SNR & COMPANY
CHARTERED ACCOUNTANTS

KRESTON SNR

INCOME TAX BULLETIN

JUNE 2023

Email: snr@snr.company | **Website:** www.snr.company

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JUDICIAL UPDATES

1. Sec.56(2)(viia) is applicable on shares received pursuant to amalgamation despite exemption from capital gains tax u/s 47(vi):

Case of : ACIT vs Vertex Projects LLP
Decision by : ITAT, Hyderabad
In favour of : Revenue
Date of Judgement : 28-04-2023

- During AY 2014-15, Assessee-company received Andhra Pradesh HC order approving a scheme of amalgamation whereby various companies merged into the Assessee, w.e.f. Apr 1, 2011. As per the scheme of amalgamation, one share of the Assessee was allotted for every share held by the shareholders of the amalgamating companies and the Assessee received shares of 11 companies which were merged with the Assessee along with the other underlying properties.
- The revenue held that since Assessee received investment in such closely held companies for inadequate consideration, provisions of Section 56(2)(viia) was applicable and since the order of the Court was delivered during AY 2014-15, the deemed gift was brought to tax in the impugned AY 2014-15 on protective basis amounting to Rs. 55.92 Cr and the assessment for AY 2012-13 will be reopened and addition under Section 56(2)(viia) will be made on substantive basis separately for AY 2012-13.

- However, CIT(A) held that since the shareholding and shareholders were identical and even post-amalgamation the shareholders were the same as well as the shareholding ratio, it would not be transferred under Section 47(vi) and thus, neither the capital gain will arise nor any deeming charge under Section 56 for the receipt of property/assets/shares, etc. can be attributed for inadequate consideration.

- On the department's appeal, as regards CIT(A)'s finding that since the transaction cannot be treated as transfer in terms of Section 47(vi) the provisions of Section 56(2)(viia) cannot be invoked, ITAT noted that proviso to Section 56(2)(viia) has only excluded such properties received by way of transaction not regarded as transfer which are mentioned in clauses (via) or (vic) or (vicb) or (vid) or (vii) of Section 47.

- The Tribunal referred to explanatory notes to the provisions of the Finance Act, 2010 that introduced Section 56(2)(viia) & opined that Section 56(2)(viia) being the specific charging provision, would have overriding effect and will prevail vis-à-vis section 47(vi).

- The Tribunal stated that Section 56(2)(viia) makes it abundantly clear that the receipt of any property without or inadequate consideration or consideration less than the FMV is sine qua non for attracting the provisions & opined that the word 'receipt' used in the section includes the receipt by way of transfer of shares also.

- The Tribunal observed that under the scheme of arrangement, the shares were received by the Assessee from the 11 transferor companies, and the amalgamated company in consideration of receipt of the shares of the transferor company had allotted its shares to the members of the amalgamating company. It noted that Clause 4.1 of the Scheme of Amalgamation provided that pursuant to the order of the High Court or any other appropriate authority sanctioning the scheme, the assets be transferred and are deemed to be transferred to and vested in the transferee company, thus "the transfer of shares (assets) have taken place and therefore, it would be wrong to say that on the part of the assessee there were no transfer of shares".

- Therefore, the Tribunal held that CIT(A)'s finding that Section 56(2)(viia) could not be invoked is incorrect & also rejected Assessee's contention that merger transactions are outside the purview of Section 56(2)(viia).

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Full Judgement : Vertex Projects LLP

SNR's Take

The tribunal has delved upon a very contentious issue. On the one hand, section 47 takes the transaction of merger out of the purview of taxation whereas on the other hand, section 56 seeks to tax any transaction entered into for an inadequate consideration. Though the tribunal has remanded back the matter to CIT (Appeals) for considering the specific grounds, however, it seems that this issue will continue to be a point of contention before the higher courts.

2. Sec.40A(3) disallowance not to be attracted where cash payments are done in the capacity of the movie distributor's agent:

Case of : T. Rajendran Vs Assistant Commissioner of Income Tax
Decision by : ITAT, Chennai
In favour of : Assessee
Date of Judgement : 13-04-2023

- Assessee-Individual is engaged in the business of film distribution.
- During assessment proceedings for AY 2012-13, Revenue observed that the predominant component of the credits and debits to the profit and loss account related to the sale and purchase of the rights of the movies and substantial portion of payments are made in cash amounting to Rs.4.73 Cr and disallowed the entire sum under Section 40A(3).
- CIT(A) sustained the addition noting that the Assessee's case does not fall under the exceptions as provided under Rule 6DD of IT Rules, 1962.
- ITAT noted that the Assessee's role was acting as an agent whereby he entered into an agreement with exhibitor/theatre owners for screening the movie and collected money in cash/cheque from the said theatre owners for onward payment to the main producer of movie.

- ITAT also noted that as per the tri-party agreement between the movie producer and the distributors, the distributors are responsible to remit Rs.12.75 Cr., one day before the theatrical release of the film and observed that the Assessee made cash payments to various parties on the directions of the distributor, being its agent, to settle the accounts of various parties.

- The tribunal pointed out that cash paid by the Assessee to various parties cannot be considered as amount paid for purchase of movie rights, even though the Assessee erroneously has debited said amount to profit and loss account and reiterated the settled principle of law that *entries in books of accounts will not decide the taxability of any income and what's relevant, is to see the nature of income and its taxability.*

- The Tribunal stated that although provisions of section 40A(3) deals with the disallowance of cash payment in excess of the prescribed limit, but proviso provided therein carves out an exception as to consideration of business expediency and other relevant factors. Further, the Tribunal accepted the Assessee's argument that unless the accounts of various persons including technicians of the movie were settled, it is impossible to release the movie on the specified date for a public audience, thus there was a business expediency in settling of accounts of various parties.

- The Tribunal also opined that the genuineness of these payments cannot be doubted since it is supported by necessary evidence, including necessary bank statements evidencing payments made to the producers. Relies on the Delhi ITAT ruling in Geo Connect, wherein it was held that where the genuineness of the payment made was not doubted and the recipient of the amount made a pre-condition for payment in cash and further, due to business expediency, the Assessee had to make payment in cash, said paymentcannot be disallowed u/s. 40A(3).

Full Judgement: T Rajendra

SNR's Take

The Tribunal has deliberated upon the issue with an open mind. Similar to the Delhi ITAT's ruling in 'Geo Connect', the Tribunal has once again reiterated that where the genuineness of the payment made was not doubted and the recipient of the amount made a pre-condition for payment in cash thereby creating business expediency, the Assessee had to make payment in cash, said payment cannot be disallowed u/s. 40A(3).

3. Addition u/s Sec.43CA cannot be sustained in case revenue failed to refer the case to valuation officer

Case of : Macrotech Developers Ltd Vs DCIT
Decision by : ITAT, Mumbai
In favour of : Assessee
Date of Judgement : 17-04-2023

- For AY 2018-19, Assessee-Company sold various properties both commercial and residential in nature and offered Rs.1.44 Cr as disallowance under Section 43CA for difference in stamp duty value and sale consideration of the properties sold by it.
- However, Revenue observed that the total variance was Rs.39.79 Cr., thus, disallowed the balance amount of Rs.38.35 Cr.
- On appeal, ITAT noted that during the assessment proceedings, Assessee had objected to the addition proposed and had even obtained a valuation report from an independent valuer, however, the Revenue did not take cognizance of Assessee's submission that the stamp duty rates are not the fair market value of the property. Thus, the Tribunal referred to the provisions of Section 43CA(2) read with Section 50(2)/(3), whereby if the Assessee claimed before the Revenue that the value of the property determined by the stamp valuation authority exceeds the fair market value of the property as on date of transfer, the Revenue is duty-bound to refer the valuation of such capital asset to valuation officer and thereafter to look at provisions of section 50(3) to substitute the actual sale consideration with the such valuation.

- The Tribunal held that the Revenue failed to do what the law mandates it to do and conveniently did not look into Assessee's claim at all without any justification while observing that *"where the law mandates the learned assessing officer to do the things in a particular manner, if he fails to do so as per the provisions of the law, we do not have any other alternative but to delete the addition."*

Full Judgement: Macrotech Developers Ltd

SNR's Take

The Tribunal has made scathing remarks that shall go a long way in reminding AOs to follow due procedures while passing orders. The Tribunal's order to delete the additions instead of remanding the matter back to the AO is a welcome step. Further, the Tribunal has stated that the tolerance band of 10% as provided in section 43CA shall be applicable retrospectively

4. Revenue cannot impose a 'Percentage of Completion Method' where 'Contract Completion Method' followed consistently:

Case of : Sahara India Power Corporation Limited Vs ACIT
Decision by : ITAT, Delhi
In favour of : Assessee
Date of Judgement : 28-04-2023

- Assessee-Company entered into a contract for energy management and maintenance of the Aamby Valley project and entered into sub-contracts in relation to such a contract. The revenue held that the Assessee did not raise any bill in respect of work done by sub- contractors and capitalized the same as WIP only to reduce the incidence of income for the relevant AYs (2003-04 and 2004-05) and accordingly computed income at 10% (as Assessee was entitled to 10% of the total project as per agreement) of work-in-progress, by applying the POCM, which was sustained by CIT(A).

- ITAT observed that the Contract Completion Method of accounting, followed by the Assessee for recognizing the income for relevant AYs with regard to its contract is a legally recognized accounting method and noted that the Assessee was continuously and consistently following the same method of accounting year to year.

- The Tribunal opined that the Assessee has a right to choose one of the two methods between contract completion method or percentage completion method, both being species of the mercantile system of accounting and the Revenue cannot thrust upon the Assessee to follow particular method of accounting.
- For this the Tribunal placed reliance upon the Supreme Court ruling in **Hyundai Heavy Industries** and held that the POCM cannot be applied to the present case, as the amendment in Section 43CB providing that profits and gains arising from a construction contract or a contract for providing services shall be determined on the basis of POCM was effective from Apr 1, 2017 and not applicable to relevant AYs and further, opined that, *"department is precluded from changing the method of accounting which has been consistently followed by the assessee from year to year in middle of the duration of the project".*
- Further, expounding upon the principle of revenue neutrality, the Tribunal relied on the Supreme Court ruling in Bilahari Investments and observed that if the income generated from the transactions arising out of the contract was offered to tax in subsequent years, it is revenue neutral and it cannot be brought to tax in the relevant AYs.

Full Judgement: Sahara India Power Corporation Limited

SNR's Take

The Tribunal has relied on the Supreme Court ruling in Bilahari Investments and delivered a logical judgment wherein it has expounded upon the principle of revenue neutrality and observed that if the income generated from the transactions arising out of the contract was offered to tax in subsequent years, it is revenue neutral and it cannot be brought to tax in therelevant AYs

5. Amount received upon settlement of property litigation by lessee cannot be subjected to capital gains tax:

Case of : Ishvakoo Grand Plaza Vs DCIT
Decision by : ITAT, Delhi
In favour of : Assessee
Date of Judgement : 15-05-2023

- During 2004, Assessee-Firm took a lease of a premises whereby the lease deed provided the Assessee with the *'right of priority of purchase of the premises'*, if the lessor intended to sell the premises.

- In Oct 2005, breaching the aforesaid clause of the lease deed, the lessor sold the premises, thus, Assessee instituted a suit for pre-emption and/or for specific performance of Agreement to Sell and for permanent injunction, which ended in settlement between Assessee and the buyer at a compensation of Rs. 20.4 Cr.

- The revenue held that the compensation was taxable as long-term capital gains arising on relinquishment of right of pre-emption/ first-priority of purchase, being capital asset under Section 2(14) and accordingly held the entire compensation as capital gains since the cost of acquisition of such right was nil, which was upheld by CIT(A).

- On appeal, ITAT, based on the lease deed, opined that "the lessee merely had a right to offer the purchase of the premises. Only rights protected were the right of tenure, rent, security, etc., and not the right to have a preferential offer to purchase from subsequent purchaser also."

- The Tribunal relied on the SC ruling in *Rikhi Ram & Ors. Vs. Ram Kumar and Ors* wherein while dealing with the pre-emptive right of a tenant, it was held that the pre-emptor who claims the right to pre-empt the sale, on the date of sale must continue to possess that right till the date of the decree. In the present case, the Assessee had handed over the possession in accordance with HC's interim order dt. Jul 2008, and thus *"having lost the possession to the purchaser, on the date of the settlement he actually did not have any right of pre-emption left to be transferred or relinquished under the settlement. So, the amount was not for transfer by way of relinquishment of right of pre-emption."*

- The Tribunal further noted that under the settlement agreement, Assessee had agreed to give up its right to sue and withdraw its suit and to remove all its asset/goods in terms of the HC order directing Assessee to surrender physical and vacant possession, opined that "once the possession is parted away by the Assessee no right of pre- emption actually survived in terms of principles of the law of pre-emption."

- The Tribunal finally held that the right of Assessee to have the offer for purchase cannot be considered to be a capital asset for the purpose of Section 2(14) and stated that the right arising out of covenant in the lease deed has no resemblance of a 'property' as its alienation, transfer or relinquishment was not possible independently at the will of Assessee.

Full Judgement: Ishvakoo Grand Plaza

SNR's Take

The Tribunal has considered the matter thoroughly and ultimately the fact of the matter is 'right of first priority of purchase of premises' given to the Assessee was not a right of pre-emption, but merely an enforceable covenant. The right for specific performance of the covenant to have priority of purchase is a mere 'right to sue' which cannot be transferred. Further, the Tribunal's order also withstands the SC ruling in the case of B.C. Srinivas Shetty wherein it was categorically mentioned that to burden Assessee with capital gain arising out of transfer of immovable property or an interest in it, the cost of acquisition is necessary to be established.

6. Reimbursement of Administrative costs to AE is not FIS. Satisfaction of 'Make Available' clause mandatory for the same:

Case of : Goldman Sachs & Co. LLC Vs DCIT
Decision by : ITAT, Mumbai
In favour of : Assessee
Date of Judgement : 08-05-2023

- During AY 2013-14, Assessee received an amount of Rs. 60.54 Cr from its associated enterprise towards services provided in relation to the development of its campus. Out of Rs. 60.54 Cr received towards professional services, Assessee offered Rs. 42.54 Cr to tax as FTS under Section 115A, however, the balance amount of 18 Cr was not offered to tax.

- The revenue held the entire Rs. 60.54 Cr as fees towards services in relation to the development of the campus as FIS as Assessee failed to provide clear-cut bifurcation of the payments being offered to tax, which was upheld by DRP.

- On appeal, perusing the clauses of the Campus Project Services Agreement (CPSA), ITAT observed that Assessee had agreed to deploy sufficient qualified personnel to ensure proper fulfillment of campus project services against which it charged cost of an employee with a markup of 7% i.e., Rs. 42.54 Cr, however, the balance 18 Cr was mere reimbursement of expenses which were initially incurred on behalf of its AE and subsequently, cross charged.

- The tribunal further opined that merely because Assessee accepted Rs. 42.54 Cr as FTS/FIS, the other payment for campus project services cannot be treated as FIS without examination of each and every service, particularly when details of such services are available on record.

- The Tribunal rejected Revenue's contention on the applicability of Article 12(4) of India-US DTAA and observed that in order to constitute 'make available', technical knowledge or skill must remain with the recipient subsequent to termination of the contract and a mere incidental advantage to the recipient is not sufficient to fall under the category of 'make available'. Further, apart from merely using the terminology 'make available', the Revenue failed to bring any instance where the AE was shown to have used such information without depending on the Assessee.

- The Tribunal further observed that the Assessee continued to receive payment for similar services on a recurring basis under the agreement in subsequent AYs which also justified that no technical knowledge, experience, skill or know-how has been made available to AE.

- Thus, the Tribunal held that on perusal of the nature of services provided by Assessee, it is evident that the said services pertain to document handling, printing charges, and similar other services which can neither be said to 'make available' to the recipient nor can consist of development of transfer of any technical plan or technical design, accordingly, does not fall within the ambit of FIS as per Article 12(4) of India-US DTAA.

Full Judgement: Goldman Sachs & Co. LLC

SNR's Take

The Tribunal's ruling is in consonance with Ahmedabad ITAT ruling in **Shell Global International** wherein it was observed that in order to constitute 'make available', technical knowledge or skill must remain with the recipient subsequent to termination of the contract and a mere incidental advantage to the recipient is not sufficient to fall under the category of 'make available'.

7. Rectification cannot be sustained for attracting tax rates as per Sec.115BBE where the original order does not invoke Sec.68/69:

Case of : Anjanee Vijetha Kasturi Vs ACIT
Decision by : ITAT, Hyderabad
In favour of : Assessee
Date of Judgement : 09-05-2023

- During a survey conducted on Assessee's business premises, Assessee gave a statement under Section 131 offering an additional income of Rs. 20 Lacs for AY 2015-16. Consequently, the assessee filed a return of income admitting an income of Rs. 23.62 Lacs including the additional income offered earlier, which was accepted by the Revenue.

- Subsequently, Revenue passed a rectification order under Section 154 holding that the unaccounted income declared by the Assessee of Rs. 20 Lacs was to be taxed under section 115BBE at flat rate of 30% instead of slab rates, which was upheld by CIT(A).

- On appeal, ITAT observed that the Revenue did not invoke Section 115BBE during the course of the assessment and accepted the additional income offered by the Assesse, and accepted the assessee's argument that the option of rectification under Section 154 would have been available to the Revenue if Section 115BBE was invoked but the Revenue levied the tax at a different rate by mistake.

- The Tribunal while referring to provisions of Section 115BBE as also Section 68/69/69A/69B/69C/69D, observed that unless the Revenue records that the assessee has not offered any explanation about the nature and source of the unexplained money or the explanation offered is not to his satisfaction, Sections 68, 69, 69A, 69B, 69C or 69D cannot be invoked and pointed out that in the absence of compliance on the part of Revenue to record the aforementioned satisfaction, it cannot be presumed that such an order was passed in respect of any income determined under Sections 68, 69, 69A, 69B, 69C or 69D or that the tax has to be levied under section 115BBE.

- Thus, the Tribunal opined that it cannot be said that there was any mistake apparent from the record or that the proceedings are amenable to the jurisdiction of the learned Assessing Officer under section 154. Thus, held that the exercise of jurisdiction under section 154 by the Revenue is bad in law and quashed the order passed.

Full Judgement: Anjanee Vijetha Kasturi

SNR's Take

The Tribunal has reiterated the Jaipur ITAT ruling in Hari Narain Gattani and Sudesh Kumar Gupta, wherein it was held that if the Revenue accepted the Assessee's return of income and levied the tax on the undisclosed income as per the slab rates, without determining such income as undisclosed under Sections 68 or 69, then the subsequent exercise of powers under section 154 to invoke Section 115BBE was held bad in law.

8. Delayed payment shall be regarded as deferred payment instead of willful tax-evasion where bonafide reasons are established. No prosecution u/s 276C/277:

Case of : Vivimed Labs Ltd
Decision by : High Court, Telangana
In favour of : Assessee
Date of Judgement : 10-01-2023

- For AY 2017-18, Assessee-Company filed its return of income declaring income of Rs.182.90 Cr and computed tax liability of Rs. 38.72 Cr. Assessee claimed to have paid such tax liability through the self-assessment tax of Rs.37.64 Cr and balance through advance tax, TDS, and TCS in the original return of income, which was verified by the company's CEO and MD. However, the payments as per challan details available in the OLTAS database reflected self-assessment tax of only Rs.10 Cr.

- Upon pointing out such variance, the company filed a revised return showing a balance tax payable of Rs.27.64 Cr.

- Revenue held that since in the original return, the company made false claim of payment of self-assessment tax of Rs.27.64 Cr, it fell squarely within the meaning of Explanation (iv) to Section 276C. The company also failed to comply with the show cause notice issued for launching prosecution and thus complaint was filed against the company and its CEO & MD who verified the return.
- HC noted that prior to the issuance of show cause notice or even lodging complaint, the company filed the return of income after noticing that there was a mistake in the tax return. The court thus observed that "there are bonafide on the part of petitioners in submitting revised tax returns after noticing that there is an omission/mistake." The court also considered the submission on behalf of the company that after filing the revised return, a substantial amount was paid by the company towards tax liability and the remaining tax was recovered by the Income Tax Department from the company's vendors. Thus, it held that it was not the case wherein a deliberate attempt is made by the company to evade tax.
- The court further opined that the conduct of the company in filing revised returns immediately after noticing an error on their part indicated that it was a case of delayed payment of tax or deferred payment and held that such delay in the payment will not amount to a willful attempt to evade tax.
- Thus, the court ordered that "There is no material to arrive to a conclusion that there is a false statement of verification or filing of a false return and thereby penal provisions are not attracted."

Full Judgement: Vivimed Labs Limited

SNR's Take

The Court's quashing of criminal complaints filed for wilful evasion of tax (Section 276C) and false information in verification (Section 277) is a welcome decision. It reiterates the fact that delayed payment of tax does not necessarily amount to wilful evasion of tax. Where due to bona fide reasons, the Assessee revised the return and corrected the details of tax payment, it is just a case of deferment of tax and thus not warranting penal provisions.

CIRCULARS/NOTIFICATIONS:

1. CBDT notifies FSSAI for Sec.10(46) exemption:

CBDT notified income tax exemption under Section 10(46) to 'The Food Safety and Standards Authority of India (FSSAI), New Delhi'. The exemption is in respect of inter alia the following incomes: (a) grants-in-aid received from the Ministry of Health and Family Welfare; (b) statutory fees such as license fee, registration fee, analysis or testing of food samples fee fixed through regulations under the Food Safety Act, 2006 and approved by the Government of India.

Read Notification: 26/2023

2. CBDT issued Guidelines for deduction of TDS on 'net winnings' from online gaming:

CBDT has issued Guidelines for the removal of difficulties under Section 194BA that deals with Winnings from Online Games. The Circular deals with inter alia: (i) computation of "net winnings" with respect to multiple wallets of one user, (ii) whether borrowed money would be considered taxable or non-taxable, (iii) treatment of bonus, referral bonus, incentives, etc., (iv) compliance, and (vi) valuation.

Read Circular: 05/2023

3. CBDT issued notifications to restrict the implications of Angel Tax in light of recent amendments:

Pursuant to Press Release dt. May 19, 2023, proposing changes with respect to Angel Tax imposed by way of section 56(2)(viib), CBDT has issued two notifications dt. May 24, 2023; Notification No. 30/2023 (effective from Apr 1, 2023) deals with startups whereby, CBDT notified that Section 56(2)(viib) shall not apply to the consideration received by a company for the issue of shares exceeding the face value if the said consideration has been received from any person, by a startup fulfilling the conditions of Para 4 and 5 of the DPIIT Notification dated Feb 19, 2019.

Notification No. 29/2023, notified the class or classes of persons of the inapplicability of Section 56(2)(viib).

Read Circular: 29/2023 **and** 30/2023

4. CBDT notified Rs. 25 Lac for leave encashment exemption:

Pursuant to the announcement by the Finance Minister in her Budget Speech this year, the CBDT has notified Rs.25 Lac as an exemption limit under Section 10(10AA) with regard to leave encashment received by non-government employees on retirement. This notification shall come into force from Apr 1, 2023. Before this Notification, the exemption limit was Rs.3 Lacs.

Read Notification: 31/2023

COMPLIANCE CALENDER:

DATE	PARTICULARS
07-06-2023	The due date for deposit of Tax deducted/collected for the month of May 2023. However, all sums deducted/collected by an office of the government shall be paid to the credit of the Central Government on the same day where tax is paid without the production of an Income-tax Challan
14-06-2023	Due date for issue of TDS Certificate for tax deducted under section 194-IA, 194-IB, 194M and 194S in the month of April 2023"
15-06-2023	Quarterly TDS certificates (in respect of tax deducted for payments other than salary) for the quarter ending March 2023
15-06-2023	First instalment of advance tax for the assessment year 2024-25
15-06-2023	Certificate of tax deducted at source to employees in respect of salary paid and tax deducted during Financial Year 2022-23
30-06-2023	The due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA, section 194-IB, section 194M and section 194-S in the month of May 2023
30-06-2023	Quarterly statement of TDS deposited for the quarter ending March 31, 2023
30-06-2023	Deadline for linking PAN with Aadhaar to avoid PAN becoming inoperative. **Note:** The deadline has been extended from March 31, 2023, to June 30, 2023, vide press release, dated 28-03-2023

SNR & COMPANY
CHARTERED ACCOUNTANTS

SNR is a firm of Chartered Accountants offering assurance, tax, accounting and consulting services to its national and international clients across the globe. The firm has its head office at New Delhi with branches at. Pune & Bengaluru. SNR has experienced a considerable growth since its inception in 1996 and is empanelled with reputed banks and with the office of the comptroller and auditor general of India The firm through its team of experts consisting of Chartered Accountants, Company Secretaries and Management professionals provides professional services to a large number of clients viz. Companies, Banks and NGOs etc.

OUR LOCATION

DELHI

A-15, Second Floor, Hauz Khas,
New Delhi- 110016
Tel: +91 11 41655801, 41655802

PUNE

Office No. 5,Kalashree Apartment,
Opposite Bank of Maharashtra,
Karve Road, Pune 411004
Ph: +91 20 25435788

BANGALORE

No. 5A, Second Floor, 6th Main,
KHB Colony, Basaveshwaranagar,
Bangalore - 560079
Tel: +91 80 42064178