Accounting and Taxation Aspects of Gold Deposit Scheme

With the Government imposing a lot of restrictions on the import of gold, jewellery houses are trying to come out with schemes which encourage citizens to free their gold holdings from their lockers and bring it into circulation. Though some banks are already running gold deposit schemes, the accounting and tax treatment of the transaction is not coming out from their annual report, may be for the reason that in terms of total size of their final accounts, such transactions are not material. Success of Gold deposit scheme to bring out gold stored in lockers and vaults is of national importance. However, the Legislative framework for the same is not ready. In fact, the Legislature has not thought about a commercial transaction of interest bearing deposits in kind.

Pliny the Elder, in 77CE, in his encyclopedic work on classical Rome, called India the 'sink of the world's precious metal'. It is believed that a Roman ship laden with gold touched an Indian port daily to carry Indian spices, silks and fine cotton in exchange. India's culture and mythology embrace gold. Given the one-way flow of gold over the centuries, till the beginning of the nineteenth century, a staggering amount of precious metal has accumulated in India. The World Gold Council estimates it to be over 20,000 tonnes. Even today, India absorbs about a quarter of the world's gold. There is no firm estimate of how much gold is held by Indian temples, but it is believed to be several thousand tonnes. One of the reasons of high Current Account Deficit (CAD) is attributed to the madness of Indians towards gold which is often termed as an unproductive asset. The finance minister is quite right in wanting to limit its import, which of late has led to increase in smuggling of this precious metal in the country and also complaint of loss of livelihood to thousands of craftsmen. With the Government imposing lots of restrictions on the import of gold, jewellery houses are trying to come out with schemes which encourage citizens to free their gold holdings from their lockers and bring it into circulation. Salient features of such schemes are:

a. The customer brings in gold in the form of jewellery, bars, coins *etc.*
b. That gold is melted by jewellery houses to ascertain its purity *etc.* and a receipt is issued to the customer for its quantity and purity (say 100 gms. of 22 carat)

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c. The pure gold so obtained is used by Jewellery house for its business (for making jewellery and coins for sale)
d. After a specified period (say one year), the customer can take back the gold with interest in the form of gold (say 105 gms of 22 carat)
e. The extra five grams is treated as interest cost by the Jewellery house. If the value of extra quantity exceeds the threshold exemption limits of Income-tax TDS, the customer is required to pay the tax amount in cash for which a TDS certificate is issued.

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Accounting of deposits in kind

The initial recording of receipt of deposit in kind will be a Balance-Sheet activity only; increasing the assets and liabilities side by an equal amount. For recording the transaction, a value in monetary terms will have to be assigned to it. This initial recognition would be at fair market value. Fair market value is the price that a given property or asset would fetch in the market place, subject to the following conditions: (i) prospective buyers and sellers are reasonably knowledgeable about the asset; they are behaving in their own best interests and are free of undue pressure of trade; (ii) a reasonable time period is given for the transaction to be completed. The definition of 'fair market value' contained in Section 2(22B) of the Income-tax Act, 1961 is on similar lines. Gold has an active market in India and therefore, it would not be difficult to get a fair market rate. However, the commodity is subject to change in rate during even the course of a day. Now the question arises, as towhat should be the rate used for accounting? Guidance may be taken from Accounting Standard (AS) 11 which permits the use of the average rate for all transactions during the week or month in which the transactions occur. So long as a consistent practice is followed for arriving at the fair market value for the purpose of recording the transaction, the adoption of the previous week's or previous day's rate will be a permissible practice.

Gold is not money as understood under the Sales Tax law. There is no reason why the word 'money' should be given a different meaning for the purpose of Companies Act or Income-Tax Act. Does this mean that the Legislature allows a free play when the transaction relates to deposits in kind?

The purpose of taking deposits in the form of gold (deposit in kind) is to use it as the inventory of business. AS 2 defines inventory *inter alia* to mean assets in the form of material or supplies to be consumed in the production process or in the rendering of services. Gold obtained under a deposit scheme will be converted into jewellery and coins by deploying labour, consumables, and further material (gems, pearls, other precious and non-precious metals and alloys *etc.*). As soon as gold is put into a production process, it will have to be brought into the regular inventory of business. This bringing-in into regular inventory will require a journal entry debiting 'purchases of inventory account' (trading or profit and loss account) and crediting earlier inventory account (asset account). Thus, the final entry in the books remains as 'purchases' debit and 'depositor' credit. This conversion of special inventory to regular inventory should be at historical cost, *i.e.*, the cost at which the initial recording of acceptance of deposit was made. There is no need of finding fair market value again.

The Income-tax Act requires that when a capital asset is converted into stock-in-trade of business conversion should happen at fair market value. Capital asset is defined under Section 2(14) of the Income-tax Act which excludes stock-in-trade, consumable stores or raw material from the ambit of capital asset. The purpose of taking deposits in the form of gold (deposit in kind) is to use it as inventory of business. Thus, the Conversion at the historical cost will be in consonance with the Income-tax Act also. An enterprise may even choose to directly record receipt of deposit as purchase of raw material.

Restatement of liability on Balance Sheet date

The concept or doctrine of prudence will require restatement of liability of repayment of deposit in kind. If the rate of gold on the Balance-Sheet date will be less than the carrying rate of liability in gold, this will lead to unrealised gain which needs to be ignored. However, if the rate of gold on the Balance-Sheet date exceeds the carrying rate of liability in gold, a provision will have to be made. In addition to

the general application of the doctrine of prudence, increase in liability is a present obligation as a result of a past event, which can be estimated reliably requiring recognition of provision in accordance with AS29. The doctrine of prudence was endorsed by the Supreme Court way back in 1953 in *Chainrup Sampatram vs. Commissioner of West Bengal [1953] 24 ITR 481* and is being applied consistently by Courts. In *Oil and Natural Gas Corporation Ltd vs. CIT [2010] 322 ITR 180 (SC)* it was held that the loss claimed by the appellant on account of fluctuation in the rate of foreign exchange as on the date of Balance-sheet was allowable as expenditure under Section 37(1) of the Income-tax Act, 1961. For taxation and accounting purposes, restatement of liability of repayment of deposit in kind is equivalent to restatement of the liability of payment in foreign currency. In *Moss vs. Hancock [1899] 2 QB 11,* it has been held that foreign money or currency and coins are chattels which can be bought and sold.

Whether gold is money

It appears neither the Companies Act nor Income-tax Act has visualised a transaction of accepting deposits in kind and also payment of interest thereon in kind.

Section 2(31) of the Companies Act, 2013 defines deposit thus: 'deposit' includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

Chapter V of the Companies Act, 2013 consisting of Sections 73 to 76 regulates the acceptance of deposit by Companies. The Act *inter-alia* requires companies to obtain the rating from a recognised credit rating agency, maintain deposit repayment reserve account and obtaining deposit insurance.

Section 269SS of the Income-Tax Act, 1961 prescribes mode of taking or accepting certain loans and deposits. *Explanation (iii)* to Section 269SS provides that loan or deposit' means loan or deposit of money.

This situation leads to the question as to whether gold is money? In *Vadivel Achari vs. Madras Sales Tax Appellate Tribunal [1969] 23 STC 273,* the Madras High Court considered the question whether payment by gold can be 'other valuable consideration' within the meaning of the Madras General Sales Tax Act. The Court held that money need not necessarily be confined to coins or currency notes but has a wider connotation. It was held that

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payment of gold could be treated as payment in the nature of cash or money consideration. That was based on the reasoning that the monetary system, both national and international, is based on gold and silver reserves, and that when currency is used, it is representing its value in gold or silver. A full bench of the Kerala High Court in *M. Jaihind vs. State of Kerala [1998] 111 STC 374 (Ker) (FB)* dissented with the above reasoning and conclusion. The Allahabad High Court in *Sales Tax Commissioner, UP vs. Ram Kumar Agarwal [1967] 19 STC 400 (All)* also held that the term 'money' has also a legal meaning as well as a popular sense both of which bar the inclusion of bullion or metal of any kind as such in the concept of 'money'. The Court explained that, what may pass for money in exceptional conditions or under the special usages and customs of a peculiar or commercially backward or primitive society is not relevant. Legally speaking, 'money' is just what a 'legal tender' is, or what a tradesman is legally bound to accept under the law of the country. The Andhra Pradesh High Court in *Vijaya Aluminium Industries vs. State of Andhra Pradesh [1996] 103 STC 508* disagreed with the conclusion in *Vadivel Achari (supra)* and followed the view taken by the Allahabad High court in *Ram Kumar Agarwal (supra).*

It can be fairly concluded that gold is not money as understood under the Sales Tax law. There is no reason why the word 'money' should be given a different meaning for the purpose of Companies Act or Income-tax Act. Does this mean that the Legislature allows a free play when the transaction relates to the deposits in kind? Though the intention might not have been so, yet the current interpretation of the term 'money', as given by the Courts, leads to such conclusion, which needs to be arrested by regulators.

TDS on interest in kind

In the earlier part, it was concluded that the Income-tax Act has not visualised a transaction of accepting deposits in kind and also payment of interest thereon in kind. Theconclusion gets fortified from the fact that the Act does not contain any provision for making TDS when payment of interest is in kind. The Karnataka High Court in *CIT vs.*

Hindustan Lever Limited 2013-TIOL-878-HC-Kar-IT judgment dated 30th August, 2013 while dealing with a matter of TDS under Section 194B (winnings from lottery or crossword puzzle) has observed that the word/term 'deduct', employed in Section 194B, postulates a reduction or subtraction of an amount from a gross sum to be paid and payment of the net amount thereafter. Where the winning is wholly in kind subtraction/reduction of any sum therefrom does not arise. The Court further noted that under Section 194B, when winnings are wholly in kind or partly in cash and partly in kind, the legislature has cast duty/responsibility on the person responsible for paying to ensure that the tax is paid before the winnings is released. Now, if we extend this analogy to the requirement of deduction of tax at source under Section 194A of the Act from payment of income by way of interest, it can be concluded that there is no requirement of deduction where payment of interest is in kind.

Section 194A talks about deduction at the time of payment or credit in cash or by the issue of a cheque or draft or by any other mode. If the rule of *ejusdem-generis* is applied, meaning of the words 'any other mode' should be restricted to 'cash or cash equivalents' and it cannot be extended to cover payments in kind. Otherwise, nothing can be deducted or subtracted from payment in kind. Unlike Section 194A, there is no requirement of deduction under Section 194B on simply crediting the sum to a payable account or suspense account *etc*. On the other hand, unlike Section 194B, there is no requirement in Section 194A of ensuring that the tax is paid by payee before the interest in kind is released. This scheme of the Income-tax Act fortifies the conclusion that the Legislature, has not envisaged a transaction where interest bearing deposits are accepted in kind and interest is contracted to be paid in kind.

Deposits in kind and Sales Tax

There is a view that, though under the agreement, the depositor gives possession of gold as deposit for earning interest, yet in effect general property in goods held in deposit passes from depositor to a jewellery house and irrespective of name given to scheme and underlying contract, whole transaction is covered under the Sales-tax (VAT) law and the applicable tax is payable every time there is a physical movement of goods. The reasons for such views are:

1. As soon as brought-in gold is melted and a receipt is issued to the customer, all the risks and rewards associated with gold stand transferred to the jewellery house. The jewellery house is free to sell, mortgage, gift or dispose the gold in any other manner whatsoever without obtaining any consent from the depositor. The goods are not delivered by the depositor to the jewellery house for performing any job on them.
2. The jewellery house is not acting as a Bailee for safekeeping of gold for consideration. The purpose of entering into transaction is to use gold as an item of 'stock in trade'. Under the transaction, the jewellery house acquires 'stock in trade' for 'deferred payment', that payment is made 'in kind' after the agreed period along with the 'period cost' (interest).
3. As per Section 26 of the Sale of Goods Act, 1930, risk *prima facie* passes with property. When under the scheme, all risks and rewards in gold stand transferred to the jewellery house, it will be difficult to say that property in gold has not been transferred. No depositor will agree to a condition, whether written or implied, of the effect that risk in goods, possession of which is given to a jewellery house, remains with the depositor.
4. The gold obtained from the depositor will loose its identity as soon as it is mixed with the other stock of gold held by the jewellery house. The depositor will never know the customer to whom goods made out of gold obtained from him under the deposit scheme has been sold. Similarly, the jewellery house cannot tell the customer that it does not have ownership rights of the ornament or coin which it is selling. In fact, Section 27 of the Sale of Goods Act will provide full protection to the customer and the depositor will not have any right to sue the customer.
5. For every sale of goods, there should be a corresponding purchase of goods. Unless the gold received as deposit is converted in purchase, the matching principle of accounting will not get satisfied. Under the mercantile system of accounting, in order to determine the net income of an accounting year, the revenue and other incomes are matched with the cost of resources

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consumed (expenses). Under the mercantile system of accounting, this matching is required to be done on accrual basis. Under this matching concept, revenue and income earned during an accounting period, irrespective of actual cash-in-flow, is required to be compared with expenses incurred during the same period, irrespective of the actual out-flow of cash. Thus, as soon as goods, manufactured out of gold received from the depositor is sold to the customer, the corresponding purchase of gold will have to be recognised. Even if the gold received is accounted as 'deposit' it will have to be converted in purchase at every sale of goods made out of gold held as deposit.

6. The substance, and not the form of the contract, is material in determining the nature of the transaction. In this transaction, substance is the acquisition of 'stock in trade for deferred payment' which will be sold for a price. Thus, the form of 'deposit' and an understanding in contract with the depositor that the property in goods remains with the depositor is of no help.

There is a contrary view which advocates that transaction is a pure barter transaction hence out of the purview of Law of Tax on Sale of Goods. Supporters of this view rely on three Judgments of the Supreme Court (i) *State of Madras vs. Gannon Dunkerley & Co. [1958] 9 STC 353; (1959) SCR 379;2002-TIOL-493-SC-CT-LB* Judgment dated 1st April, 1958 wherein the Court observed that if the consideration for transfer of title to the goods was not money but other valuable consideration, it may then be exchanged or bartered but not sold. The observation came in the context of dispute about powers of States, of imposing a tax, on the supply of materials in the works contracts. It was held that the expression 'sale of goods' is a *nomenjuris*, and therefore it should be construed in the sense which it has in the Indian Sale of Goods Act. In the concluding paragraphs, the Supreme Court observed that if the power to tax supply of materials in the works contracts would have been lodged with the States, the Constitution might have given an inclusive definition of 'sale' in Entry 54 in the State List contained in the Seventh Schedule of the Constitution so as to cover the extended sense. The Allahabad High Court in *Sales Tax Commissioner, UP vs. Ram Kumar Agarwal [1967] 19 STC 400 (All)* Judgment dated 6th September, 1966 following *Gannon Dunkerley (supra)* held that the words 'other valuable consideration' which occur in the definition of sale under the Sales Tax Act, and which do not find a place in the definition of 'sale' in the Sale of Goods Act, must be held to be *ultra vires* the scope of the Provincial or State Legislatures. Those words, at best, can be interpreted, on the basis of the rule of *ejusdem generis* to mean payment, *i.e.*, by cheque, bills of exchange or any such other negotiable instruments. (ii) *Devi Dass Gopal Krishnan vs. State of Punjab & others [1967] 20 STC 430 (SC)); 3 SCR 557* Judgment dated 10th April, 1967 wherein the Court observed that the expression 'valuable consideration' has a wider connotation. The Court further observed that the said expression has been used in the collocation of 'cash' and 'deferred payment' in the definition of sale in most of the Sales Tax Acts and it has never been argued or decided that the said expression means other than monetary consideration. In conclusion, in order to maintain 'consistent legislative practice', it was held that the expression 'valuable consideration' takes colour from the preceding expression 'cash or deferred payment'. If so, it can only mean some other monetary payment in the nature of cash or deferred payment.(iii) *Commissioner of Income Tax vs. Motor And General Stores P. Ltd [1967] 66 ITR 692 (SC); 1968 AIR 200, 1967* Judgment dated 2nd May, 1967 which was a matter under the Income-tax Act, 1922 where, in the absence of definition of word 'sale' under the Income-Tax Act, 1922 reference to Section 54 of the Transfer of Property Act and then to Sale of Goods Act, 1930 was made to hold that the exchange of immovable and movable property with shares was not a sale of that immovable and movable property.

It is a settled law that a precedent is an authority only for what it actually decides and not what may remotely or even logically follow from it. A decision on a question which has not been argued cannot be treated as a precedent[1]. It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to

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[1] *Goodyear India Ltd vs. State of Haryana [1990] 188 ITR 402; 76 STC 71; 1990 AIR 781*

be answered in that judgment[2]. In none of the above three judgments, the Court was directly called upon to answer the question whether a barter transaction, and in the current context a transaction purported to be a transaction of loan or deposit in kind, which is accounted for in the books as purchases, will be excluded for liability of tax on sale or purchase of goods. In *Devi Dass Gopal Krishan (Supra),* the Courts refrained from examining the meaning of 'valuable consideration' to maintain 'consistent legislative practice' and in the *Motor and General Stores* there was no definition of sale under the relevant statute.

The States get the authority to levy sales tax by virtue of Entry 54 in the State List contained in the Seventh Schedule of Constitution. The power to levy tax on inter-state transactions is vested in the Union Government by virtue of Entry 92A in the Union List. Both these entries are about 'Taxes on the sale or purchase of goods……' In the absence of any definition of the word 'sale' in the Constitution, the word 'sale' contained in above entries was assigned meaning as understood under the Indian Sale of Goods Act, 1930. The Constitution (Forty-sixth) Amendment Act, 1982 which received the assent of the President on 2nd February, 1983, brought about a deviation by introducing the definition of the phrase 'tax on the sale of purchase of goods' by inserting Article 366(29-A). The definition is an inclusive definition. The introduction of definition was aimed at the expanding meaning of 'sale' to bring the concept of 'deemed sales'. This Constitutional amendment posed a question as up to what extent the concept of 'sale' for taxation purposes has become independent of the Sale of Goods Act, 1930. It is settled a law that the word 'includes' or 'including' is normally used to enlarge the scope of the definition or expression to include things that would not properly fall within its ordinary connotation. In other words, it is used as an extensive word.

A three Judges Bench of the Supreme Court in *Bharat Sanchar Nigam Limited vs. Union of India [2006] 3 SCC 1; [2006] 145 STC 91 (SC)* Judgment dated 2nd March, 2006 examined the effect of insertion of Article 366(29-A) and declared in para 44 that despite the amendment (i) definition of 'sale' for the purposes of the Constitution in general and for the purposes of entry 54 of List II (State list) in particular remains unaltered [except to the extent that the clauses in Article 366(29-A) operate] and (ii) the word 'goods' has not been altered by the 46th amendments and (iii) the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A) remains unaffected. It was declared that the transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of the Sales of Goods Act, 1930 for the purpose of levy of sales tax.

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In the same paragraph, the Court also said that the contents of the concepts do not remain static and also that the Courts must move with the times. In fact, the Supreme Court way back in 1989 in *Video Electronics Pvt. Limited and Another vs. State of Punjab and Another [1990] 77 STC 82 (SC)* observed that it is not that with changing times the meaning changes but changing times illustrate and illuminate the meaning of the expression used. The connotation of the expressions used takes its shape and colour in the evolving dynamic situations (page 109 of report).

Like all other linguistic canons of construction, the *ejusdem generis* principle applies only when a contrary intention does not appear[3]. The interpretation of the words 'other valuable consideration' contained in the phrase 'for cash or deferred payment or other valuable consideration' used in the definition of sale as contained in the Uttar Pradesh Trade Tax Act, 1948 came before a Division bench of the Supreme Court in *Dhampur Sugar Mills Limited vs. Commissioner of Trade tax, U.P. [2006] 147 STC 57 (SC)* Judgment dated 12th May, 2006. The matter pertained to the post Constitutional amendment period and the Supreme Court had the benefit of having views of a three Judges bench of the same Court on effects of the Constitutional amendment. The matter pertained to a commercial contract wherein the lease rent (license fee) payable for transfer of right to use a sugar mill, though quantified in monetary terms was settled by the supply of molasses, generated in the mill, to the owners. The value of molasses was also quantifiable in monetary terms. The assessee relying on *Gannon Dunkerley & Co. [1958] (supra); Devi Dass Gopal*

[2] *CIT vs. Sun Engineering Works P. Ltd. [1992] 107 CTR 209; 198 ITR 297 (SC)*
[3] *Maharashtra University of Health and others vs. Satchikitsa Prasarak Mandal & Others [2010] 3 SCC 786*

Krishnan (supra) and *Motor and General Stores P. Ltd. (supra)* contended that supply of molasses for an amount equivalent to the license fee would not constitute a sale of molasses so as to attract the provisions of Sales tax Act. *Bharat Sanchar Nigam Limited vs. Union of India (supra)* was also pressed in service in support of the contention. In short, the contention was that the consideration for supply of molasses was a license fee, which is not 'money' hence such supply cannot be said to be 'sale' as understood under the Sales of Goods Act, 1930 and therefore under the Sales-tax Act. Dismissing the contention that the Supreme Court held that (i) the definition of 'sale' as contained in the Sales-tax Act, being an inclusive one must be given a broad meaning (ii) only when the consideration for transfer consists of other goods, it may be an exchange of barter (iii) it is unconceivable in law that a license fee can be subject-matter of barter or exchange(iv) An adjustment of price in a case of this nature would come within the purview of the term 'other valuable consideration' (v) *decisions in Devi Dass Gopal Krishnan (supra)* and *Motor and General Stores P. Ltd. (supra)* are not an authority for the proposition that cash or deferred payment cannot be by way of adjustment(vi) the term 'valuable consideration' in the changed context (in view of the Constitution amendment) may be viewed differently and finally that (vii) for construction of the words 'sale of goods', now the court is not necessarily required to fall upon the definition of sale of goods, as contained in the Sales of Goods Act, 1930. It has to be governed by its enlarged definition under Clause (29-A) to Article 366 of the Constitution of India.

Thus, the traditional meaning given to the words 'other valuable consideration' based on the principal of *ejusdem generis* is given a go-bye after the Constitution (Forty-sixth) Amendment Act and Sales tax authorities in States are levying tax on barter transactions based on this exposition of law.

In the *Ozone Properties Pvt. Ltd. vs. Addl. Commissioner of Commercial Taxes [2012] 52 VST 370 (Karnataka HC)* Division bench, Judgment dated 9th November, 2010 the appellant, a property developer, entered into a joint development agreement with the owners of certain land, and in furtherance of the agreement after completion of the project, 26.45% of the built-up area was to be transferred to the owners of the land in lieu of transfer of 73.55% of their undivided interest in the land to the appellant. The built up area of 73.55% put up by the appellant remained with it. Most of the construction work was handed over to the sub-contractors who were registered dealers. The revenue brought the transaction to tax as works contract, which was contested by the assessee. The first appellate authority, relying on the *Motor and General Stores P. Ltd. (supra)* set aside levy and held that the transaction involving an undertaking by the appellate builder or developer for exchange of 26.45% built up area in the property for 73.55% undivided interest in the land does not amount to sale. The revisioning authority under *suo moto* revisional powers relying on the *Dhampur Sugar Mills Ltd. (supra)* restored levy of tax. When the matter reached the High court, as all the facts of the transactions were not properly examined by the authorities below, the High court sent the matter back to the assessing officer.[4]

In the recent times, it is observed that the law of sale of goods is developing not through the issues arising out of the traditional, commercial or civil disputes but rather through the tax laws[5]. The Gujarat VAT Act, 2003 specifically includes 'supply by way of barter of goods' in the definition of sale. The definition of 'sale' in the Gujarat VAT Act, like other State's VAT Acts, is an inclusive one. Now the question arises that are other States which do not specifically include 'barter' in the inclusive definition of sale not entitled to levy tax on barter of goods or the law as framed for the Gujarat VAT is Unconstitutional? Does the law need to have valuation rules? Can non-monetary consideration, for the purpose of Sales Tax be stretched upto the extent that it has been stretched for the purposes of the Central Excise Act where even benefit which was not measured in terms of money was included in the purview of consideration[6]? Whether barter is limited to exchange of goods for goods only and if goods are exchanged for service then how will the valuation happen? These precise questions are yet to be answered by the Courts.

It is also pertinent to note that the words which came for interpretation before the Supreme Court

[4] *In Larsen & Toubro Limited vs. State of Karnataka 2013-TIOL-46-SC-CT-LB; [2013] 65 VST 1 (SC) Judgment dated 26th September, 2013 a three judges Bench of Supreme Court observed that in the development agreement between the owner of the land and the developer, direct monetary consideration may not be involved but such agreement cannot be seen in isolation to the terms contained therein and following development agreement, the agreement in the nature of the tripartite agreement between the owner of the land, the developer and the flat purchaser whereunder the developer has undertaken to construct for the flat purchaser for monetary consideration. It was however clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser.*

[5] *See preface of Mulla The Sale of Goods Act - 2007 edition by Dr. Justice G . C. Bharuka*

[6] *In Commissioner of Central Excise vs. Fiat India Pvt. Ltd. 2012-TIOL-58-SC-CX; [2012] 283 ELT 161 (SC) the intention of the assessee to penetrate the market was held to be 'extra commercial consideration'.*

in *Devi Dass Gopal Krishnan (supra)* and *Dhampur Sugar Mills Limited (supra)* were 'other valuable consideration'. The Central Sales Tax Act and also many of the State VAT Acts use the words 'any other valuable consideration'. The use of the word 'any' generally makes the scope of the word or phrase with which it is used unlimited. The Black's Law Dictionary, Sixth Edition defines 'any' thus: "Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity, 'Any' does not necessarily mean only one person, but may have reference to more than one or to many. The word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject matter of the statute. It is often synonymous with 'either', 'every', or 'all'. Its generality may be restricted by the context; thus, the giving of a right to do some act 'at any time' is commonly construed as meaning within a reasonable time; and the words 'any other' following the enumeration of particular classes are to be read as 'other such like', and include only others of like kind or character."

In *Radhas printers vs. State of Kerala [1993] 90 STC 201 (Kerala HC)* Division Bench Judgment dated 27th September, 1992[7] the assesse supplied goods valued at ₹1,00,000 to its sister concern on the consideration that the latter shall return the goods together with interest at 15% per anum on ₹1,00,000. The goods were returned after a year with interest of ₹15,000. According to the assesse, since the same was a loan transaction it did not include the said amount of ₹1,00,000 as its taxable turnover. The revenue maintained that the loan transaction is a make-believe one, the provision for payment of interest is totally inconsistent with a case of exchange or barter, and with due regard to the fact that the value of the goods in question was reckoned and since admittedly interest was charged on the said amount and was paid and received, the assesse cannot claim that the transaction was only a loan and not a sale. The High Court dismissed revision petition filed by the assesse holding that the stipulation for payment of interest has added significance when it is remembered that the same usually could be on the purchase price, indicative of deferred payment rather than damages for the user of the goods. In this particular case, the assesse could not produce stock register to demonstrate that the goods said to be given on loan were actually received back. Thus, on facts, its case was weak.

Is it transfer of right to use?

A transaction of loan or deposit of gold cannot be termed as transaction of transfer of right to use. It is for the reason that under the contract, when the depositors part with the gold, it parts with 'general' property in goods. The essential requirement of a transaction for transfer of the right to use goods is not the transfer of the property in goods, but it is right to use property in goods[8]. In the transfer of right to use, customers are not entitled to sell or offer for sale, mortgage and pledge the goods, whereas in the transaction in hand, as soon as the brought-in gold is melted and a receipt is issued to the customer, all risks and rewards associated with gold stand transferred to the jewellery house. The jewellery house is free to sell, mortgage, gift or dispose the gold in any other manner whatsoever without obtaining any consent from the depositor. The goods are not delivered by the depositor to the jewellery house for performing any job on them. In transfer of right to use goods, there is an implied stipulation of return of the very same goods whereas in a transaction under the gold deposit scheme, the jewellery house is not returning very same goods. In fact, it cannot. Otherwise, the whole purpose of entering into the transaction will vanish. The jewellery house promises to return the goods which have an approximate correlation between the goods received and the goods returned.

Where we stand

The success of Gold deposit scheme to bring out gold stored in lockers and vaults is of national importance. However, the above analysis of law demonstrates that Legislative framework for the same is not ready. In fact Legislature has not thought about a commercial transaction of interest bearing deposits in kind. In recent years, demand of gold has picked up not because of religious or ceremonial reasons but as a hedge against inflation. The depositor is interested in protection of purchasing power of its savings. In substance, when depositor parts with its gold, it really sells the same with a stipulation of buying back the same quantity at original price on a later date. On sale, as the payment is not received by depositor immediately it becomes entitled to period cost, i.e., interest. Viewing the transaction from any other eye will make it non-starter. ■

[7] *The decision in Radhas Printers case [1993] 90 STC 201 (Ker) does not require reconsideration.. - M. Jaihind vs. State Of Kerala [1998] 111 STC 374 (Ker) (FB)*

[8] *G S Lamba & Sons vs. State of Andhra Pradesh [2011] 43 VST 323 (AP HC) ; 2012-TIOL-49-HC-AP-CT*