Celebration

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