DTPA

Direct Taxes Professionals' Association

eBulletin

October & November, 2020

Headlines

- Admission and Retraction of Statement in Survey & Search Cases
- Update on Code of Ethics of ICAI
- Commonly found Errors in Tax Audit
- Audit Process Flow
- Latest Income Tax Judgements & Circulars
- Recent Case Laws on GST
- Company Law Updates
- GST Circulars & Notifications – October '2020
- Representation by team DTPA before various Authorities
- PRE-BUDGET MEMORANDUM ON DIRECT TAXES & INDIRECT TAXES (Goods & Services Tax)
- NOVEMBER CALENDAR

Dear friends,

This is our fifth Edition of DTPA E-Bulletin for the month of October and November 2020. Both the month are full of festive seasons and professional commitments. However some relief has been gained with the extension of due date for filling tax audit report and other returns.

After the Covid pendamic in the month of March 2020, economy is gradually coming to the track and share market has also touched the new life time high in this month. We do hope that things will become gradually normal and much more better in year 2021.

Wishing you a Happy and Subh Diwali in advance.

With warm regards

CA MAHENDRA K AGARWAL
Chairman - DTPA Journal Committee
10th November, 2020

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Dear Members,

Happy Bijoya and Dushera

The festive seasons is on – may be a bit off enthusiasm, we just celebrated Durga Puja and are on the doorsteps of celebrating a Happy Diwali. My sincere request to all Members to take all precautions while enjoying celebrations and keep in mind the mask and distancing measures.

The E- Bulletin for October & November 2020 is before you and I am sure you will like the same for its useful contents.

The Bulletin Committee under the able chairmanship of CA Mahendra Kumar Agarwal has been working very hard to bring out these Bulletins of knowledge bank on a monthly basis.

This volume includes calendar for November Compliances, Articles and Case Laws for day to day use of the Members and the representations DTPA has made since commencement of this term, which also include Pre Budget Suggestions on Direct Tax Provisions and the GST Provisions mailed today. All Representations were well responded by the concerned Authorities in as much as we could get a favourable result at the end.

I would sincerely request all the Members to contribute useful articles and compilations, which I assure, will find place in the next published bulletin, if found worthy of publication.

My best wishes to the Members and a Very Happy Diwali in advance.

With regards

CA Narendra Kumar Goyal
President - DTPA
10th November, 2020

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Index

Champer - I - Income Tax

A. Admission and Retraction of Statement in Survey & Search Cases — 01
Adv. Narayan Jain, LL.M., Advocate

B. Commonly found Errors in Tax Audit — 23
CA Suman Choudhury

C. Latest IT Judgements & Circulars — 25
CA Manjulata Shukla

Champer - II - GST

D. Recent Case Laws on GST — 42
CA Daya Shankar Agarwala

E. GST Circulars & Notifications – October '2020 — 64
CA Ankit Kanodia

Champer - III - Company Law

F. Company Law Updates — 71
CA Mayur Agrawal

Champer - IV - IBC & Other

G. Update on Code of Ethics of Icai — 74
CA Sumantra Guha

H. Audit Process Flow — 76
CA Suman Choudhury

I. Insolvency Resolution Process for Personal Guarantors to Corporate Debtors — 80
CA Binay Kumar Singhania

Champer - V - Miscellaneous

J. Representation by team DTPA before various Authorities — 86

K. Pre-Budget Memorandum on Direct Taxes - Union Budget 2021-22 — 106

L. Pre-Budget Memorandum on Indirect Taxes - Union Budget 2021-22 — 117

M. DTPA News Links — 124

N. Compliance Calendar for November, 2020 — 126

Admission and Retraction of Statement in Survey & Search Cases

Adv. Narayan Jain, LL.M., Advocate

1. Introduction

As in judicial proceedings in Courts, the **evidences both oral and documentary, are relevant in deciding the issues in the income-tax proceedings**.

Oral evidences, include Statements which are made before the income-tax authorities in relation to matter of inquiry, search and survey proceedings and may also include examination of the assessee or related parties.

Documentary evidences include all documents produced before the income-tax authority for his verification/inspection.

Admissions: Oral and documentary evidences, *inter alia*, depending upon the circumstances include 'Admissions' which play a crucial role in any judicial proceeding. There is considerable importance of Statements recorded during search and seizure operations, which is clear from the intent of Legislature as it thought fit to include a separate section 132(4) for recording of Statement during a search operation.

Presumption in case of Search and Survey proceedings: Further section 292C has been inserted by the Finance Act, 2007 with retrospective effect from 1-10-1975 allowing presumption as to assets, books of account, etc. found during search under section 132 and requisition under section 132A.

Later on by the Finance Act, 2008 the ambit of section 292C has been enlarged by including presumption in case of survey proceedings under section 133A with retrospective effect from 1-6-2002. The words 'may be used in evidence in any proceedings' appearing in section 132(4) are of great significance. The judicial views with regard to use of a Statement recorded under section 132(4) as a piece of evidence against the person making the Statement, and circumstances in which such person can retract the Statement as also **necessity for revenue to corroborate the admission,** are analysed in this article.

2. Admissions as in Evidence Act

Statementsrecorded under various provisions of the Income-tax Act, are vital tool in the hands of the income-tax authorities in their quest to establish certain factual and legal positions. Written Statements are used as evidence in various proceedings under the Income tax Act.

The word "Statement"is neither defined in the Income-tax Act nor in the Evidence Act, and, hence, it assumes its dictionary meaning of 'something that is stated'.

Admissions are Statements by a party of the existence of a fact which is relevant to an issue in dispute.

An Admissionis a Statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made by a party or by a person concerned with him in any of the ways as described under sections 18 to 23 of the Indian Evidence Act, 1872.

It may be noted that **the Statement may be either denial or admission of a fact** and at the same time it may be addressed to any one.

Section 17 of the Indian Evidence Act, 1872 defines **admission** as an oral or documentary **Statement** which suggests any inference as to any fact in issue or relevant fact.

As per **section 31** of the Indian Evidence Act, **admissionsare not conclusive proof** of the matters admitted, **but they may operate as**

estoppel under the provisions of the law as contained. **For an admission to be effective, corroboration with third party evidence is required.**

Admission, though sometimes strong evidence, are, however, not conclusive proof of the facts admitted. But what a party himself admits to be true, may reasonably be presumed to be so, **unless it is satisfactorily explained or successfully withdrawn**. So long as they do not operate as estoppel, **persons making admissions Admissionare at liberty to contradict them or to show that they are untrue or mistaken or made under a misapprehension**. Thus, **the effect of an admission is to shift the burden of proof to the party making the admission.**

The Supreme Court in ***Basant Singh* v. *Janki Singh* AIR 1967 SC 341**, held that:

> "An **admission by a party in a plaint signed and verified by him in a prior suit is an admission within the meaning of section 17** of the Indian Evidence Act, 1872 and may be proved against him in other litigations... **Section 17 of the Act makes no distinction between an admission made by a party in a pleading and other admissions**."

Evidentiary value of an admission: Considering the evidentiary value of an **admission** and the fact that an **admission** shifts the onus in terms of section 31 of the Evidence Act, the Supreme Court in **Kishori Lal v. Mst. Chaltibai AIR 1959 SC 504** held that:

> "... **the admissions shifted the onus on to the respondent on the principle that what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted, the fact admitted must be taken to be established....**" (p. 511)

3. An analysis of the term Admission

Admission is an extremely important piece of evidence and it is generally **admissible** against its maker. In regard to income-tax proceedings the **admissions** can be in various forms which may, *inter alia,* include:

(*i*) Admissions or Statements made in the returns of income;

(*ii*) replies or averments made in income-tax proceedings;

(*iii*) oral explanation which may be recorded in the form of Statements;

(*iv*) averments and pleadings in appellate proceedings.

In the income-tax proceedings, generally oral evidences or explanations are recorded in the form of Statements. These Statements are recorded in the assessment proceedings or on various other occasions so as to be ultimately used in assessment of correct income. These Statements can be of the assessee or of the witnesses.

Recording of the oral evidence in the form of Statements is also known as oral examination, the purpose of which is to elicit truth. This oral examination is generally at the instance of the income-tax authority.

4. Cases on search authorisation/ Issue of authorisation held invalid

4.1 In *H.L. Sibal v. CIT [1975] 101 ITR 112 (P&H)*, **it was held that power under section 132(1) has to be exercised in an honest manner and search warrants cannot be indiscriminately issued purely as matter of policy. The Commissioner has to record his reasons before issuing search warrant and where there was no information with Commissioner on basis of which he could form requisite belief under section 132(1)(a), (b) or (c) to issue search warrant in respect of search of premises of assessee, warrant issued for conducting aforesaid search and proceedings pending against assessee under section 132(5) were to be quashed.** The High Court also observed at page 138 of the ITR, as follows: "The applicability of Section 165, Criminal Procedure Code, to the searches made under Section 132(1) gives an indication that **this Section is intended**

to apply in limited circumstances to persons of a particular bent of mind, who are either not expected to cooperate with the authorities for the production of the relevant books or who are In possession of undisclosed money, bullion and jewellery, etc. Take for instance, a particular assessed who has utilised his undisclosed income in constructing a spacious building His premises cannot be subjected to a search under this Section on this score alone. A search would be authorised only if information is given to the CIT that such a person Is keeping money, bullion, jewellery, etc., in this building or elsewhere. Further, if an assessee has been regularly producing his books of account before the assessing authorities who have been accepting these books as having been maintained in proper course of business, it would be somewhat unjustified use of power on the part of the CIT to issue a search warrant for the production of these books of account unless of course there is information to the effect that he has been keeping some secret account books also. He has to arrive at a decision in the background of the mental make up of an individual or individuals jointly interested in a transaction or a venture. A blanket condemnation of persons of diverse activities unconnected with each other on the odd chance that if their premises are searched some incriminating material might be found is wholly outside the scope of Section 165, Criminal Procedure Code. This power has to be exercised in an honest manner and search warrants cannot be indiscriminately issued purely as a matter of policy."

4.2 In *Dr.Nand Lal Tahiliani v. CIT [1988] 39 Taxman 127 (Allahabad)/[1988] 170 ITR 592 (Allahabad)*, the Allahabad High Court held that the condition precedent for an action under Section 132 was possession of the Information mentioned in the said Section. If either of the conditions was missing or not adhered to then the authority was precluded from invoking the provisions of Section 132. In order that averment "of information must be in a good faith and not a mere pretence, it was necessary that information in consequence of which it was formed must be valid and linked with the ingredients mentioned in this Section. There must be a rational connection between the information or material and the belief about undisclosed income. While quashing the authorisation which had been issued, the Court referred to the note of satisfaction which had been recorded and observed that the reputation of roaring practice or rumour of charging high rate of fee could not be regarded as tangible material on the basis of which an opinion could be formed as contemplated by Section 132 of the Act. The satisfaction of the authorities under Section 132 may be subjective but it must be arrived at objectively and on material which is available.

4.3 In *Balwant Singh and others v. R.D. Shah, Director of Inspection, [1969] 71 ITR 550 (Del.)*, the Division Bench held that the **High Court could not test the adequacy of the grounds leading to the satisfaction which was recorded** under Section 132 of the Act. It was, however, observed that the Director of Inspection or the Commissioner ought not to lightly or arbitrarily invade the privacy of a subject. If the grounds on which the belief is founded are non-existent or are irrelevant or are such on which no reasonable person can come to that belief, the exercise of the power would be bad, but short of that, the Court cannot interfere with the belief bona fide arrived at by the Director of Inspection. It is, however, for the Court to examine whether the reasons for the belief have a rational connection or relevant bearing to the formation of the belief. **It was further observed, that search authorisation could not be issued merely with a view to making a roving or fishing enquiry, but could be issued only when their existed a good ground for believing that further proceedings may have to be taken.**

4.4 In *Moti Lal v. Preventive Intelligence Office, 80 ITR 418 (All.),* the Division Bench of the Allahabad High Court observed while interpreting the provisions of Section 132, in the language of Justice R.S. Pathak, as follows : "In my opinion the power conferred under Section 132(1) is contemplated in relation to those cases where the precise, location of the article or thing is not known to the Income Tax Department and,

therefore, a search must be made for it, and where it will not be ordinarily yielded over by the person having possession of it and, therefore, it is necessary to seize it……I am unable to accept the contention on behalf of the Income Tax Department that Section 132(3) will Include a case where the location of the article or thing is known and where ordinarily the person holding the custody of it will readily deliver it up to Income Tax Department, such article or thing. I think, it requires neither search nor seizure.” The said decision was approved by the Supreme Court in the case of *CIT v. Tarsem Kumar, 161 ITR 595 (SC).*

4.5 In *Jignesh FarshubhaiKakkad v. DIT (Inv) [2003] 132 Taxman 350 (Gujarat)/[2003] 264 ITR 87 (Gujarat)*, during the course of search in case of members of ‘A’ Group under section 132, the premises of one ‘P’ had been searched by the respondent- authorities and certain sum was found which according to ‘P’ belonged to his firm ‘J’ of which he was a partner after disassociating himself from the ‘A’ Group. The High Court held that from the perusal of the satisfaction note submitted by the respondent No. 2 and the satisfaction recorded by the respondent No. 1, it was clear that there was no justifiable reason for having search under the provisions of section 132 at the residence of the petitioners. The condition precedent referred to in section 132 had not been satisfied. No justifiable reason had been recorded for having search either by respondent No. 2 or by respondent No. 1 regarding his satisfaction. Simply because certain sum was found at the residence of ‘P’ and simply because ‘P’ was one of the partners of ‘J’, **there was no justifiable reason to issue authorization by respondent No. 1 in favour of respondent No. 2 for having search at the residence of the petitioners. The condition precedent for having search under the provisions of section 132 did not exist.** [Para 11] It was held that in the circumstances, the said satisfaction was arrived at in a mechanical manner and without any application of mind. The impugned orders of issuing athorization were quashed and set aside.

5. Recording of Statement under Section 132(4) and Presumption under sec. 292C

Section 132 (4) of Income Tax Act deals with recording of statements on oath. The same reads as under:

The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Income-tax Act.

Explanation : For the removal of doubts it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Income tax Act.

Recording of statements of the assessee and/ or other persons connected with the search, found in place of search and whom the authorized officer deems fit for recording a statement, is a common practice during such proceedings. It may be noted that the statement is recorded not for questioning simpliciter. and is taken on oath, its sanctity is quite high in the eyes of law and therefore, cannot be allowed to be retracted easily.

The words **‘may be used in evidence in any proceedings’** appearing in section 132(4) are of great significance. The judicial views with regard to use of a Statement recorded under section 132(4) and circumstances in which such person can retract the Statement as also **necessity for revenue to corroborate the admission,** are analysed hereinafter.

Presumption under Section 292C : Section 292C has been inserted by the Finance Act, 2007 with retrospective effect from 1-10-1975 **allowing presumption as to assets, books of account, etc. found during search under section 132 and requisition under section 132A.**

Later on by the Finance Act, 2008 the ambit of section 292C **has been enlarged by including presumption in case of survey proceedings**

under section 133A with retrospective effect from 1-6-2002.

6. CBDT Instruction dated March 23, 2003:

In the light of the statements recorded followed by retractions on the ground of coercion and threat in the course of search and survey operations, the Board issued the Instructions F.No. 286/2/2003 – IT (Inv.) dated March 23, 2003 stating as follows:

"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess undisclosed income during the course of the search and seizure and survey operation. Such confession, if not based on credible evidence, are retracted by the concerned assessees while filing return of income. In these circumstances, confession during the search and seizure and survey operation do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax department. Similarly, while recording statement during the course of search and seizure operation, no attempt should be made to obtain confession as to the undisclosed income."

7. Admissions are not conclusive proof

Admission, though sometimes strong evidence, are, however, not conclusive proof of the facts admitted. But what a party himself admits to be true, may reasonably be presumed to be so, **unless it is satisfactorily explained or successfully withdrawn.** So long as they do not operate as estoppel, **persons making admissions are at liberty to contradict them or to show that they are untrue or mistaken or made under a misapprehension.** Thus, **the effect of an admission is to shift the burden of proof to the party making the admission.**

Admissions play a very important role in the income-tax proceedings, as they generally bind the maker. **In the absence of any denial or explanation therefor, an admission is almost conclusive regarding the facts contained therein.**

They generally dispense with the requirement of adducing further evidence or proof to support a fact. **Though section 31 of the Indian Evidence Act, 1872 states that admissions are not conclusive proof of the matters admitted, yet admissions in the absence of rebuttal may conclude an issue.**

Under the Income-tax Act also **admissions** bind the maker **if these are not properly rebutted or retracted.** Some important judgments of the Supreme Court explain the concepts and relevance of admission and rebuttal or retraction of admitted facts, are discussed hereinafter.

As per **section 31** of the Indian Evidence Act, **admissions are not conclusive proof** of the matters admitted, **but they may operate as estoppel** under the provisions of the law as contained.

8. Retraction of Statement

A statement given on oath under section 132(4) may be retracted depending on the facts and circumstances of the case. When a person intends to retract his or her statement, the same should be done without undue delay and by giving cogent reasons for doing so along with other evidences to corroborate the reasons given for retraction.

It is settled law that a statement which is recorded under coercion or threat may be retracted and even statements which were given under mistaken facts or mistaken position of law, may be retracted, as soon as possible, giving cogent reasons explaining the mistake. **Even if an admission is made in a statement, the same cannot be held to be conclusive in every case especially when the assessee or any other person whose statement has been recorded under section 132(4) seeks to retract it and shows some genuine concrete reason.**

However, retraction of statements made, is viewed adversely by the Income Tax Department, in most cases. Article 20(3) of the Constitution says that no person accused of any offence shall be compelled to be a witness against himself. This is

based upon a legal maxim which means that no man is bound to accuse himself.

9. Decisions where Retraction of Statement was held VALID

9.1 *Pullangode Rubber Produce Co. Ltd. v. State of Kerala [1973] 91 ITR 18 (SC) :* Their Lordships while observing that **admission is an extremely important piece of evidence, held that, it cannot be said to be conclusive and the maker can show that it was incorrect.** [Also refer *S. Arjun Singh v. CWT [1989] 175 ITR 91/[1988] 41 Taxman 272 (Delhi)*].

9.2 In *Commissioner of Income Tax, Central-III v. Lavanya Land Pvt. Ltd. and Others [2017] 397 ITR 246 (Bom.)*, the Hon'ble Bombay High Court dismissed an appeal filed by the revenue against the order of the ITAT, Mumbai and upheld the order of the ITAT in which it had set aside the additions made by the revenue based on the statement made by person who was searched but which was later retracted by him. In this case, a search was conducted at the premises of one of handlers of the assessee company and his statement was recorded which showed an admission that a large sum of money was received by him to purchase lands in the name of the assessee company. The said statement was retracted by him after a period of two and a half months. However, the department proceeded to issue a notice to the assessee under section 153C of the Act on the basis of the statement of the person searched and without taking into account the retraction, an addition was made under section 69. The CIT(A) upheld the addition made. On appeal, the ITAT Mumbai set aside the addition made. ***Adverting to the fact that the concerned person (DilipDherai) has retracted his statement, the Tribunal arrived at the conclusion that merely on the strength of the alleged admission in the statement, the additions could not be made as*** *the essential ingredients of Section 69C of the IT Act enabling the additions were not satisfied. This was not a case of 'no explanation'. Rather, the Tribunal concluded that* ***the allegations made by the authorities are not supported by actual cash passing hands.*** Against the order of the ITAT, the revenue filed an appeal to the Hon'ble Bombay High Court, which held while dismissing the appeal of the revenue, in para 22 of its Order, as under:

"*It is not possible for us to reappraise and re-appreciate the factual findings. The finding that Section 153C was not attracted and its invocation was bad in law is not based just on an interpretation of Section I53C but after holding that the ingredients of the same were not satisfied in the present case. That is an exercise carried out by the Tribunal as a last fact finding authority. Therefore, the finding is a mixed one. There is no substantial question of law arising from such an order and which alternatively considers the merits of the case as well.*"

9.3 **Retraction of statements recorded at odd hours: The admissibility of retraction of statements which were given in an exhausted state and at odd hours was allowed** by the Hon'ble Gujarat High Court in *KailashbenManharlcil Choksi v CIT [2010] 320 ITR 411 (Guj,)*. It was held that a statement which has been recorded u/s 132(4) at odd hours is not a voluntary statement if it is subsequently retracted. The Hon'ble High Court observed that *the main grievance of the A.O. was that* ***the statement was not retracted immediately and it was done after two months. It was an afterthought and made under legal advise.*** *However, if such retraction is to be viewed in light of the evidence furnished along with the affidavit, it would immediately be clear that the assessee has given proper explanation for all the items under which disclosure was sought to be obtained from the assessee. The High Court held that the explanation seems to be more convincing, has not been considered by the authorities below and additions were made and/or confirmed merely on the basis of statement recorded under Section 132(4) of the Act. Despite the fact that the said statement was later on retracted no evidence has been led by the Revenue authority.* ***Merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in***

support of such admission. The High Court also held that the statement recorded at such odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission.

9.4 ***Principal CIT, Central III v. Krutika Land (P.) Ltd. [2019] 103 taxmann.com 9 (SC):*** **During search certain incriminating documents were found in possession of one DD, managing and handling land acquisition on behalf of assessee-company and his statement was recorded. He stated that there were amounts disbursed for purchase of lands and a certain amount of cash had also been received by him to purchase lands. However, later he had retracted his statement. A.O. issued notice under section 153C and initiated proceedings against assessee and made additions under section 69C. High Court held that since seized documents did not belong to assessee but were seized from residential premises of one Mr. DD who had later retracted his statement, no action under section 153C could be undertaken in case of assessee. It further held that since entire decision was based on seized documents and there was no material to conclusively show that huge amounts revealed from seized documents were actually transferred from one side to another, additions under section 69C were not sustainable. SLP of Revenue was dismissed.**

9.5 *Satinder Kumar (HUF) v. CIT [1977] 106 ITR 64 (HP):* It was held that it is true that an admission made by an assessee constitutes a relevant piece of evidence but **if the assessee contends that in making the admission he had proceeded on a mistaken understanding or on misconception of facts or on untrue facts** such an admission cannot be relied upon **without first considering the aforesaid contention.**

9.6 *Asstt. CIT v. Jorawar Singh M. Rathod [2005] 148 Taxman 35 (Ahd. – Trib.) (Mag.) :* In this case, the assessee stated in retraction that **during recording of statement he was under constant threat of penalty and prosecution and was confused about various questions asked by the search party about documents, papers, etc., of other persons found from his premises. He declared the sum under pressure which was evident from the fact that no such corroborative evidence, asset or valuables were found in form of immovable or movable properties from his residence** in support of the amount of disclosure which was later on retracted but not accepted by the department. The Tribunal **observed**: "…It is true that simple denial cannot be considered as a denial in the eyes of law but at the same time it is also to be seen (that) the material and valuables and other assets are found at the time of search. **The evidence ought to have been collected by the revenue during the search in support of the disclosure statement.**

9.7 *S.R. Koshti v. CIT [2005] 193 CTR (Guj.) 518:* **If an assessee under a mistake, misconception or on not being properly instructed, is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. The decision in CIT v. Durga Prasad More [1973] CTR (SC) 500, was followed i.e., test of human probabilities. The High Court said "We do not find any material on record on which basis it can be said that the disclosure of the assessee of Rs. 16 lakhs is in accordance with law** or in spirit of section 132(4)…". (p. 872)

9.8 *Surinder Pal Verma v. Asstt. CIT [2004] 89 ITD 129 (Chd.) (TM)-* The Chandigarh Bench of the Tribunal took a realistic view of the facts and circumstances in which disclosure is generally made in search and seizure proceedings. It was observed: **"It is well known fact that the confessional statements made during the search are often vulnerable on the ground that the person giving such statements remain under great mental strain and stress. They also do not have the availability of relevant details, documents and books of account at the time of giving such statements in the absence of which precise information relating to the mode of utilization of such income and the year of such investment cannot be correctly furnished. The**

assessees are, therefore, entitled to modify/clarify the statements after verifying the necessary details from the relevant records at later point of time." (p. 24)

9.9 *Asstt. CIT v. Rameshchandra R. Patel [2004] 89 ITD 203 (Ahd.) (TM)* – It was accepted that **the assessee had a right to retract but that has to be based on evidence brought on record to the contrary and there must be justifiable reason and material accepting retraction** i.e., cogent and sufficient material have to be placed on record for acceptance or retraction. All that has to be done by the assessee if he is to retract the statement which was recorded in the presence of witnesses unless there is evidence of pressure or coercion. The facts of each case have to be considered to reach the conclusion whether retraction was possible or not as there can be no universal rule. **Further corroboration of retracted statement is necessary** where the assessee established **at the earliest possible opportunity by leading reliable evidence and proving thereby the erroneous or incorrect nature of the facts admitted or confessed** and also where the evidence available on record is inconsistent with the confessional statement.

9.10 *Asstt. CIT v. Anoop Kumar [2005] 147 Taxman 26 (Asr.) (Mag.):* The A.O. worked out the income on the basis of seized material which was less than the income declared in statement under section 132(4). The assessment was, however, made on the income confessed in the statement. The **Tribunal observed:** "…It is also a fact that total income so computed by the Assessing Officer falls below the income disclosed under section 132(4). **It is not the case of the department that the difference in the income assessed and income disclosed under section 132(4) represents some other concealed income. Therefore, it is clear that there is no material available with the department to justify the addition so far as the difference between the income computed by the Assessing Officer and income disclosed under section 132(4).** In other words, the **so-called disclosure under section 132(4) is bald and has no legs to stand and in such a case retraction is justified**… (p. 292)

9.11 *Avadh Kishore Das v. Ram Gopal AIR 1979 SC 861:* The Supreme Court held that **evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong, but they do raise an estoppel and shift the burden of proof on to the person making them.** The Supreme Court further held that **unless shown or explained to be wrong, they are an efficacious proof of the facts admitted.**

9.12 *Gyan Chand Jain v. ITO [2001] 73 TTJ (Jodh.) 859* – Held that, it is not the position of law that no addition can be made on the basis of an **admission** at all, but **the position of law is that the person making an admission is not always bound by it and sometimes can get out of its binding purview if that person can explain concisely with supportive evidence/material or otherwise that the admission made by him earlier is not correct or contains a wrong statement or that the true state of affairs is different from that represented therein and so, the same should not be acted upon for fastening tax liability** which should rather be fixed on the basis of correct/true facts, as ascertained from material on record. Unless it is explained as stated above, the admission does retain its binding nature for the person who makes the **admission** and the same may, if considered reasonable in view of other facts on record and following the principles of **preponderance of probability**, form the basis of fastening liability. The ITAT allowed part relief to assessee.

9.13 *Hotel Kiran v. Asstt. CIT [2002] 82 ITD 453 (Pune)* – It is settled law that *admission by a person is a good piece of evidence though not conclusive and the same can be used against the person who makes it.* The reason behind this is, a **person making a statement stops the opposite party from making further investigation.** This principle is also embedded in the provisions of the Evidence Act. But the **statement recorded under section 132(4) is on a different footing.** The Legislature in its wisdom has provided that such a **statement may be used** as evidence in any proceedings under the Act. However, **there are**

exceptions to such admission where the assessee can retract from such statement/admission. The first exception exists where such statement is made involuntarily, i.e., obtained under coercion, threat, duress, undue influence, etc. But the burden lies on the person making such allegation to prove that the statement was obtained by the aforesaid means. **The second exception** is where the **statement** has been given under **some mistaken belief either of fact or of law.** If he can show that the **statement** has been made on mistaken belief of facts, than the facts on the basis of which **admission** was made were incorrect.

9.14 *CIT (LTU) v. Reliance Industries Ltd. [2019] 102 taxmann.com 372 (Bombay)/[2019] 261 Taxman 358 (Bombay)/[2020] 421 ITR 686 (Bombay) [SLP granted in [2020] 114 taxmann.com 320 (SC)]*, the **Appellate Authorities allowed payments made to 'S', a consultant holding that there was sufficient evidence justifying payments made to 'S' and Assessing Officer other than relying upon statement of 'S' recorded in search had no independent material to make disallowance.** The CIT (Appeal) and Tribunal concurrently held that 'S' retracted his statement within a short time by filing an affidavit. Subsequently his further statement was recorded in which he also reiterated the stand taken in affidavit. **The High Court slammed AO for making disallowance of payment merely relying on statement of payer recorded during search, which said that 'S' had not rendered any service to assessee so as to receive such payments. The allowance of payments made to 'S',** a consultant, was allowed as business expenditure. The assessee had set up a captive power generating unit and provided electricity to its another unit. It claimed deduction u/s 80-IA in respect of the profits arising out of such activity. It contended before the Assessing Officer that the valuation of electricity provided to the another unit should be at the rate at which the electricity distribution companies were allowed to supply electricity to the consumers. The issue at hand had been examined by the Bombay High Court on earlier occasion in Income Tax Appeal No. 2180 of 2011 and the view taken by the Tribunal in similar circumstances was upheld. A similar issue came up for consideration before the Chhattisgarh High Court in the case of *CIT v. Godawari Power &Ispat Ltd. [2014] 42 taxmann.com 551/223 Taxman 234 (Chhattisgarh)*, in which the Court had upheld the claim of the assessee. The Gujarat High Court in the case of *Pr.CIT v. Gujarat Alkalies& Chemicals Ltd. [2017] 395 ITR 247/88 taxmann.com 722 (Gujarat)* also had occasion to examine such an issue and allowed the expenditure.

9.15 In *CIT v. Uttamchand Jain [2009] 182 Taxman 343 (Bom) / [2010] 320 ITR 554 (Bombay),* the Assessee, a dealer in diamonds, had declared certain diamond jewellery under Voluntary Disclosure of Income Scheme, 1997 – Said declaration was accepted by department and a certificate was issued to assessee – In his return of income for relevant assessment year, assessee claimed to have sold said jewellery to one T on 20-1-1999. Return was processed u/s 143(1)(a), but later, on basis of statement of T recorded during course of survey conducted upon him wherein he had stated that he was not actually doing business of diamonds and transactions reflected in his books of account were merely accommodation entries. The A.O. reopened assessment and made addition of entire sale amount as undisclosed income of assessee. The Tribunal, relying upon retracted statement made by T, deleted impugned addition. Since existence of diamond jewellery with assessee prior to sale was evidenced by VDIS, 1997 certificate and on sale of said jewellery assessee had received consideration which was duly accounted for, mere fact that jewellery sold by assessee was not found with purchaser 'T' could not be a ground to hold that transaction was bogus and consideration received by assessee was his undisclosed income. The Court held that **retraction statement of Mr. Trivedi is corroborated by the pay-in-slips/cash deposits in the bank account of Mr. Trivedi and the non-availability of the jewellery claimed to have been sold by the assessee to Mr. Trivedi, is a reasonable and**

possible view. Therefore, the High Court upheld the decision of the Tribunal in deleting impugned addition.

9.16 In *CIT v. Rakesh Ramani [2018] 94 taxmann.com 461 (Bom.)/ [2018] 256 Taxman 299 (Bom.) / 168 DTR 356 (Bom.)(HC),* **in course of block assessment, assessee brought on record various documents to establish that jewellery seized from him actually belonged to his employer, impugned addition made in respect thereof merely on ground that assessee in course of statement made u/s 132, had admitted that said jewellery belonged to him, could not be sustained. It was also held that there is no requirement in law that evidence in support of its case must be produced by assessee only at time when seizure has been made and not during assessment proceedings.** Besides, the entire basis of the revenue's case is the statement made on the date of the seizure. The voluminous evidence filed by the respondent during the course of the assessment proceedings has been completely ignored on the ground that the same was not produced when the seizure was made. The High Court held that there is no requirement in law that evidence in support of its case must be produced by assessee only at the time when the seizure has been made and not during the assessment proceedings. The basis of the decision was the evidence led by the respondent during the assessment proceedings which established that the jewellery belonged to his employer 'P' Jewellers. **Therefore, the Bombay High Court held that the view taken by the two Authorities namely the Commissioner (Appeals) as well as the Tribunal is a possible view on the facts as existing. Therefore, the Court held that the question of law does not arise to any substantial question of law and the appeal of the Revenue was dismissed.**

10. Retraction partly accepted

In *Pranav Construction Co v. ACIT (1998) 61 TTJ 145 (Mum) (Trib) (dt 12 -11-1997),* the AO was of the view that whereas in the statement recorded under s. 132(4) the partner of the assessee-firm had disclosed an income of Rs. 70 lakhs, **in the return there has been retraction of the said statement inasmuch as the assessee had declared only Rs. 10,53,680 on account of undisclosed income.** The assessee had retracted from the statement in respect of two issues, the first being the undisclosed receipts, which were reduced from Rs. 70 lakhs to Rs. 52,68,400 and the second being the claim of expenses amounting to Rs. 42,14,720. The assessee explained that "The aforesaid statement was recorded by the ADIT at 2.30 A.M. in the early morning, though it was mentioned at 11.45 P.M. The assessee pleaded that he was totally tired and was under tremendous pressure and not in a proper state of mind to understand the implications as to what is stated in the said statement. He stated before the ADI during search that the aforesaid amount of Rs. 80 lakhs is the gross receipts, but as a builder, the assessee are required to incur lot of expenditure, which is unaccounted for. The A.O. felt that it cannot be postulated that the assessee had effected the payments out of the moneys received by it earlier in respect of the flats, offices and shops and recorded in the books. With regard to the admission, the learned D.R. had argued that there is no scope for allowing any expenditure because the statement of the assessees partner u/s 132(4) relates to disclosure of income, which means net income. The Tribunal observed ***"We are of the view that the admission cannot be read as an Act of Parliament and that it has to be read in the context fairly and reasonably. We have already adverted to this aspect. The burden can be discharged either by direct evidence or if such evidence is not available the assessee can always point out to circumstantial evidence supporting the claim. In the present case in respect of the payment of Rs. 9 lakhs there is direct evidence and in respect of the payment of protection money to the extent of Rs. 20 lakhs to Shellar and Padmakar Choudhary, there is circumstantial evidence, to which we have already referred. The further deduction of Rs. 1 lakh which we have allowed is also based only on the circumstantial evidence such as newspaper cuttings, reports, etc."*** The Tribunal considered total on-money receipts @ Rs. 100 per sq. ft. for 73,371 sq. ft.

73,37,100 and allowed deduction for payments as protection money, for vacating hawkers, tapories, etc. Rs.30 Lacs and Pooja expenses of Rs.14,720 and thus the addition was reduced to Rs. 43,22,380.

11. Leakage to media will jeopardise investigation, such tendency should be curbed

In *Rajendran Chingaravlelu (Mr) v. R. K. Mishra, Addl. CIT [2010] 186 Taxman 305 (SC)/[2010] 320 ITR 1 (SC)*, **When a bona fide passenger is carrying an unusually large sum, and his claims regarding source and legitimacy have to be verified, some delay and inconvenience is inevitable and, in such a situation, rights of passenger will have to yield to public interest. Intelligence officers are entitled to satisfy themselves not only that money is from a legitimate source, but also that such a large amount is being carried for a legitimate purpose and, therefore, even if carrier is not guilty of any offence in carrying money, verification or seized amount may be warranted to ensure that money is not intended for commission of a crime or an offence.** *There is a growing tendency among investigating officers (either police or other departments) to inform the media, even before the completion of investigation, that they have caught a criminal or an offender. Such crude attempts to claim credit for imaginary investigational breakthroughs should be curbed. Premature disclosures or 'leakage' to the media in a pending investigation will not only jeopardise and impede further investigation, but many a time, allow the real culprit to escape from law.*

12. Decisions where Retraction of Statement was NOT ACCEPTED

12.1 **Ms. Priyanka Chopra v. Deputy CIT, Central Circle-1(3), Mumbai* [2018] 89 taxmann.com 287 (Mumbai – Trib.)** *:* **A search was carried out in case of assessee in course of which various incriminating documents were seized. In said proceedings, assessee as well as her mother admitted certain undisclosed investment towards purchase of assets. Subsequently, assessee's mother retracted her statement. A.O. however, added amount admitted to assessee's taxable income. It was noted that it was only with reference to search and seizure material that assessee's mother had given a specific amount to various heads wherein undisclosed income had been utilized. Furthermore, so-called retraction was by mother of assessee and there was no retraction whatsoever by assessee. Impugned addition was based upon incriminating material found or searched and, thus, same was confirmed. [Para 8]**

12.2 BannalalJat Constructions (P.) Ltd. v. Assistant Commissioner of Income-tax [2019] 106 taxmann.com 128 (SC): A search was carried out at business premises of assessee-company – In course of search proceedings, statement of director of assessee-company was recorded under section 132(4) admitting certain undisclosed income. In course of assessment, A.O. made addition to assessee's income on basis of statement given by its director. Subsequently, director of assessee-company retracted said statement. Tribunal, however, finding that statement had been recorded in presence of independent witness, confirmed addition made by Assessing Officer. High Court also opined that mere fact that director of assessee-company retracted statement at later point of time, could not make said statement unacceptable. It was further opined that burden lay on assessee to show that admission made by director in his statement was wrong and such retraction had to be supported by a strong evidence showing that earlier statement was recorded under duress and coercion. High Court finding that assessee failed to discharge said burden, confirmed order passed by Tribunal. – Whether, on facts, SLP filed against decision of High Court was to be dismissed – [Para 2]

12.3 Thiru S. Shyam Kumar v. Assistant CIT, Central Circle-III(3), Chennai* [2018] 99 taxmann.com 39 (Madras): A search was conducted in business premises of assessee wherein certain loose slips were recovered, which showed several entries pertaining to

cash and cheque transactions in respect of purchase of a property. Assessee accepted in his statement that slip represented on-money payment made for purchase of property in question. Later on, assessee retracted from his statement and claimed that loose slips were only dumb slips – Tribunal however, rejected claim of assessee and confirmed addition under sec. 69. Since notings in loose slips were clear, retraction made by assessee after period of two years was rightly rejected as an afterthought. [Paras 8 and 11]

12.4 *Narayan BhagwantraoGosavi, Balajiwale v. Gopal Vinayak Gosavi AIR 1960 SC 100:* The Hon'ble Supreme Court held that an **admission is the best evidence that an opposite party can rely upon and, though not conclusive, yet could be decisive of the matter unless successfully withdrawn or proved erroneous.**

12.5 *Fakir Mohmed Haji Hasan v. CIT [2002] 120 Taxman 11/[2001] 247 ITR 290 (Guj),* Gujarat High Court upheld the department's action of treating the amount as deemed income.

12.6 *ManharlalKasturchandChokshi v. Asstt. CIT [1997] 61 ITD 55 (Ahd.)* – **Proof of threat or coercion is necessary for valid retraction. The allegation that the assessee was tortured and harassed by the search team and was forced to make an admission is not enough.**

12.7 *Param Anand Builders (P.) Ltd. v. ITO [1996] 59 ITD 29 (ITAT- Mum)*, It was held by ITAT, Mumbai that **allegations of torture and harassment were unacceptable when independent witnesses were present at the time of search. Mere filing of a letter retracting the statement was not held to be rebuttal of the presumption that what is admitted is true.** The Tribunal's observations were also based on the fact that the **'Panchas' had not brought any harassment to the notice of the higher authorities.**

12.8 *Video Master v. Joint CIT [2002] 83 ITD 102 (Mum) ITAT,* Mumbai dealt with a case where aseessee retracted statement made claiming it to have been made **under duress and coercion. During search, D, who was partner of assessee-firm, made voluntary disclosure of Rs. 3 crores comprising earnings from two films and income on account of discrepancy in books of account. The retraction made by 'D' later on, after a gap of one month of recording statement, was immaterial as it could not be said that D's statement under section 132(4) was recorded under duress. It was held that since statement recorded in present case under section 132(4) was fully supported with documents seized during course of search, additions made by Assessing Officer of Rs. 1.83 crores treating same as undisclosed income of assessee from share of profits from two films was justified.**

12.9 *Hotel Kiran v ACIT [2002] 82 ITD 453 (Pune),* **Addition of Rs. 4.5 lakhs was made by Assessing Officer on account of 'on-money' alleged to have been paid by assessee-firm for purchase of flat and plot for partner. During search partner of assessee itself had admitted that amount was paid before agreement out of suppressed profits of firm. It could be said that there was a direct nexus between payment of 'on-money' and suppressed profits of assessee-firm. Since source of payment of Rs. 4 lakhs was suppressed profits of assessee-firm, assessee was entitled to set off this amount against suppressed business profits of firm relating to year concerned to the extent addition was ultimately sustained because a person cannot be taxed twice over same income. Where statement under section 132(4) was voluntarily made and there was no coercion or threat whatsoever and contents of statement were clear and unambiguous, same would be binding on assessee even if it was subsequently retracted.**

12.10 *The Bombay High Court in the case of T. LakhamshiLadha& Co. v CIT [2016] 386 ITR 245 (Bom)*, held that in case there is a statement by a senior partner of an assessee firm, **statement cannot be retracted by another partner of that firm in absence of any allegation of pressure and coercion by the department and there**

being no evidence to prove that original statement was incorrect.

12.11 In *Dhunjibhoy Stud & Agricultural Farm v DCIT, [2002] 82 ITD 18 (Pune),* ITAT, Pune Bench held that where a retraction of a statement was made on an affidavit after a lapse of three years, the same should not be considered and the admissions made earlier were held to be admissible evidences.

12.12 In *ManmohansinghVig v Deputy Commissioner of Income Tax, Circle 1(1), [2006] 6 SOT 18 (Mum),* the ITAT while coming to a conclusion as to the admissibility of a retraction made on an affidavit by the assessee, laid out **certain reasoning for not admitting the same.** The conclusions drawn by the Tribunal would be useful for us and gives us an insight to ascertain as to what the Courts have regard to, while dealing with retractions and how a retraction should be framed. The relevant extract is given hereunder:

a) What was retracted subsequently was only a denial. **No material evidence was furnished so as to discharge onus cast on the assessee** by virtue of statement recorded under sections 132(4) and 131(1A),

b) **Presumption raised under section 132(4A) is not rebutted** by the assessee by submitting cogent evidence. Hence, the statement given under sections 132(4) and 131 (1A) hold their evidentiary value.

c) **No material has been submitted to show that any pressure or coercion was exercised** while recording the statements under sections 132(4) and 131(1A). **No complaint was filed immediately after search or recording of statement under section 131 (1A) to show that there was any pressure or coercion.** Statement under section 132(4) was recorded before witnesses. Hence, there is a presumption that there was no pressure/coercion unless proved.

d) **Disclosure was enhanced during statement under section 131(1A)** as compared to the statement given under section 132(4). Hence, the theory of pressure or coercion applied during recording of statement under section 132(4) is not acceptable.

e) **The assessee is silent for about 11 months**. No letter/correspondence was sent immediately after recording of statement under section 132(4). **Hence, theory of pressure or coercion is only an afterthought.**

f) **Disclosure of several items were based on documents found in the search.** These documents were explained under sections 132(4) and 131(1A). **Hence, there is a strong reason to believe that statement under sections 132(4)/131(1A) reveal correct state of affairs and retraction has to be ignored.**

The ITAT held that the retraction or rather denial is not established by any material/evidence and hence the same cannot be substituted for admission made by the assessee under sections 132(4) and 131(1A) and supported by documentary evidence found in the search. Hence, the additions made were confirmed.

12.13 *In Asst. CIT v Expresso Investments [2006] 8 SOT 287 (Mum)* the retraction made was held to be incomplete and the contents thereof were inconclusive. In the said case **neither did the content of the retraction show any coercion or duress exerted and neither did it have any conclusive and corroborative evidences by witness in the affidavit of retraction** submitted by the assessee. The ITAT referred to the celebrated book titled 'Administrative Law' by Sir William Wade (eighth edition by Wade and Forsyth – Oxford University Press), in which the legal position has been explained at p. 242 as under :

"The basic principle of estoppel is that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. Justice here prevails over truth. Estoppel is often described as a rule of evidence, but more correctly it is a principle of law. As a principle of common law it applies only to representations about past or present facts".

The ITAT also held that discretion is vested with assessing officer, to use statement under section 132(4) as evidence. However it is not incumbent

on him to make addition solely on the basis of such statement. Even otherwise, in our opinion, mere admission, without any corroboration, is not enough for making addition. In the statement under section 132(4), the assessee merely stated that some of the cash creditors may not be genuine. It is on the basis of such doubt that addition was made. In these circumstances of cash creditors, the assessing officer should not come in the way of assessee. In the present case, assessing officer merely got restricted himself to the statement under section 132(4). He had chosen to make enquiries regarding genuineness of the cash creditors by asking the assessee to prove the genuineness of such cash credits. Having done so, he could not make addition on the basis of statement under section 132(4) alone. Rather, he should have dealt with each credit with reference to the materials on the record. Accordingly, the order of Commissioner (Appeals) was set aside and matter was restored to the file of assessing officer for fresh adjudication after giving reasonable opportunity of being heard.

12.14 *Sidhharth Shankar Roy v. Commissioner of Customs, Mumbai 2013 (291) ELT 244 (Tri.) (Mumbai) (Order dated 30-8-2011)*, it was held that retraction of a confessional statement should be addressed to the same officer to whom the confessional statement was given u/s 108 of the Customs Act. In this case, the retraction was made before the Judicial Magistrate and not before the concerned officer of Customs (AIU). Moreover, though the officer of Customs who was alleged to have beaten/manhandled the appellants challenged their retractions before the ACMM, he was not cross-examined by any of the appellants. The Tribunal found that the appellants have not been able to establish that the said statements were extorted from them by the officers of AIU by threat, coercion, force or assault. The submissions made by them before the Judicial Magistrate and those made before this Tribunal in this regard are inconsistent and incoherent. The Medical Reports relied on by the appellants also do not support their allegation that they were assaulted by any officer of Customs. The medical reports, on the other hand, refer to assault by the police. The Tribunal held that the Commissioner rightly rejected the retractions.

12.15 *In HiralalMaganlal& Co. v DCIT [2005] 96 ITD 113 (Mum)* the assessee took a complete turn around and alleged that the statements of the aforesaid persons were forcibly recorded and that the seized sheets were mere estimates of goods to be purchased. The ITAT held that the somersault taken by the assessee several months after search was, as held by the Assessing Officer, was an afterthought and the events following thereafter were simply a device to frustrate the efforts of the Department to sniff off the unaccounted income of the assessee which it had unambiguously and voluntarily declared and offered for taxation at the time of search. **The ITAT also laid down some useful principles as under in para 35:**

a) **Statements in the nature of declarations covered by the provisions of section 115 of the Evidence Act, are binding on the declarant. They can neither he retracted nor do they require any corroboration.** Such declarations can form the sole basis for assessment. The declaration made by partner in the assessee-firm through his statement recorded under section 132(4) falls squarely within the ambit of section 115 of the Evidence Act and hence the same was neither open to retraction nor required any further corroboration. The assessing officer could, therefore, base the impugned addition on the said declaration.

b) Statements which are not in the nature of declarations under section 115 of the Evidence Act are also binding and can form the sole basis for assessment **if they are not effectively retracted. Effective retraction is possible in two situations. First situation is where it is not voluntarily made. A statement, however, cannot he said to be involuntarily made merely because it is subsequently sought to be retracted.** It is also to be remembered that the law of evidence presumes regularity and correctness of the official actions unless proved otherwise and hence the said principle will also govern the statement recorded by a public official. The

provisions of section 132(4) also create rebuttable presumption in favour of the statements recorded there under and authorize their use in evidence in any proceeding under the Income Tax Act. **The burden is, therefore, squarely on the person who alleges that the statement was not made voluntarily to prove that it was involuntarily made or made under coercion or undue influence or that it was made under mistaken belief or was obtained by fraud or misrepresentation.** Mere allegation will not suffice. **Second situation is where the person seeking to retract proves, by leading cogent and reliable evidence, the erroneous or incorrect nature of the facts stated or confessed at the earliest possible opportunity.** In the case before us, it has been held above that the **assessee has squarely failed to satisfactorily discharge the burden that the confessional statement made by partner under section 132(4) was involuntarily made or made under coercion or undue influence or was made under mistaken belief or obtained by fraud or misrepresentation.** Rather, the evidence available on record shows that it was voluntarily made by Shri Sanghvi with due care and caution and after necessary consultations with all concerned. Besides, there has been **inordinate delay, which has not been substantiated, on the part of the assessee to retract from the confessional statement. Retraction is also not supported by any independent or reliable evidence to prove the incorrect nature of the facts confessed in the statement.** The confessional statement of the partner is also corroborated by other evidence. For these reasons also, **the assessing officer, was therefore, in our view, justified in basing the impugned addition on the basis of confessional statement made at the time of search.**

c) A confessional statement, which is not in the nature of declaration under section 115 of the Evidence Act, continues to have evidentiary value even after its retraction. **However, such retracted confession/statement needs corroboration if it has been successfully retracted.**

13. Relevant Points in case a Statement is RETRACTED

13.1 *The Retraction must be made without delay: Kantilal C. Shah v ACIT [2011] 133 ITD 57 (Ahd)* held that **retraction of statement made u/s 132(4) will not be permissible if the retraction has been made after a lapse of ample time and not done immediately.** In this case, a search was conducted on 12/12/1995 and on that very day a statement u/s. 132(4) of the Act was recorded, however, after a lapse of around nine and a half months, i.e., 01/10/1996 a retraction was made through an Affidavit. The said retraction was not immediately submitted before the AO but it was submitted through a covering letter dated 19/11/1996. This was pointed out by Id. D.R. that the retraction in the form of an Affidavit dated 1/10/1996 was kept with the assessee for one and a half months and on 19/11/1996 it was submitted before the AO. According to his pleadings the said delay thus demonstrated that the assessee was not confident about filing of the retraction. **There must be some convincing and effective evidence in the hands of the assessee through which he could demonstrate that the said statement was factually incorrect.** An assessee is under strict obligation to demonstrate that the statement recorded earlier was incorrect, therefore, on the basis of those specific evidences later on retracted. Further there should also be some strong evidence to demonstrate that the earlier statement recorded was under coercion. **In the present case, the retraction is general in nature and lacking any supportive evidence. Rather assessee took several months to retract the initial statement, which by itself created a serious doubt.**

13.2 In *Council of Institute of Chartered Accountants of India v Mukesh R. Shah,[2004] 134 Taxman 265 (Guj)* the Hon'ble Gujarat High Court, held that **it goes without saying that a retraction made after a considerable length of time, would not have the same efficacy in law as a retraction made at the earliest point of time from the day of admission. A belated retraction would fall in the category of afterthought instead of being retraction…. "**

13.3 Evidences to corroborate reasons for retraction

Sudharshan P. Amin v. Asst. CIT [2013] 35 taxmann.com 370 (Gujarat)/[2013] 217 Taxaman 37 (Guj.): **In search, assessee had disclosed a sum as undeclared income – Assessee again admitted same in his confessional statement. However, during assessment proceedings, assessee retracted from his statement. Assessee's CA who was present at time of confessional statements did not suggest any undue pressure or allurement by department. Further, assessee had not offered any explanation as to why he repeated confessional statement even after search. It was held that retraction made by assessee could not be accepted and addition should be made to his income as undeclared investment.** When retracting a statement made on oath under section 132(4), it should always be supported by effective evidence which shows that the statement which was earlier recorded was incorrect on facts or was taken under inter alia coercion and intimidation. **Merely mentioning that the statement was recorded using undue influence, threat or coercion, or that there was a mistake of facts or law. may not be enough. What has to be seen is how clearly the same is spelt out and what evidence, has been attached to demonstrate the same.**

13.4 Intimation of retraction to higher authorities

In *Principal CIT v Roshan Lai Sancheti [2019] 306 CTR (Raj) 140*, the Rajasthan High Court held in para 19 that "*Statement recorded under sec. 132(4) and later confirmed in statement recorded under sec. 131, cannot be discarded simply by observing that the assessee has retracted the same because* ***such retraction ought to have been generally made within reasonable time or by filing complaint to superior authorities or otherwise brought to notice of the higher officials by filing duly sworn affidavit or statement supported by convincing evidence.*** *Such a statement when recorded at two stages cannot be discarded summarily in cryptic manner by observing that the assessee in a belatedly filed affidavit has retracted from his statement.* ***Such retraction is required to be made as soon as possible or immediately after the statement of the assessee was recorded.*** *Duration of time when such retraction is made assumes significance and in the present case* ***retraction has been made by the assessee after almost eight months*** *to be precise, 237 days.*

13.5 Statements made involuntarily i.e. obtained under coercion, threat, duress, undue influence etc.

In *Deepchand& Co v ACIT [1995] 51 TTJ (Bom.) 421,* the ITAT, Mumbai held that there is no supporting evidence to confirm the additions except the statements of two partners recorded at the time of search. It would not be out of context to mention here that **the statements recorded by the search party during the search of more than two days and two nights cannot be considered to be free, fearless and voluntary.** There is a considerable substance in the assessee's contention that the **statements were recorded under pressure and force.** The Tribunal had held that retraction should be allowed if it is based on proper principles and evidence. In the ordinary course no assessee would say that he had much concealed unaccounted money as mentioned in the statements herein. At the most what was expected to say was that certain income from the business was not disclosed, but putting in the mouth of the assessee that so much amount was unaccounted and concealed would itself indicate that the admission was forcible and not voluntary.

13.6 Retraction after obtaining copy of Statement on ground of mistaken belief either of fact or law

a) In *JyotichandBhaichand Saraf & Sons (P.) Ltd. v Deputy Commissioner of Income-tax, Circle 11(1) (ITAT Pune) [2012] 139 ITD 10 (Pune),* a search and seizure action was taken under section 132. During the course of search action, statement of the Director of the assessee was recorded under section 132(4) on 6th November 2001. **The assessee was given copies of the statement**

recorded under section 132(4) of the I.T. Act, 1961 on 20,h May 2002. On receipt of the copy of the statement the assessee realized that there was a mistake in the declaration of income. The assessee submitted a letter clarifying the mistake on 21st June 2002 to the Assessing Officer and retracted the statement made under mistake of fact. The assessment order was accordingly issued and was set aside by the CIT under sec. 263 stating that the same was prejudicial to the interest of the revenue and was made by the assessing officer without application of mind. On appeal, the Ld. ITAT held that *the department has not brought on record any* ***corroborative evidence*** *so as to establish undisclosed income having been invested in agricultural land.* ***Statement of the assessee cannot he sole basis without any cogent and corroborative evidence****. This is the reason that the mistake in the statement is immediately clarified on the receipt of the statement by the appellant as stated above. Moreover, no material/evidence was found during the course of search action indicating on-money payment or any undisclosed investment in agricultural land at Malad.* ***The assessee has clarified the mistake in the statement immediately on receipt of the statement. Thus the statement has been retracted on realization of the mistake. The statement was given under mistaken belief of law that the suppressed sale is unaccounted/undisclosed income*** *instead of correct legal position that the gross profit arising from unaccounted sale is the undisclosed income. It is a settled position that admission made by the assessee u/s 132(4) is an important piece of evidence but the same is not conclusive. It is open to the assessee who made the admission to show that it is incorrect and the same is given under mistaken belief of fact or law. Statement of Director indicate that* ***he was not mentally composed at relevant point of time.*** *There is nothing on record to suggest that said undisclosed income declared on behalf of assessee has nexus with undisclosed investment in the said agricultural land.*

b) Amritsar ITAT Bench in Asstt. CIT v Janak Raj Chciuhan [2006] 102 TTJ 316 (Asr.), observed that admission made at the time of search action is an important piece of evidence, but the same is not conclusive. It is open to the assessee who made the admission to show that it is incorrect and same was made under mistaken belief of law and fact.

14. Principles of Natural Justice

ITAT, Jodhpur Bench in *Maheshwari Industries v Asstt. CIT [2005] 148 Taxman 74 (Jodh) (Mag.)* has held that additions should be considered on merits rather than on the basis of the fact that the amount was surrendered by the assessee. It is settled legal position that unless the. provision of statute warrant **or there is a necessary implication on reading of section that the principles of natural justice are excluded, the provision of section should be construed in manner incorporating principles of natural justice and quasi-judicial bodies should generally read in the provision relevant section a requirement of giving a reasonable opportunity of being heard before an order is made which will have adverse civil consequences for parties effected.**

15. Mode and Manner of Retraction

Retraction of a statement later on, which was made during the search operation is not an easy way to escape the tax implications and **requires corroborative evidence and documents to support the retraction and show the circumstances as to why the person is retracting his statement made earlier.** The person has to go through minute scrutiny by the tax authorities and the courts later on at different stages if the need be. The following aspects should be kept in mind:

a) **Affidavit** – A retraction should be made on an affidavit along with supporting evidences, if any,

b) **Affidavit of witnesses** – Additional affidavit of the witnesses present during search or seizure may also be filed. The statement of the witnesses present holds good value and may aid the assessee in getting relief.

c) **Elaborate** – It must clearly lay down the facts of the case and detail the evidences showing inter alia use of force, coercion, intimidation or any mistake of fact/law, whatever may be the case.

d) **Highlight Error** – In case of a mistake of fact or law, it must clearly lay down as to what statement was recorded, what mistake took place in making such a statement, the reason for the same and the actual correct position. Evidences in support of the correct facts must also be attached.

e) **Inform Senior Officers** – In addition to the A.O., Authorised Officer {who conducted the Search), a retraction which is made on affidavit or otherwise should also be communicated to higher authorities.

f) **Earlier the better** – Any retraction should be done at the earliest without any delay. A retraction made immediately may strengthen the case of the assessee whereas a belated retraction will in most cases will have no value and would be seen as an afterthought.

16. Burden of Proof lies on the assessee

16.1 In case the assessee wishes to retract the statement earlier made whether voluntarily or involuntarily, the burden to prove that the said statement was derived by exerting force or intimidation or was given due to mistake of fact or law, lies upon the assessee. Merely an onus to disprove the already existing and supposedly incorrect statement does not lie, but an entirely new burden arises on filing of an affidavit and that burden has to be shifted by the assessee at the earliest.

This position was enunciated in *CIT v. O. Abdul Razak [2013] 350 ITR 71 (Ker)*, wherein the Hon'ble Kerala High Court made the following observations in para 9, on the statement recorded under section 132(4) of the Act and its retraction by the assessee:

Section 132 of the Income-tax Act deals with search and seizure and sub-section (4) of section 132 empowers the authorised officer during the course of the search and seizure to examine on oath any person who is found to be in possession or control of any books of account, documents, money or valuable articles or things, etc., and record a statement made by such person which can be used in evidence in any proceedings under the Income-tax Act. The **Explanation** appended to clause (4) also makes it clear that such examination can be in respect of any matters relevant for the purpose of **any investigation and need not be confined to matters pertaining to the material found as a result of the search.** A plain reading of section 132(4) would clearly show that what was intended by empowering an officer conducting the search to take a statement on oath was to record evidence as contemplated in any adjudication especially since section 131 confers on all officers empowered therein with the same powers as vested in a court under the Code of Criminal Procedure, 1973, for the purpose of the Income-tax Act.

It was further observed in para 11, that

"Admission as has been often held is the best evidence on a point in issue and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous. Any retraction of a clear admission made has to be on the ground of it being either erroneous or factually incorrect or one made under threat or coercion…"

And finally adverting to the issue of **burden of proof in case of retraction**, the Hon'ble court held in para 13, as under:

In the instant case, on the **clear admission of the assessee corroborated by the documents,** the burden on the Department ceases to exist. **On the retraction being filed by the assessee, there is a burden cast on the assessee to prove the detraction or rather disprove the admissions made.** It is not a shifting of the onus but a **new burden cast on the assessee to disprove the earlier admissions having evidentiary value.** As noticed earlier, retraction made by the assessee can only be considered as a **self-serving after thought** and no reliance can he placed on the same to disbelieve the clear admissions made in the statement recorded under section 132(4). Deletion of the additions vis-a- vis the property transactions on the reasoning that the Department cannot do so on the basis of the admission made under section 132(4) and on the premise that the Department ought to have proved retraction to be

untrue cannot be countenanced in view of the specific words employed in section 132(4).

16.2 In *CIT, Bikaner v Ravi Mathur [2017] (1) WLC (Raj.) 387*, the Hon'ble Rajasthan High Court held that the **burden to prove the retracted statement lies on the assessee.** The High Court held that the statements recorded under Section 132(4) have great evidentiary value and it cannot be discarded as in the instant case by the Tribunal in a summary or in a cryptic manner. **Statements recorded under Section 132(4) cannot be discarded by simply observing that the assessee retracted the statements.** One has to come to a definite finding as **to the manner in which retraction takes place.** On perusal of the facts noticed hereinbefore, we have noticed that while the statements were recorded at the time of search on 9.11.1995 and onwards but retraction, is almost after an year and that too when the assessment proceedings were being taken up in November 1996.

We may observe that retraction should be made as soon as possible and immediately after such a statement has been recorded, either by filing a complaint to the higher officials or otherwise brought to the notice of the higher officials, either by way of a duly sworn affidavit or statements supported by convincing evidence through which an assessee could demonstrate that the statements initially recorded were under pressure/coercion and factually incorrect. In our view, **retraction after a sufficient long gap or point of time, as in the instant case, looses its significance and is an afterthought.** Once statements have been recorded on oath, duly signed, it has a great evidentiary value and it is normally presumed that whatever stated at the time of recording of statements under Section 132(4), are true and correct and brings out the correct picture, as by that time the assessee is uninfluenced by external agencies. Thus, whenever an assessee pleads that the statements have been obtained forcefully or by coercion or undue influence without material/contrary to the material, then it should be supported by strong evidence which we have observed hereinbefore. Once a statement is recorded under Section 132(4), such a statement can be used as a strong evidence against the assessee in assessing the income, **the burden lies on the assessee to establish that the admission made in the statements are incorrect/wrong and that burden has to be discharged by an assessee at the earliest point of time**

16.3 In *S.C. Gupta v CIT [2001] 248 ITR 782 (All)*, the Allahabad High Court held that a statement made voluntarily by the assessee could form the basis of assessment. **The mere fact that the assessee retracted the statement could not make the statement unacceptable. The burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income. This burden does not even seem to have been attempted to be discharged.**

17. Case laws about head of income under which disclosed income to be considered

17.1 *Dev Raj Hi-Tech Machines Ltd. v. Dy. CIT [2017] 83 taxmann.com 15 (ITAT- Amritsar):* The ITAT, Amritsar held that **where additional income surrendered by assessee-company in search proceedings was declared as business income and same was accepted by Assessing Officer after considering reply of assessee, revision proceedings initiated under section 263 by Commissioner on basis that such income should be taxed as deemed income under section 69A was not sustainable. The ITAT also held that the wordings of surrender letter are very important as it can save the assessee from the clutches of section 115BBE. It must be clearly stated whether the income is business income or any unexplained income or investment.**

17.2 *Abdul Qayume v. CIT [1990] 184 ITR 404/ 50 Taxman 171 (All.)* : The Allahabad High Court opined that **an admission or an acquiescence cannot be the foundation for an assessment where the income was returned under an erroneous impression or misconception of law.** It is always open to an assessee to demonstrate and satisfy the authority concerned that **a particular**

income was not taxable in his hands and that it was returned under an erroneous impression of law. The principle can be applied in a case where the disclosure made under section 132(4) did not match with the material collected in search and seizure operation. In this case, during the course of survey under section 133A the **assessee surrendered an additional income over and above the normal income for the year under consideration. In return of income, the assessee declared such surrendered income as business income. And it was held that from the surrender letter it was apparent that the assessee had made surrender as additional income over and above the normal profits of the concern and since the income has been declared as business income,** the same has to be assessed under the head business income **and not as deemed income under the provisions of section 69A.**

17.3 *Kim Pharma (P.) Ltd. v. CIT [2013] 35 taxmann.com 456/216 Taxman 153 (Punj. & Har.)* where the court came to the conclusion that the amount surrendered during survey was not reflected in books of account and no source from where it was derived was declared by assessee, it was assessable as deemed income of assessee under section 69A and not business income. The court further observed that the opening words of s. 14 **'save as otherwise provided by this Act' clearly leave scope for 'deemed income' of the nature covered under the scheme of ss. 69, 69A, 69B and 69C being treated separately,** because such deemed income is not income from salary, house property, profits and gains of business or profession, or capital gains, nor is it income from 'other sources' because the provisions of ss. 69, 69A, 69B and 69C **treat unexplained investments, unexplained money, bullion etc. and unexplained expenditure as deemed income** where the nature and source of investment, acquisition or expenditure, as the case may be, **have not been explained or not satisfactorily explained.** Therefore, in these cases, the source not being known, **such deemed income will not fall even under the head 'Income from other sources'.**

17.4 In *Fakir Mohme Haji Hasan's case CIT [2002] 120 Taxman 11/[2001] 247 ITR 290 (Guj)* it was held that value of gold in question was liable to be included in assessee's income as deemed income under sec. 69A as source of investment or its acquisition was not explained.

18. Tax under sec. 115BBE

Earlier the assessee was not concerned whether the department is treating it as deemed income or business income **as the income was taxable maximum at the rate of thirty percent. But after amendment in section 115BBE from assessment year 2017-18 this matter has become very important and if the department treats surrendered income as deemed income it will be subject to tax at the rate of 60 percent plus 25 per cent surcharge and education cess. The effective aggregate rate u/s 115BBE now 78 per cent. If the A.O. makes addition penalty under section 271AAC may also be levied @ 10 per cent of tax, which will make the overall burden @84 per cent on assessee. It is prohibitive and needs urgent review. It is desirable that tax under sec. 115BBE should be at best 30 per cent or the maximum marginal rate.**

19. Deductions permitted from undisclosed income declared by assessee

19.1 *Sheth Developers [2012] 25 taxmann.com 173 (Bombay)/[2012] 210 Taxman 208 (Bombay)(Mag.)*, the Bombay High Court held that **Builders receiving undisclosed income in course of its business, is entitled to benefit of deduction under section 80-IB(10). The plea of revenue that in view of section 69A benefit of deduction u/s 80-IB(10) would not be available to assessee was not well founded.**

19.2 *ACIT v. Mahalaxmi Infraprojects Ltd (2018) 63 ITR 671 (Pune) (Trib),* In case of Survey in an Industrial undertaking, additional income was offered as non genuine purchases. Tribunal held that additional income had been assessed in hands of assessee from same nature of business. Hence assessee was eligible to claim deduction u/s 80IA(4) of the Act. Followed *Sheth Developers 25*

taxmann.com 173 (Bom)(HC).

20. No Power of confinement or arrest

In *L.R. Gupta And Ors. v. Union Of India And Ors. [1992]194 ITR 32 (Delhi)*, the Counsel for assessee submitted that the ingredients of Section 132(1) were not satisfied in the present case and the authorisation which was issued was liable to be quashed. It was further contended by the learned Counsel that the respondents were also in error in passing orders under Section 132(3) in respect of the jewellery. The Court agreed that the respondents had no jurisdiction to prevent the assessee from attending to his work in Court. However his statement could be recorded. The Court held that, in the present case, no reasonable person could have come to the conclusion that the ingredients contained in Clause (a), (b) or (e) of Section 132 were attracted, therefore, the Court issued writ of mandamus quashing the impugned authorisation and also the further action which had been taken by the Income Tax Department pursuant to the said authorisation including the seizure of all documents, cash and jewellery. The department was directed to return the said documents, cash and jewellery, seized by them, to the petitioners within two weeks from the date of Order.

21. Officers posted in Directorates of Investigation (Investigation Wing) and Commissionerates of TDS, only and exclusively shall act as Income-tax Authority for the purposes of power of survey under section 133A and the survey action has to be resorted to only as a last resort

The CBDT has issued an Order in **F No. 187/3/2020-ITA-I, Dated 13th August, 2020,** which states that with the launch of the Faceless Assessment Scheme, 2019, the Income-tax Department is moving towards minimal interface with the taxpayers, aiming at significant improvement in delivery of services and greater transparency in the working of the department. The survey action u/s 133A of the Act being an intrusive action, it is expected that the same should be carried out with utmost responsibility and accountability. In furtherance of the above, the Central Board of Direct Taxes, in exercise of powers under section 119 of the Income-tax Act, 1961 hereby directs that the officers posted in Directorates of Investigation (Investigation Wing) and Commissionerates of TDS, only and exclusively shall act as "Income-tax Authority" for the purposes of power of survey under section 133A of the Income-tax Act. Further the competent authority for approval of such survey action u/s 133A of the Act shall henceforth be DGIT (Inv) for investigation wing and Pr.CCIT/CCIT (TDS) for TDS charges, as the case may be. This order shall come into force with effect from the 13th August, 2020.

The CBDT has issued another **Order on 18th September, 2020 for partial modification to the order F. No. 187/3/2020-ITA-I, dated 13th August, 2020** prescribing the "Income-tax Authority" for the purpose of exercise of power of survey u/s 133A of the Act, the CBDT has directed that:-

i) the verification surveys by the International Taxation charges will henceforth be conducted by them with the approval of the CCsIT (International Taxation) concerned and where there is no CCIT (International Taxation), with the approval of CCIT (International Taxation).

ii) the verification surveys by the TDS charges will henceforth be conducted by them with the approval of CCsIT (TDS) and where there is no CCIT(TDS), with the approval of Pr. CCsIT.

iii) any survey action u/s 133A of the Act by the Central charges will be conducted after the approval of CCIT(Central)/DGIT(Investigation) and in collaboration with the investigation wing.

The **Order on 18th September, 2020 also states that** before approving any survey action, Pr. CCsIT/ Pr. DGsIT/CCsIT/DGsIT must ensure that all the other possibilities are exhausted and **the survey action has to be resorted to only as a last resort.**

22. Whether survey be converted into search

In *Vinod Goel (Advocate) v. UOI [2001] 118 Taxman 690 (P&H)/[2001] 252 ITR 29 (P&H),* it

was held that **on basis of documents collected during search and seizure of premises of RKAK and RKC, authorities felt satisfied that petitioner had nexus with some property dealing and resultantly a survey was conducted at petitioner's premises. Again, on basis of incriminating documents collected during survey, survey was converted into search and seizure for which Addl. Director gave authorisation. In view of fact that documents recovered during previous search established nexus between business of RKAK and RKC with petitioners, search and seizure carried out at premises of petitioner should be held to be in continuation of previous search.** When sufficient number of incriminating documents were recovered during survey of petitioner's premises and concerned officer recorded in warrant his satisfaction that required documents would not be produced in case of summons issued under section 131, on ground of mere presence of some defects in warrant, it could not be said that conversion of survey into search and seizure was illegal.

23. Sealing of business premises

In *Shyam Jewellers v. CCIT [1992] 196 ITR 243 (Allahabad)*, it was held that **business premises of assessee cannot be sealed off either under section 133A or section 132. When there was no information before Chief Commissioner at time of passing authorization order that assessee was in possession of undisclosed money, bullion, jewellery or other valuable article, such a vague and general order could not be treated as an authorization order in law and no proceedings on basis of such an order could have taken place. It was held that initiation of search proceedings and passing of assessment order under section 132(5) were invalid and liable to be quashed.**

24. Recording of Telephone conversation/ Statements

24.1 In **S. Pratap Singh v. The State of Punjab AIR 1964 AIR 72 (SC), 1964 SCR (4) 733**, it was held that rendering of the tape recorded conversation can be legal evidence by way of corroborating the statements of a person who deposes that the other speaker and he carried on that conversation or even of the statement of a person who may depose that he overheard the conversation between the two persons and what they actually stated had been tape recorded. How much weight to be given to such evidence will depend on the other factors which may be established in a particular case.

24.2 **Other cases on Tape recorded conversation / statement**

a) YusufaliEsmailNagree v. The State of Maharashtra 1968 AIR 147 (SC)

b) Ram Singh v. Col Ram Singh AIR 1986 SC 3

c) Rama Reddy v. V.V. Giri AIR 1971 SC 1162

d) R.M. Malkani v. State of Maharashtra AIR 1973 SC 157

e) Z.B. Bukhari v. B.R. Mehra AIR 1975 SC 1788 - Tape recorded speeches are documents as defined in section 3 of the Evidence Act.

25. Conclusion

An admission in statement under section 132(4) is vital and the department may make addition in income based on such statement unless successfully retracted. However, in order it to be effective, the retraction should be made properly and at the earliest possible opportunity and establishing the situation as to how the facts stated in statement mistaken on facts or in law and if necessary to prove that the statement was recorded with coercion and pressure.

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Commonly found Errors in Tax Audit

CA Suman Choudhury

The Taxation Audits Quality Review Board of ICAI has come across certain commonly found errors/ non-compliances while conducting review of Tax Audit Reports. Some of them, which need specific attention of members, have been mentioned, below for reference:

a) **Revised SA 700, Forming an Opinion and Reporting on Financial Statements(*Para 11.9 of the Guidance Note on Tax Audit under Section 44AB of the Income-Tax Act, 1961)***

ICAI had pursuant to the issuance of the Revised SA 700, Forming an Opinion and Reporting on Financial Statements, prescribed a revised format of the auditor's report on financial statement. Since Form No. 3CA and Form No. 3CB are required to be filed online in a preset form and the same are not in line with the requirements of SA 700, there is no specifically allocated field for providing information relating to the respective responsibilities of the assessee and the tax auditor as required in terms of the principles laid out in SA 700. However, having regard to the importance of these respective responsibility paragraphs from the perspective of the readers of the tax audit report, it is suggested that these respective responsibility paragraphs relating can be provided in the space provided for giving observations, etc., under clause (3) of Form No.3CA or Clause (3) and Clause (5) of Form No.3CB as the case may be.

The illustrative Assessee's responsibility paragraph and Tax Auditor's responsibility paragraphs in respect of Form No.3CB has been given in the Guidance Note. The same are to be suitably reworded to meet the situation envisaged in Form No.3CA.

Commonly Found Errors:

a) Many of the Tax Audit reports do not have the paragraphs relating to Assessee's responsibility and Tax Auditor's responsibility as required by the Guidance Note in respect of SA 700.

b) Some of the tax audit reports contained a reference about the attached physically signed tax audit reports which mention these Paragraphs thereby complying with the requirement of SA 700. However, as per the Guidance Note on Tax Audit the same are specifically required to be mentioned / reported under clause (3) of Form No.3CA or Clause (5) of Form No.3CB, as the case may be.

a) **Observations/Comments/ Discrepancies/Inconsistencies by Auditor(*Para 14.5 of the Guidance Note on Tax Audit under section 44AB of the Income-tax Act,1961*)**

"Where any of the requirements in this form is answered in negative or with qualification, the report shall state the reasons thereof. The tax auditor should state this qualification in the audit report so that the same becomes a comprehensive report and the user of the audited statement of particulars can realize the impact of such qualifications."

Also as per Para 15.5 of the Guidance Note *on Tax Audit under section 44AB of the Income-tax Act, 1961*:

Under clause (a) of paragraph 3 of Form

No.3CB, the tax auditor has to report his "observations/comments/ discrepancies/ inconsistencies," if any. The expression "Subject to above" appearing in clause (b) makes it clear that such observations/ comments/ discrepancies/ inconsistencies which are of qualificatory nature relate to necessary information and explanations for the purposes of the audit or the keeping of proper books of accounts or the true and fair view of the financial statements, respectively to be reported on in paragraphs (A), (B) and (C) under clause (b) of paragraph 3. While reporting on clause (a) of paragraph 3 of Form No. 3CB the tax auditor should report only such of those observations/comments/ discrepancies/ inconsistencies which are of qualificatory nature which affect his reporting about obtaining all the information and explanations which were necessary for the purposes of the audit, about the keeping of proper books of account by the head office and branches of the assessee and about the true and fair view of the financial statements. Further, only such observations/comments/ discrepancies/inconsistencies which are of a qualificatory nature should be mentioned under clause (a). Any other observations/ comments/ discrepancies/ inconsistencies, which do not affect the reporting on the matters specified above may form part of the notes to accounts forming part ofthe accounts. In case the tax auditor has no observations/comments/ discrepancies/ inconsistencies to report which are of qualificatory nature, "NIL" should be reported in this part of paragraph 3.The tax auditor may then give his report as required by sub-paragraphs (A), (B), and (C) of paragraph 3 and paragraph 4.

Commonly Found Error:

In certain tax audit reports that were examined, it has been observed that the qualification paragraph i.e. clause (3) of Form No.3CA or Clause (5) of Form No.3CB, as the case may be, contained a reference to Notes to Form No. 3CD. These notes did not mainly contain the qualifications but also contain general additional information.

As per the Guidance Note (paragraphs mentioned above) only qualifications/ observations should be reported in the space provided in the form No. 3CA/3CB itself while the additional information which are not in the nature of qualification could be attached as notes.

LATEST INCOME TAX JUDGEMENTS

CA Manjulata Shukla

SECTION 37(1) OF THE INCOME TAX ACT, 1961 - BUSINESS EXPENDITURE

ElgiEquipments Limited v. Joint Commissioner of Income Tax - [2020] 120 taxmann.com 142 (Madras)
Where assessee was able to produce their annual report along with accounts prepared in accordance with AS-18 that there was a gradual increase in sales compared to early years by subsidiary companies in foreign country and Assessing Officer, Commissioner (Appeals) and Tribunal did not dispute genuineness, and bonafides of expenditure incurred by assessee for foreign travel, expenditure having been incurred wholly and exclusively for purpose of business would be allowable.

SECTION 92C OF THE INCOME TAX ACT, 1961 - TRANSFER PRICING - COMPUTATION OF ARM'S LENGTH PRICE

Deputy Commissioner of Income Tax, Range-9(1)(1) v. Agility Logistics (P.) Ltd. - [2020] 119 taxmann.com 141 (Mumbai - Trib.)
Where assessee-company entered into international transaction with its AE and in course of such transactions had paid freight expenses and CUP method was adopted to benchmark said transaction, since said method was accepted in earlier years, in absence of any change in facts and circumstances, TPO could not make addition to assessee's ALP by applying TNMM during relevant year.

Elcome Technologies (P.) Ltd. v. Deputy Commissioner of Income Tax-Range 15(1)(1) - [2020] 119 taxmann.com 233 (Mumbai - Trib.)
Comparables, functional similarity - General : Comparability of a case has to be considered on year to year basis and, therefore, merely because a case has been held to be comparable for one year cannot per se be considered as comparable for succeeding year as well Whether a particular company is a comparable or not is an exercise which has to be carried out every year in case of an assessee considering facts of that specific year.

Deputy Commissioner of Income-Tax, Circle 6(1)(2), Bengaluru v. State Street Services (India) (P.) Ltd. - [2020] 119 taxmann.com 276 (Bangalore - Trib.)
Comparables, functional similarity - BPO/Call centre : Where assessee was engaged in providing Business Process Outsourcing, a company engaged in engineering design services which fell within ambit of Knowledge Process Outsourcing requiring high skill sets was incomparable to assessee.

Deputy Commissioner of Income-Tax, Circle 6(1)(2), Bengaluru v. State Street Services (India) (P.) Ltd. - [2020] 119 taxmann.com 276 (Bangalore - Trib.)
Comparables, functional similarity - Information technology enabled services (ITESs) : Where assessee was engaged in providing ITES and revenue sought inclusion of company engaged in medical transcription services falling under ITES, however, at same time revenue sought exclusion of another company also engaged in medical transcription services, revenue's

approach to TP study being not uniform, issue of comparability of company sought for inclusion was to be set aside to TPO for afresh consideration.

SECTION 92CA OF THE INCOME TAX ACT, 1961 - TRANSFER PRICING - REFERENCE TO TPO

Hyundai Motor India Ltd. v. Deputy Commissioner of Income Tax - [2020] 119 taxmann.com 302 (Madras)

Where Transfer Pricing Officer (TPO) finding that royalty paid by assessee-company to its holding company was higher than average royalty paid by four comparable companies made additions to income of assessee and assessee filed an instant writ petition against same, since statutory remedies were available in system, assessee ought to have approached Tribunal before approaching this Court, thus, instant writ petition could not be entertained.

SECTION 50C OF THE INCOME TAX ACT, 1961 - CAPITAL GAINS - SPECIAL PROVISION FOR COMPUTATION OF FULL VALUE CONSIDERATION

Areva T & D (I) Ltd. v. Commissioner of Income Tax - [2020] 119 taxmann.com 171 (Madras) Transfer of assessee's non-transmission and distribution business in exchange of issuance and allotment of equity shares under a scheme of arrangement approved by High Court is not a slump sale exigible to capital gain tax under section 50 as transfer pursuant to approval of scheme of arrangement is not a contractual transfer but a statutorily approved transfer and cannot be brought within definition of word 'sale'.

A.V.V.N. Prasad Reddy v. Income Tax Officer - [2020] 118 taxmann.com 537 (Visakhapatnam - Trib.)

Sale considerations : As per proviso to section 50C, with effect from 1-4-2003, stamp duty value of property on date of execution of agreement to sell should be adopted instead of value on date of execution of sale deed, for determination of capital gains.

Network Construction Company, v. A. Commissioner of Income-tax, Circle-2, Thane - [2020] 119 taxmann.com 186 (Mumbai - Trib.)

Sale of development rights : Provisions of section 50C could not be applicable to sale of development rights in respect of buildings

PENALTY

ASSISTANT COMMISSIONER OF INCOME TAX VS DLF LTD. (FORMERLY KNOWN AS DLF UNIVERSAL LTD.) : (2020) 60 CCH 0028 DelTrib

Merely because the disallowance has been confirmed by the higher forum, it cannot automatically result into penalty.

DEDUCTIONS

KARKURISSI SERVICE CO-OPERATIVE BANK LIMITED VS INCOME TAX OFFICER : (2020) 60 CCH 0043 CochinTrib

Assessing Officer has to conduct an inquiry into the factual situation as to the activities of the assessee society to determine the eligibility of deduction u/s 80P.

SECTION 10B OF THE INCOME-TAX ACT, 1961 - EXPORT ORIENTED UNDERTAKING

Commissioner of Income Tax v. Oliver Valves India (P.) Ltd. - [2020] 118 taxmann.com 548 (Madras)

Computation of deduction : Where assessee company was a 100 percent Export Oriented Unit (EOU), engaged in business of assembling and exporting valves, management fee earned by

assessee in nature of export services which was incidental to business of export of valves would partake character of profit and gain from business and assessee was to be allowed exemption under section 10A on same .

SECTION 245R OF THE INCOME TAX ACT, 1961 - ADVANCE RULING - PROCEDURE ON RECEIPT OF APPLICATION

Commissioner of Income Tax-1 (International Taxation) v. Authority For Advance Ruling - [2020] 119 taxmann.com 80 (Delhi)

A question cannot be said to be pending under clause (i) of proviso to section 245R(2) upon issuance of a mere notice under section 143(2) especially when it has been issued in a standard pre-printed format and questions raised before Authority for Advance Ruling do not appear to be forming subject matter of said notice.

SECTION 36(1)(iii) OF THE INCOME-TAX ACT, 1961 - INTEREST ON BORROWED CAPITAL

Morakhia Copper and Alloys (P.) Ltd. v. Assistant Commissioner of Income-tax - [2020] 119 taxmann.com 214 (Ahmedabad - Trib.)

Where Assessing Officer made disallowance under section 36(1)(iii) of interest expenditure incurred by assessee holding that assessee had not furnished any information suggesting that interest free funds were given to subsidiaries either from its own funds or from borrowed funds, since amount of capital including reserve available to assessee was to be presumed to have been utilized in advancing such interest free advance, thus, no disallowance of interest expenses was to be made on account of diversion of fund to extent of own fund available with it, matter was to be remanded.

SECTION 36(1)(va) OF THE INCOME-TAX ACT, 1961 - EMPLOYEE'S CONTRIBUTIONS

Morakhia Copper and Alloys (P.) Ltd. v. Assistant Commissioner of Income-tax - [2020] 119 taxmann.com 214 (Ahmedabad - Trib.)

Allowabilityof : Where assessee employer failed to deposit an amount towards employee contribution on account of ESI with concerned department on or before due date prescribed in law and Assessing Officer by invoking provisions of section 36(1)(va) read with section 2(24)(x) made addition of aforesaid amount to income of assessee, impugned addition made to income of assessee was justified .

SECTION 61 OF THE INCOME TAX ACT, 1961 - TRANSFER OF ASSETS - REVOCABLE

Income Tax Officer-21(3)(2) v. Scheme A1 of ARCIL CPS 002 XI Trust - [2020] 119 taxmann.com 216 (Mumbai - Trib.)

Assessee-trust set up by Asset Reconstruction Co. (India) in pursuance to SARFAESI Act and RBI Guidelines for purpose of liquidating/recovering NPAs acquired from banks Assessing Officer had held that assessee was an Association of Persons(AOP) and not a trust and brought to tax entire surplus in income and expenditure account.

SECTION 69A OF THE INCOME TAX ACT, 1961 - UNEXPLAINED MONEY

Ram Prasad Meena v. Income Tax Officer - [2020] 119 taxmann.com 217 (Jaipur - Trib.)

Where during year, assessee had returned income of Rs. 2 lakhs (approx.) and purchased agricultural land for Rs. 40 lakhs and Assessing Officer noted that agricultural income was meagre and assessee could not prove immediate source of investment in purchase of land and he treated said investment as unexplained, since income/saving of assessee for last 4 years i.e. income from sale of crop and income from sale of

vegetable and lahsun, after deducting agricultural expenses and household expenses, would come to approx. 40 lakhs which was quite sufficient and fully explained source of investment in land, assessee had fully proved source of investment in purchase of agricultural land and thus addition under section 69A be deleted.

SECTION 80G OF THE INCOME-TAX ACT, 1961 - DEDUCTIONS

Jhalana Wildlife Research Foundation v. Commissioner of Income-tax (Exemption) - [2020] 119 taxmann.com 210 (Pune - Trib.)

Donation to certain funds, charitable institutions : Where Commissioner (Exemption) denied benefits under section 80G to assessee company, registered under section 12AA, for reason that assessee failed to produce any evidence about having incurred any expenditure in its financial statements towards charitable object of company, since when Commissioner (Exemption) rejected assessee's application under section 80G, profit and loss account of assessee showing expenditure incurred by assessee on charitable activities was not prepared and same were prepared a little later, matter was to be remanded.

SECTION 48 OF THE INCOME-TAX ACT, 1961 - CAPITAL GAINS - COMPUTATION OF

Fozia Khan v. Income Tax Officer - [2020] 119 taxmann.com 187 (Jaipur - Trib.)

Commission : Where assessee sold a residential house and claimed deduction under section 48 on account of commission paid to agent in respect of such sale, since preparation of documents being sale deed, purchase of stamp duty and other documents and formalities required assistance and help of a well versed person who have experience of such work, Assessing Officer was to be directed to allow 2 per cent of sale consideration as expenditure on account of commission paid to real estate agent by assessee .

Dr. DevikaGunasheela v. Joint Commissioner of Income-tax - [2020] 119 taxmann.com 275 (Bangalore - Trib.)

Indexed cost of acquisition : Provisions of section 55(2)(b)(ii) provides that if capital asset becomes property of assessee by way of succession, cost of acquisition of capital asset would be cost of capital asset to previous owner or FMV as on 1-4-1981 at option of assessee, if capital asset was acquired by previous owner prior to 1-4-1981.

SECTION 49 OF THE INCOME-TAX ACT, 1961 - CAPITAL GAINS - COST WITH REFERENCE TO CERTAIN MODES OF ACQUISITION

Fozia Khan v. Income Tax Officer - [2020] 119 taxmann.com 187 (Jaipur - Trib.)

Indexed cost of acquisition : Where assessee sold a residential house acquired by it from her grandmother in 2008 through a registered gift deed, computation of indexation cost of acquisition of property in question so as to compute capital gains arose to assessee on its sale was to be computed by taking year of acquisition as 1988 i.e when property was acquired by previous owner (grandmother of assessee) and not from year when property was gifted to assessee i.e. 2008 .

SECTION 54 OF THE INCOME-TAX ACT, 1961 - CAPITAL GAINS - PROFIT ON SALE OF PROPERTY USED FOR RESIDENCE

Fozia Khan v. Income Tax Officer - [2020] 119 taxmann.com 187 (Jaipur - Trib.)

Where assessee claimed payment made towards furniture and fixtures purchased along with new house property as part of investment made in new residential house for purpose of exemption under section 54, since assessee had not made such claim either before Assessing Officer or

Commissioner (Appeals), such a plea which was completely new and required investigation of new facts not brought before lower authorities could not be accepted at this stage.

SECTION 54F OF THE INCOME-TAX ACT, 1961 - CAPITAL GAINS - EXEMPTION OF, IN CASE OF INVESTMENT IN RESIDENTIAL HOUSE

Chandramohan Manohar Potdar v. Assistant Commissioner of Income Tax-21(3), Mumbai - [2020] 119 taxmann.com 280 (Mumbai - Trib.)

Conditions precedent : Where possession of property owned by assessee was not taken by him as it was unfit for habitation, it could not be said that assessee was not owner of property.

Dr.DevikaGunasheela v. Joint Commissioner of Income-tax - [2020] 119 taxmann.com 275 (Bangalore - Trib.)

Where assessee was denied benefit of deduction under section 54F on ground that assessee owned more than one residential houses, other than new asset on date of transfer of original asset, since properties were in fact not residential houses owned by it and assessee had only given lease of vacant land and obtained rent for land and not for any building, and thus, assessee did not own more than one residential house, other than new asset on date of transfer of original asset, deduction u/s. 54F should be allowed to assessee .

Anil Dev v. Deputy Commissioner of Income Tax, Circle-2(2)(1), Bengaluru - [2020] 119 taxmann.com 328 (Bangalore - Trib.)

Proviso (ii) to section 54F : Where Assessing Officer disallowed exemption under section 54F to assessee on ground that assessee was owner of two other residential properties along with one purchased by him out of consideration from sale of shares, in view of facts that one of those properties was a commercial property and that other residential property was fully owned by wife of assessee and merely name of assessee was included in purchase deed, assessee was to be allowed exemption under section 54F.

SECTION 55 OF THE INCOME-TAX ACT, 1961 - CAPITAL GAINS - COST OF ACQUISITION

Dr. DevikaGunasheela v. Joint Commissioner of Income-tax - [2020] 119 taxmann.com 275 (Bangalore - Trib.)

FMV as on 1-4-1981 : Where assessee had adopted value as on 1-4-1081 at Rs. 150 per sq. Ft. on basis of a report of a registered valuer and guideline value of property as on 1-4-1981 was Rs. 100 per sq. ft., claim of assessee for adopting FMV as on 1-4-1981 at Rs. 150 per sq. ft. was reasonable and same was directed to be accepted .

SECTION 71A OF THE INCOME TAX ACT, 1961 - LOSSES – INCOME FROM HOUSE PROPERTY

Commissioner of Income Tax v. Indus Fila Ltd. - [2020] 120 taxmann.com 7 (Karnataka)

Where Tribunal allowed assessee amalgamated company to set off losses in respect of amalgamating company, since Tribunal had not adverted to fact that whether assessee company had complied with conditions laid down in section 71A(2) which were mandatory so as to enable assessee to claim benefit of set off under section 71A, matter was to be remanded .

SECTION 69C OF THE INCOME TAX ACT, 1961 - UNEXPLAINED EXPENDITURE

New Woodlands Hotel (P.) Ltd. v. Assistant Commissioner of Income Tax, Company Circle-VI(2) - [2020] 119 taxmann.com 202 (Madras)

Where addition was made in hands of assessee engaged in hospitality business on ground that bogus expenditure was claimed towards service charges paid to its employees, since assessee submitted that as tips were given to room boys

and they alone benefitted, other employees raised objection and a settlement was arrived at between employees and assessee regarding payment of service charges and he had produced annual accounts, statement of income, register of wages of persons employed evidencing payment of service charges to permanent employees and copy of vouchers for cash payment to other employees, said settlement could not have been brushed aside and bulk of the materials produced could not have been rejected and thus, Assessing Officer was not justified in treating payment of said service charges as bogus expenditure .

SECTION 80-IA OF THE INCOME-TAX ACT, 1961 - DEDUCTIONS - PROFIT AND GAINS FROM INFRASTRUCTURE UNDERTAKINGS

PPN Power Generating Company (P.) Ltd. v. Commissioner of Income Tax, (Appeals)-III - [2020] 119 taxmann.com 198 (Madras)
Where assessee engaged in generation of power prayed for deletion of impugned additions made under normal provisions of Act as well as under section 115JB on ground that receipts from sale of power to Tamilnadu Generation and Distribution Corporation had been subjected to tax in subsequent year, Assessing Officer was to be directed to reopen assessments from years 2010-11 to 2014-15 on this issue alone and examine whether assessee had paid taxes on these receipts, which addition had been sustained in impugned assessment year 2009-10 and after affording an opportunity to assessee, redo assessment only on this aspect .

SECTION 80-IB OF THE INCOME-TAX ACT, 1961 - DEDUCTIONS - PROFITS AND GAINS FROM INDUSTRIAL UNDERTAKINGS OTHER THAN INFRASTRUCTURE DEVELOPMENT UNDERTAKINGS

Principal Commissioner of Income Tax, Central-4, Mumbai v. Kores India Ltd. - [2020] 119 taxmann.com 281 (Bombay)
Housing Project : Where assessee constructed residential buildings on a plot of land on basis of commencement certificate issued on 19-6-1997 and subsequently, assessee constructed another building on same plot of land pursuant to commencement certificate issued on 24-12-2003, since new project was independent from original housing project, construction was to be held started after 1-10-1998, enabling assessee for deduction under section 80-IB .

SECTION 80P OF THE INCOME TAX ACT, 1961 - DEDUCTIONS - INCOME OF CO-OPERATIVE SOCIETIES

Sant Motiram MaharajSahakari Pat Sanstha Ltd. v. Income Tax Officer, Ward Parbhani - [2020] 120 taxmann.com 10 (Pune - Trib.)
Where assessee co-operative society, engaged in providing credit facility to its members, earned interest income on deposits made with co-operative banks, since these were short-term deposits of money not required for time being, such interest earned on these deposits would fall within ambit of "profits and gains of business attributable to" providing credit facilities by assessee to its members and assessee was eligible to claim deduction on same under section 80P(2)(a)(i).

SECTION 115BBC OF THE INCOME TAX ACT, 1961 - ANNONYMOUS DONATIONS

ShriramBahuuddeshiyaSevabhaviSanstha v. Income Tax Office (Exemption Ward) - [2020] 119 taxmann.com 203 (Pune - Trib.
An assessee needs to separately pass the test u/s 115BBC subject to the exceptions If a particular receipt turns out to be anonymous donations, the same gets caught within the mischief of section 115BBC and hence mars the exemption of income to that extent notwithstanding that the assessee applied 85% of such anonymous

donations for the objects of the trust Section 13(7) clearly provides that nothing contained in section 11 or section 12 shall operate so as to exclude from the total income of the previous year of the person in receipt thereof, any anonymous donation referred to in section 115BBC on which tax is payable in accordance with the provisions of that section.

SECTION 40A(3) OF THE INCOME-TAX ACT 1961 - BUSINESS DISALLOWANCE - CASH PAYMENT EXCEEDING PRESCRIBED LIMITS

Principal Commissioner of Income Tax v. Sumukha Synthetics - [2020] 119 taxmann.com 234 (Madras)

Where assessee had entered into agreement with a company for conversion work on job work basis and paid conversion charges in cash as bank account of said company could not be operated because of order of attachment passed by ESI department, assessee was entitled to exemption under rule 6DD in respect of payment made in cash and thus, no disallowance under section 40A(3) was called for.

SECTION 245D OF THE INCOME-TAX ACT, 1961 - SETTLEMENT COMMISSION - PROCEDURE ON APPLICATION UNDER SECTION 245C

Commissioner of Income Tax v. M.A. Jacob & Company - [2020] 119 taxmann.com 232 (Madras)

Where assessee had not offered income at first instance but only after search under section 132 offered additional income and subsequently filed settlement application, and Settlement Commission granted waiver of interest, but subsequently, rectified order rejecting waiver of interest and directed that interest under section 234B shall be charged up to date of order under section 245D(4), in view of decision of Supreme Court that Settlement Commission cannot re-open its concluded proceedings by invoking section 154 so as to levy interest under section 234B in view of section 245-I, subsequent order passed by Settlement Commission based on subsequent legal position on issue, was remanded back to Settlement Commission.

MINISTRY OF FINANCE

(Department of Revenue)

(CENTRAL BOARD OF DIRECT TAXES)

NOTIFICATION

New Delhi, the 1st October, 2020

INCOME-TAX

G.S.R. 610(E).—In exercise of the powers conferred by section 44AB, section 92E, clause (iv) of sub-section (2) of section 115BAA, sub-clause (iii) of clause (c) of sub-section (2) of section 115BAB, clause (iii) of sub-section (2), proviso to sub-section (3) and sub-section (5) of section 115BAC, clause (iii) of sub-section (2), proviso to sub-section (3) and sub-section (5) of section 115BAD read with section 295 the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely: -

1. **Short title and commencement.—**(1) These rules may be called the Income-tax (22nd Amendment) Rules, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Income-tax Rules, 1962 (hereafter referred to as the principal rules), -

(a) in rule 5, in sub-rule (1), for the proviso, the following proviso shall be substituted, namely: -

"Provided that the allowance under clause (ii) of sub-section (1) of section 32 in respect of depreciation of any block of assets entitled to more than forty per cent. shall be restricted to forty per cent. on the written down value of such block of assets in case of -

(i) a domestic company which has exercised option under sub-section (4) of section 115BA, or under sub-section (5) of section 115BAA, or under sub-section (7) of section 115BAB; or

(ii) an individual or Hindu undivided family which has exercised option under sub-section (5) of section 115BAC; or

(iii) a co-operative society resident in India which has exercised option under sub-section (5) of section 115BAD:

Provided further that, for the purposes of section 115BAA, if the following conditions are satisfied, namely: -

(i) option under sub-section (5) thereof is exercised for a previous year relevant to the assessment year beginning on the 1st day of April, 2020;

(ii) there is a depreciation allowance, in respect of a block of asset, from any earlier assessment year or allowance of unabsorbed depreciation deemed so under section 72A, which is attributable to the provisions in clause (iia) of sub-section (1) of section 32; and

(iii) such depreciation or allowance for unabsorbed depreciation is not allowed to be set off under clause (ii) or clause (iii) of sub-section (2) thereof, the written down value of the block of asset as on the 1st day of April, 2019 shall be increased by such depreciation or allowance for unabsorbed depreciation not allowed to be set off:

Provided also that, for the purposes of section 115BAC and section 115BAD, if the following conditions are satisfied, namely: -

(i) the option under sub-section (5) of the respective section is exercised for a previous year relevant to the assessment year beginning on the 1st day of April, 2021;

(ii) there is a depreciation allowance, in respect of a block of asset, from any earlier assessment year which is attributable to the provisions in clause (iia) of sub-section (1) of section 32; and

(iii) such depreciation is not allowed to be set off under sub-clause (a) of clause (ii) of sub-section (2) of section 115BAC or clause (ii) of sub-section (2) of section 115BAD,

the written down value of the block of asset as on the 1st day of April, 2020 shall be increased by such depreciation not allowed to be set off.";

(b) after rule 21AF, the following rules shall be inserted, namely: -

"Exercise of option under sub-section (5) of section 115BAC. - 21AG. (1) The option to be exercised in accordance with the provisions of sub-section (5) of section 115BAC by a person, being an individual or Hindu undivided family, for any previous year relevant to the assessment year beginning on or after the 1st day of April, 2021, shall be in Form No. 10-IE.

(2) The option in Form No. 10-IE shall be furnished electronically either under digital signature or electronic verification code.

(3) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall, -

(i) specify the procedure for filing of Form No. 10-IE;

(ii) specify the data structure, standards and manner of generation of electronic verification code, referred to in sub-rule (2), for verification of the person furnishing the said Form; and

(iii) be responsible for formulating and implementing appropriate security, archival and retrieval policies in relation to the Form so furnished.

Exercise of option under sub-section (5) of section 115BAD. - 21AH. (1) The option to be exercised in accordance with the provisions of sub-section (5) of section 115BAD by a person, being a co-operative society resident in India, for any previous year relevant to the assessment year beginning on or after the 1st day of April, 2021, shall be in Form No. 10-IF.

(2) The option in Form No. 10-IF shall be furnished electronically either under digital signature or electronic verification code.

(3) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall, -

(i) specify the procedure for filing of Form No. 10-IE;

(ii) specify the data structure, standards and manner of generation of electronic verification code, referred to in sub-rule (2), for verification of the person furnishing the said Form; and

(iii) be responsible for formulating and implementing appropriate security, archival and retrieval policies in relation to the Form so furnished.

3. In the principal rules, in Appendix II,-

(a) in Form No 3CD,-

(i) in Part A, after serial number 8 and the entries relating thereto, the following shall be inserted, namely: -

"8a. Whether the assessee has opted for taxation under section 115BA/115BAA/115BAB?";

(ii)in Part B, -

(I) in serial number 18, after clause (c), the following clauses shall be inserted, namely: -

"(ca) Adjustment made to the written down value under section 115BAA (for assessment year 2020-21 only) …………

(cb) Adjusted written down value ……………………………";

(II) in serial number 32, for clause (a), the following clause shall be substituted, namely: -

"(a) Details of brought forward loss or depreciation allowance, in the following manner, to the extent available:

Sl No	Assessment Year	Nature of loss/ allowance (in rupees)	Amount as returned* (in rupees)	All losses/ allowances not allowed under section 115BAA	Amount as adjusted by withdrawal of additional depreciation on account of opting for taxation under section 115BAA^	Amounts as assessed (give reference to relevant order)	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

*If the assessed depreciation is less and no appeal pending than take assessed.

^ To be filled in for assessment year 2020-21 only.";

(b) in Form No 3CEB, in Part C,-

(i) serial number 22 and the entries relating thereto shall be omitted;

(ii) serial numbers 23 and 24 shall be re-numbered as serial numbers 22 and 23 respectively;

(iii) after serial number 23 as so renumbered, the following shall be inserted, namely: -

"24.	Particulars in respect of specified domestic transaction in the nature of any business transacted between the persons referred to in sub-section (6) of section 115BAB: Has the assessee entered into any specified domestic transaction(s) with any persons referred to in sub-section (6) of section 115BAB which has resulted in more than ordinary profits expected to arise in such business? If "yes", provide the following details: (a) Name of the person with whom the specified domestic transaction has been entered into (b) Description of the transaction including quantitative details, if any. (c) Total amount received/receivable or paid/ payable in the transaction - (i) as per books of account; (ii) as computed by the assessee having regard to the arm's length price. (d) Method used for determining the arm's length price [*See* section 92C(1)].	Yes/No _______________";

(c) after Form No. 10-ID, the following forms shall be inserted, namely: -

"FORM No. 10-IE

[*See sub-rule (1) of rule* 21AG]

Application for exercise/ withdrawal of option under clause (i) of sub-section (5) of section 115BAC of the Income-tax Act, 1961

To,

The Assessing Officer,

……………..

……….........

Sir/ Madam,

I, ...[name of individual]/ Karta of Hindu undivided family (HUF)................[name of HUF]* / .... , on behalf of.......................... [name and address of the individual/ HUF*, having Permanent Account Number (PAN) …………………….. do hereby exercise/ withdraw* the option referred to in clause (i) of sub-section (5) of section 115BAC of the Income-tax Act, 1961 for previous year 20…..-……and subsequent years.

2. The details for this purpose are given below:

(i) Name of the individual/ HUF* :

(ii) Whether the individual/ HUF* has any income under the head profit or gains from business or profession : Yes/ No

(iii) PAN :

(iii) Address :

(iv) Date of Birth/ Incorporation* :dd/mm/yyyy

(v) Nature of Business/ Profession* :

3. (i) Whether the individual/ HUF has any Unit in International Financial Services Centre (IFSC), as referred to in sub-section (1A) of section 80LA: Yes/No

(ii) If answer to (i) is Yes, provide following details: (Add number of columns depending on number of Units):

	Unit 1	Unit 2	Unit 3
(1)	(2)	(3)	(4)
Name of Unit			
Address of Unit			
Nature of activities undertaken in Unit			

4. (i) Whether option under clause (i) of sub-section (5) of section 115BAC has been exercised in Form 10-IE for any earlier previous year/ years and is now being withdrawn **(to be activated if withdrawal option is selected)** : Yes/No

(ii) If yes, previous year in which option was exercised : 20....-20.....

(iii) Date on which option exercised in Form 10-IE : d/mm/yyyy

5. I understand that the option under clause (i) of sub-section (5) of section 115BAC, once exercised in a previous year, cannot be withdrawn for the same previous year and can subsequently be withdrawn only once for any other previous rendering me/ Individual/ HUF* ineligible for exercising option under section 115BAC in terms of proviso to sub-section (5) thereof.

6. I do hereby further affirm that the conditions stipulated in section 115BAC are and shall be satisfied by me/ Individual/ HUF* (to be activated in case where the option is being exercised).

*Delete whichever is inapplicable.

Place:

Date:

Yours faithfully,

Signature of Individual/ Karta of HUF / Authorised Representative ………………………………….

Name…………………………………………

Designation………………………………….

Address…………………………………………

Note: This form shall be signed by the individual/ Karta of the HUF/ Authorised Representative.

FORM No. 10-IF

[*See sub-rule (1) of rule* 21AH]

Application for exercise of option under sub-section (5) of section 115BAD of the Income-tax Act, 1961

To,

The Assessing Officer,

……………

………

Sir/ Madam,

I,.. , on behalf of [name and registered address of the co-operative society exercising the option under sub-section (5) of section 115BAD] ………. having Permanent Account Number (PAN)……………………………….. do hereby exercise the option referred to in sub-section (5) of section 115BAD of the Income-tax Act, 1961 for previous year 20…..-…… and subsequent years.

2. The details of the co-operative society are given below:

(i) Name of the co-operative society :

(ii) Whether a resident co-operative society : Yes/No

(iii) PAN :

(iv) Registered Address :

(v) Date of Incorporation : dd/mm/yyyy

(vi) Nature of activities :

3. (i) Whether the co-operative society has any Unit in International Financial Services Centre (IFSC), as referred to in sub-section (1A) of section 80LA: Yes/No

(ii) If answer to (i) is Yes, provide following details: (Add number of columns depending on number of Units):

	Unit 1	Unit 2	Unit 3
Name of Unit			
Address of Unit			
Nature of activities undertaken in Unit			

5. I understand that the option under sub-section (5) of section 115BAD, once exercised for any previous year, cannot be subsequently withdrawn for the same or any other previous year.

6. I do hereby further affirm that the conditions stipulated in section 115BAD are and shall be satisfied by the aforesaid co-operative society.

Place:

Date:

Yours faithfully,

Signature of Principal Officer…………….……………….

Name…………………………………

Designation……………………….

Address…………………….………

Note: This form shall be signed by the principal officer.";

(d) in Form ITR-6 relating to assessment year 2020-21,-

(i) in Schedule DPM, -

(I) after serial number 3 and the entries relating thereto, the following shall be inserted, namely: -

"3a.	Amount as adjusted on account of opting for taxation section 115BAA				
3b.	Adjusted Written down value on the first day of previous year (3) + (3a)";				

(II) for serial number 5, the following shall be substituted, namely: -

"5.	Consideration or other realization during the previous year out of 3b or 4";				

(III) for serial number 6, the following shall be substituted, namely: -

"6.	Amount on which depreciation at full rate to be allowed (3b + 4 -5) (enter 0, if result is negative)";				

(IV) for serial number 20, the following shall be substituted, namely: -

"20.	Capital gains/ loss under section 50 (5 + 8 -3b - 4 -7 - 19) (enter negative only, if block ceases to exist)";				

(ii) for Schedule CFL, the following Schedule shall be substituted, namely: -

“Schedule CFL Details of Losses to be carried forward to future years

CARRY FORWARD OF LOSS

S. No.	Assessment Year	Date of Filing (DD/ MM/ YYYY)	House property loss	PTI house property loss	Total House property loss	Loss from business other than loss from speculative business and specified business			Loss from speculative business	Loss from specified business	Loss from life insurance business u/s 115B	Short-term capital loss			Long-term Capital loss			Loss from owning and maintaining race horses
						Brought forward business loss	Amount as adjusted on account of opting for taxation section 115BAA/	Brought forward Business loss available for set off during the year				Normal	PTI	Total	Normal	PTI	Total	
1	2	3	4a	4b	4c	5a	5b	5c=5a-5b	6	7	8	9a	9b	9c=9a+9b	10a	10b	10c	11
I	2010-11																	
Ii	2011-12																	
iii	2012-13																	
iv	2013-14																	
v	2014-15																	
vi	2015-16																	
vii	2016-17																	
viii	2017-18																	
ix	2018-19																	
x	2019-20																	
xi	Total of earlier year losses b/f																	
xii	Loss distributed among the unit holder (Applicable for Investment Fund only)																	
xiii	Balance available of Total of earlier year b/f (xi-xii)																	
xiv	Adjustment of above losses in Schedule BFLA				(2i of schedule BFLA)			(2ii of schedule BFLA)	(2iv of schedule BFLA)	(2v of schedule BFLA)	(2iii of schedule BFLA)							(2xiv of schedule BFLA)
xv	2020-21 (Current year losses to be carried forward)				(2xvi of schedule CYLA			(3xvi of schedule CYLA)	(B48 of schedule BP, if –ve)	(C54 of schedule BP, if –ve)	E(iv) of schedule BP, (if –ve)			(2x+3x+4x+5x of item E of schedule CG)			(6x+7x+8x) of item E of schedule CG)	(8e of schedule OS, if –ve)”
xvi	Total loss Carried forward to future years																	
xvii	Current year loss distributed among the unit-holder (Applicable for Investment fund only)”;																	

(iii) for Schedule UD, the following Schedule shall be substituted, namely: -

“Schedule UD	Unabsorbed depreciation and allowance under section 35(4)							
S. No	Assessment Year	Depreciation				Allowance under section 35(4)		
		Amount of brought forward unabsorbed depreciation	Amount as adjusted on account of opting for taxation section 115BAA	Amount of depreciation set-off against the current year income	Balance carried forward to the next year	Amount of brought forward unabsorbed allowance	Amount of allowance set-off against the current year income	Balance Carried forward to the next year
(1)	(2)	(3)	(3a)	(4)	(5)	(6)	(7)	(8)
i	Current Assessment Year							
ii								
iii								
iv	Total”.							

[Notification No. 82/2020/F. No. 370142/30/2020-TPL]

ANKIT JAIN, Under Secy .(Tax Policy and Legislation Division)

Note : The principal rules were published in the Gazette of India Extraordinary, Part III, section 3, sub-section (i), *vide* notification number S.O. 969(E), dated the, 26th March, 1962 and were last amended *vide* notification number G.S.R. 574 (E) dated the 22nd September, 2020.

Circular No. 18 / 2020

F.No. IT(A)/1/2020-TPL
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
****

Dated: 28th October, 2020

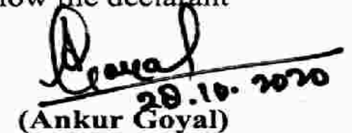
Subject: Clarifications in respect of the Direct Tax *Vivad se Vishwas* Act, 2020 – reg.

With the objective to reduce pending income tax litigation, generate timely revenue for the Government and benefit taxpayers by providing them peace of mind, certainty and savings on account of time and resources that would otherwise be spent on the long-drawn and vexatious litigation process, the Direct Tax *Vivad se Vishwas* Act, 2020 (hereinafter referred to as '***Vivad se Vishwas***') was enacted on 17th March, 2020. The provisions of *Vivad se Vishwas* had been amended by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 to provide certain relaxation in view of the COVID-19 pandemic and also to empower the Central Government to notify certain dates.

2. The Central Government vide the notification S.O. 3847(E), dated 27th October, 2020, has extended the date for payment without additional amount under *Vivad se Vishwas* from 31st December, 2020 to 31st March, 2021. The said notification also notified the last date for filing declaration under *Vivad se Vishwas* as 31st December, 2020.

3. Under the existing provisions of sub-section (2) of section 5 of the *Vivad se Vishwas,* the declarant is required to pay the amount within a period of 15 days from the date of receipt of certificate from the designated authority. However, as per the aforesaid notification, a declarant who files declaration on or before 31st December, 2020 can make payment without additional amount on or before 31st March, 2021. Hence, requiring payment by the declarant within a period of 15 days from the date of receipt of certificate from the designated authority may result into undue hardship for the declarant in whose case the period of 15 days expires before 31st March, 2021.

4. In order to mitigate undue hardship and remove difficulty that may be caused by the aforesaid requirement of payment within 15 days from the date of receipt of certificate from the designated authority, in exercise of powers conferred under section 10 and 11 of *Vivad se Vishwas*, it is hereby clarified that where a declarant files a declaration under *Vivad se Vishwas* on or before 31st December, 2020, the designated authority, while issuing the certificate under sub-section (1) of section 5 of the *Vivad se Vishwas*, shall allow the declarant to make payment without additional amount on or before 31st March, 2021.



(Ankur Goyal)
Under Secretary to the Govt. of India

RECENT CASE LAWS ON GST

CA Daya Shankar Agarwala

1.M/s VISHNU ENTERPRISES Vs THE JOINT COMMISSIONER OF CENTRAL GOODS AND SERVICES TAX CGST BHAVAN-Returns not filled due to system error should be accepted without imposing any liabilities on the taxpayer.

2020-TIOL-1486-HC-MUM-GST

GST - Court on 8th February, 2019, gave liberty to the petitioner to file returns and pay taxes, so as to avoid future liability of interest, if it accrues - While the petitioner exercised the liberty so granted to it, **the liberty was meaningless as the returns filed by the petitioner were not accepted by the system** - Respondents did not seeking modification of the order and now they are seeking time for filing of the reply to this application and are also seeking to raise challenge about maintainability of this petition - Bench does not understand if the grounds were known to the respondents, why respondents did not question the order dated 08.02.2019 earlier - **Filing of a tax return is something which is not a one way affair - What happens in the filing of return is a positive act on the part of assessed and corresponding acceptance of such positive act by the revenue - In the present case, the positive act in the nature of filing of the return did take place, but the effort was negated by the respondents and now blame is being put on the system that respondents have adopted to enable e-filing of tax returns - In such a case, the system can always be amended suitably for the system is created by human beings** and not vice-versa - Two weeks time granted to the respondents to file reply in the matter - Meanwhile, respondents shall make suitable amends to the system and accept the returns filed by the petitioner on or before the next date.If the petitioner's returns are not accepted online, the petitioner shall be allowed to file them manually, which returns shall be taken on record by the respondents – Two week's time granted to the respondents to make suitable amends in the matter.

Comments:

Time and again taxpayer's have faced hardships due to lack of infrastructural support from GSTN. Filling of return is an obligation for taxpayer. Timely compliance is beneficial for the taxpayer to avoid future liabilities. But failure to do so due to technical glitches in the system, taxpayers cannot be held liable. Thus, returns not filled due to system error should be accepted either manually or the system should allow modifications. This ruling brings a sigh of relief for those aggrieved due to the technical lapse in GSTN.

2.Commissioner of Service Tax, Ahmedabad Versus M/s Adani Gas Ltd.-Supply of tangible goods to be considered as taxable service- Civil Appeal No. 2633 of 2020- Apex Court

This appeal arises from a judgment and order of the Customs, Excise, & Service Tax Appellate Tribunal,1 West Zonal Bench at Ahmedabad in Service dated 5 April 2019. The Tribunal has, in exercise of its appellate jurisdiction, reversed the 30 March 2011 decision of the Commissioner of Service Tax, Ahmedabad2 and **set aside the demand for payment of service tax on the charges collected by the respondent for supply of pipes and measuringequipment to its customers under Section 65(105)(zzzzj) of the Finance Act, 1994.** This appeal rests on the interpretation and applicability of the provisions of Section 65(105)(zzzzj) of the Finance Act, 1994.

The respondent is in the business of distributing natural gas - Compressed Natural Gas3 and Piped Natural Gas4 - to industrial, commercial, and domestic consumers. Among other purposes, industrial consumers use PNG for manufacturing operations. Domestic and commercial consumers use PNG for cooking, power supply and air-conditioning. In order to facilitate the distribution of PNG to industrial, commercial and domestic consumers through pipes, **the respondent installs an equipment described as 'SKID' at their customers' sites. The SKID equipment consists of isolation valves, filters, regulators and electronic meters. The equipment regulates the supply of PNG being distributed and records the quantity of PNG consumed by the customer, which is then used for billing purposes**. The respondent enters into an agreement – the Gas Sales Agreement5 - with consumers to whom gas is supplied by it. The manufacture of CNG falls under Chapter Sub-Heading 27112900 of the Central Excise Tariff Act, 1985. The respondent is also engaged in providing the taxable service falling under the category of "transport of goods through pipeline", as defined in Section 65(105)(zzz) of the Finance Act, 1994

During the course of an audit by the officers of Central Excise, Ahmedabad-I during January 2009, it was noticed that the respondent had received income under the head of "gas connection charges" from its industrial, commercial, and domestic customers. From the GSA and the invoices, it was found that charges were collected for the "supply of pipes, measuring equipment etc." while providing new gas connections to customers. The ownership of the equipment is not with the customer but is retained by the respondent. The customer does not have control or any legal rights over the equipment. Value Added Tax was also not paid on these charges collected from the customers. A Notice to Show Cause6 was issued to the respondent stating that the transactions undertaken by them are covered under the category of "supply of tangible goods service", The Show Cause Notice required the respondent to pay service tax with effect from 16 May 2008 on the gas connection charges recovered for the period from 16 May 2008 to 31 March 2009.

Comments:

Service tax Department has always tried to prove that a transaction of deemed sale is supply of tangible goods to bring it in the purview of taxability in Service Tax regime. This revenue favourable judgement is going to be used to the advantage of revenue. Ignoring the basic principles of right to use as has been earlier decided by the Apex Court in BSNL/TATA judgment. What we need to keep in mind is the only because VAT was not paid in the instant case, the assessee has been asked to pay Service Tax and also in the GST regime the concept of composite supply would have to be seen before applying the ratio in the GST regime.

3.M/s DEEPAK FERTILIZERS AND PETROCHEMICALS CORPORATION LTD VS COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX-Total CENVAT credit for Rule 6 of CCR,2004 is to be read as total Common CENVAT Credit- 2020-TIOL-1310-CESTAT-MUM

Rule 6 of CCR, 2004 - Case of the Department in this case is that the appellant had adopted incorrect value of "P" in the formula 'M/N*P' provided under Rule 6(3A)(c)(iii) ibid in as much as the factor "P" denotes total Cenvat credit and not common Cenvat credit - Department had initiated show cause proceedings against the appellant, which culminated into the adjudication order dated 30.11.2016, wherein an amount of Rs.25,51,063/- along with interest was ordered for recovery and penalty of Rs.2,50,000/- was imposed on the appellant - appeal to CESTAT.

Held: Issue arising out of the present dispute is no more *res integra* , in view of the decision of this Tribunal in the case of Reliance Industries Ltd. - **2019-TIOL-1593-CESTAT-AHM** - It is held therein that if the whole Rule 6(1),2020-TIOL-

1310-CESTAT-Mumbai-Central Excise Page 1 of 3(2), (3) is read harmoniously and conjointly, it is clear **that "Total Cenvat Credit" for the purpose of formula under Rule 6(3) is only total Cenvat credit of common input service and will not include the Cenvat credit on input/input service exclusively used for the manufacture of dutiable goods;** that if the interpretation of the Revenue is accepted, then the Cenvat credit of part of input service even though used in the manufacture of dutiable goods, shall stand disallowed, which is not provided under any of the Rule of Cenvat Credit Rules, 2004 - following the same, impugned order is set aside and appeal is allowed: CESTAT

Comments:

This judgement clarifies the long pending issue and puts to rest the misuse of the same. The intention of the law would not be to reverse credit of input services used specifically against the provision of taxable output services as the same would be unjust to the customer. This judgement shall have implications in GST as well and thus beneficial for all.

4.HC: Sets-aside order passed in FORM GST DDRC-01A, Directs fresh consideration of matter after granting hearing opportunity

Formative Tex Fab vs. State of Gujarat- [TS-735-HC-2020(GUJ)-NT]

Gujarat HC quashes and **sets-aside FORM GST DDRC-01A** (Intimation of Tax Ascertained Payable) in view of the facts of the case while remitting the matter to Revenue for fresh consideration; Refers to the **fact that no sooner the assessee failed to respond to summons under section 70, Revenue issued order fixing liability of Rs. 1 crore;** Notes assessee plea that "he has been medically advised not to get out of his house. During that particular period, the writ applicant had also undergone cataract surgery" and had informed the same to Revenue; Considering that a huge liability has been determined to be discharged by the assessee, views that, "**one opportunity of hearing should be given to the writ applicant", directs Revenue to fix a date for de novo hearing**; However, clarifies that provisional attachment (FORM GST DRC-22) should continue so that no third party rights are created during the interregnum period : Gujarat HC

Comments:

This judgement would help the assessees where the department is initiating proceedings without actually providing any opportunity of being heard to the assessee and blatantly ignoring the legal provisions. The above judgment puts the assessee in beneficial position and avoids unnecessary departmental harassment.

5.Kalpsutra Gujarat vs. The Union of India[TS-749-HC-2020(GUJ)-NT]

Gujarat HC hears writ petition seeking striking of down Rule 86A of CGST Rules, 2017, in so far as it gives power to block ITC at no fault of registered recipient and to declare it ultra vires of Section 16 of CGST Act, 2017; Records Petitioner's plea to utilize the ITC until proved that supplier did not pay the tax after following up the provision of CGST Rules, 2017; Before the HC, the Petitioner further pleads for granting stay against recovery of ITC; HC issues notice while requiring Revenue to explain whether (i) omission on the part of the third party (Seller) in filing the GSTR-3B for the relevant period would be sufficient to block ITC of writ applicant (ii) for blocking ITC, the Department has invoked Rule 86A of the CGST Rules

6.Jariwala Sales Private Ltd. vs. Union Of India.

In this case the Hon'ble Gujarat High Court has accepted the writ and issued notice to Revenue to file a reply

7.M/s Gr Infraprojects Limited versus Union of India

[D.B. Civil Writ Petition No. 6337/2020]

Hon'ble Rajasthan High Court has issued notice to government, in case of Rule 36(4), which

places a restriction on availment of ITC @10/20% over and above amount reflected in GSTR 2A, despite having valid Tax Invoice.

8.**Sales Tax Bar Association (Regd.) &Anr. Vs. Union of India & Ors.[TS-1152-HC-2019(DEL)-NT]**

Delhi HC issues notice in a writ petition challenging **Rule 36(4)** which restricts ITC upto 20% of value of invoices in respect of invoices/debit notes whose details have not been uploaded by the suppliers; Petitioner challenges Rule 36(4) as being ultra vires section 41, 42 and 43 of the CGST Act r.w. section 16 which lays down the entire scheme of matching, verifying and validating credit; Moreover, Petitioner submits that Rule 36(4) finds its reference in Section 43A of CGST Act which overrides section 41 42 and 43, however this section has yet to be notified and hence, the rule purportedly issued thereunder cannot stand in the eyes of law.

9.**Society For Tax Analysis vs. Union of India[R/SPECIAL CIVIL APPLICATION NO. 19529 OF 2019]**

In this case the **Hon'ble Gujarat High Court** has accepted the writ and **issued notice to Revenue** to file a reply.

10.Movement for GST Simplification vs. Union of India[PUBLIC INTEREST LITIGATION]

A petition under Article 32 of the Constitution of India praying for a Writ ofMandamus or any other appropriate writs seeking issuance of specific guidelines and/or directions in respect of disallowance of Input Tax credit on the ground of non filling of return by supplier of goods rule 36(4) of CGST Act,2017 and disallowance of Input Tax credit on the ground of non filling of Form GSTR 3B within the limitation prescribed u/s 16(4) of CGST Act,2017 and also on the simplification of complex compliance and penal structure of Goods and Services Tax.

11.Transtonnelstroy Afcons Joint Venture Versus Union of India & other(s) - HC disallows Refund of INPUT SERVICES in case of Inverted duty structure.

2020-TIOL-1599-HC-MAD-GST

Madras High Court

GST - Refund of Tax - Inverted Duty Structure - Section 54 of CGST Act, 2017 - Rule 89 of CGST Rules, 2017 - Whether Sec 54(3)(ii) is violative of Article 14 of the Constitution - **Whether Rule 89(5) is in conformity with Sec 54(3)(ii) - Whether it is necessary to interpret Rule 89(5) and, in particular, the definition of Net ITC therein so as to include the words input services**.

Held –

- **Section 54(3)(ii) does not infringe Article 14 of Constitution of India.**
- Refund is a statutory right and the extension of the benefit of refund only to the unutilised credit that accumulates on account of the rate of tax on input goods being higher than the rate of tax on output supplies by **excluding unutilised input tax credit that accumulated on account of input services is a valid classification and a valid exercise of legislative power.**
- Therefore, there **is no necessity to adopt the interpretive device of reading down so as to save the constitutionality of Section 54(3)(ii).**

Section 54(3)(ii) curtails a refund claim to the unutilised credit that accumulates only on account of the rate of tax on input goods being higher than the rate of tax on output supplies. In other words, it qualifies and curtails not only the class of registered persons who are entitled to refund but also the imposes a source-based restriction on refund entitlement and, consequently, the quantum thereof .

- As a corollary, Rule 89(5) of the CGST Rules, as amended, **is in conformity with Section 54(3)(ii). Consequently, it is not necessary to interpret Rule 89(5) and, in**

particular, the definition of Net ITC therein so as to include the words input services.

Comments :

In the above ruling, HC has stressed more on the text of the statue than on the intent of the law and thereby concluded that refund of input services (in case of refund for inverted duty structure) shall not be available. Ruling is completely opposite to what Gujrat HC concluded in the case of VKC Footsteps India Pvt Ltd. wherein stress was given on the intent of the act and ITC of input service for inverted duty structure was granted. If the above ruling of Madras HC is to be considered, various assessees across the country who are facing the similar issue of accumulation of credit on account of inverted duty structure on input services shall suffer financial strain. Revenue should reconsider issue being faced by taxpayers at large and bring some relief to avoid such blockage of credit.

12.Union of India vs. G S Chatha Rice Mills & Ors. - Meaning of Day , Date and time .Civil Appeal No 3249 of 2020

Supreme Court

- **CUSTOMS-** Customs duty increased from Nil to 200 percent for all imports from Pakistan w.e.f 16/12/2019- Notification uploaded at 20.46.58 hours - **Whether increased rate applicable for bill of entry presented before that time?** The Apex Court decided the above question in favour of the respondent by dismissing appeal of union of India. While so doing the court interpreted the provisions of **General Clauses Act, Customs Act-Rules & Regulations, Information Technology Act, 2000 and catena of judicial decisions in this regard .**

Held –

- The court explained that the provisions of **General Clauses Act which provided in Section 5(3)** that Unless the contrary is expressed, a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement **could not be applied in the instant case as the notification issued under the Customs Act could not be said to be a Central Act** or a regulation and it was simply issued under the delegated power under the Act and stood on a different footing.
- The court also noted that the provisions in the Customs Act for the **electronic presentation of the bill of entry for home consumption** and for self-assessment have to be read in the context **of Section13 of the Information Technology Act which recognizes "the dispatch of an electronic record" and "the time of receipt of an electronic record".**
- The legal regime envisaging the electronic presentation of records, such as the presentation of a bill of entry, has been imparted precision as a result of the enabling framework of the Information Technology Act under which these records are maintained.
- The presentation of the bill of entry under Section 46 is made electronically and is captured with time stamps in terms of the requirements of the Information Technology Act read with Rule 5(1) of the Information Technology (Electronic Service Delivery) Rules,2011.
- **The court also noted that with the change in the manner of publishing gazette notifications from analog to digital, the precise time when the**

gazette is published in the electronic mode assumes significance.

Comments :

In the above ruling, SC has stressed on the importance of IT Act and defines that the point of time from which gazette notifications come into force. This judgement is a landmark judgement which will be helpful in all streams of laws including Income-tax, GST, excise, customs etc.

13.Jay Jay Mills India Pvt. Ltd. vs. The State Tax Officer - All objections were required to be dealt with by the authority, before passing an order.

2020-TIOL-1602-HC-MAD-GST

Madras High Court

GST - The Department had, in a cryptic manner, rejected some of the proposals by stating that, as per Section 54 (8)(a), 0the ineligible goods or services are not directly used for making zero-rated supply. The Hon'ble High Court held that **all objections were required to be dealt with by the authority, before passing an order.**

Held –

- The court observed that Department in a cryptic manner, rejected some of the proposals by stating that, as per Section 54 (8)(a), the ineligible goods or services are not directly used for making zero-rated supply. Apart from this, there is absolutely no other reasons adduced in the order.
- The statutory authority **are bound to consider the claim made and pass a reasoned order.**
- **All these objections were required to be dealt with by the authority, before taking a final call, which is conspicuously absent. As such, the order itself can be termed to be "a non-speaking order" and therefore, are liable to be set aside and the matter is remanded back to the respondent for fresh consideration.**

Comments :

Once again the Department has been put to check. There are countless cases where the Department have not passed reasoned orders according to their own whims and fancies thereby abusing the statutory powers bestowed upon them. The Courts have observed and bestowed justice upon suffering taxpayers.

14.**Insitel Services Pvt. Ltd. vs. UOI - Rule 90(3) of the CGST Rules is ultra vires Articles 14 and 19(1)(g) of the Constitution of India, or alternatively for Rule 90(3) of the CGST Rules to be read down to the effect that the rectification of deficiencies shall not be treated as submission of fresh application for the purpose of computing limitation of applying for refund and grant of interest on delayed refund under the Central Goods and Services Tax Act, 2017 – Notice issued to the Government**. **2020-TIOL-1579-HC-DEL-GST**

Delhi High Court

GST - Petitioner submits that the refund procedure in **Rule 90(3) of the CGST Rules is arbitrary, illegal and ultra vires for the reason that issuance of a deficiency memo effectively results in rejection of the refund application without giving any opportunity of hearing to the applicant – further submits that a refund application under Section 54 of the CGST Act read with Rule 89 and Rule 90(3) of the CGST Rules is automatically treated as rejected** and the second refund

application is treated as a fresh application and the interest amount is calculated only from **the date of the second refund application or subsequent applications which are filed after receiving the deficiency memos**. Thus, according to the petitioner, the applicants are deprived of their right to claim interest on refund from the date of the initial application – Government are permitted to file their counter-affidavits within four weeks.

Comments :

There have been innumerable instance where refund has either become time barred or there is loss of interest as in the above case as the filing of refund application after the issuance of RFD-03 is considered a fresh application. We hope that the Rule 90(3) of the CGST Rule is written down and justice is given to the taxpayers.

15.Best Sellers (Cochin) Pvt. Ltd. vs. Assistant State Tax Officer - The provisions of the Act and Rules mandate that an e-way bill is required only for consignments whose value exceeds Rs.50,000/-, the detention at the instance of the respondent cannot be said to be justified.

2020-TIOL-1592-HC-KERALA-GST

Kerala High Court

- Petitioner is aggrieved by Ext.P7 **detention notice issued to him** - It is the case of the petitioner that the transportation was of a consignment of watches that had been supplied to him by the seller in Delhi at a **discounted rate of Rs.8.99** - Transportation of the goods was accompanied by Ext.P4 tax invoice, where the supplier in Delhi **had shown the actual price of the consignment** of watches, which was Rs.4,49,550/- and had **given a discount of almost the entire amount** save to the extent of Rs.8.99, and had paid IGST at the rate of 18% on the actual value of the watches - **Consignment was detained** by the respondent, on the ground that, although the consignment was covered by a valid invoice, it was not accompanied by a valid e-way bill.

Held-

- I find force in the contention of the learned counsel for the petitioner that inasmuch as the effective value of the goods that was transported was only Rs.8.99 as evident from Ext.P4 invoice, and the provisions of the Act and Rules mandate that an e-way bill is required only for consignments whose value exceeds Rs.50,000/-

The detention at the instance of the respondent **cannot be said to be justified**. Under such circumstances, I allow this Writ Petition by quashing Ex.P7 order and **directing the respondent to forthwith release the goods** and the vehicle to the petitioner on the petitioner producing a copy of this judgment before the said authorities. The learned Government Pleader shall also communicate the gist of this judgments to the respondent for enabling the petitioner to obtain an immediate release of the goods and the vehicle

Comments :

The current case provides a relief as to the determination of the amount considered for calculation of Rs. 50,000/- for EWB limit and explains the same excludes discount if any provided.

16.CIAL Duty Free and Retail Services Ltd. (CDRSL) & Ors. vs. UOI & Ors. - sets-aside order rejecting refund of Input Tax Credit (ITC) to Duty Free Shops (DFS) located at the international airport.

TS-813-HC-2020(KER)-NT

Kerala High Court

GST - Kerala HC (Ernakulam) allows a batch of writ petitions, sets-aside order **rejecting refund of Input Tax Credit (ITC) to Duty Free Shops (DFS) located at the international airport**; Observes that goods like cigarettes, alcohol, perfumes, chocolates and cosmetics etc. are sold to the international passengers i.e. departing passengers or passengers arriving into India (arriving passengers) which do not cross customs frontiers;

Held-

- HC noted that the question posed qua entitlement of refund of taxes in respect of goods and services provided at international airport would be applicable to outgoing international tourist i.e. departure area in view of the **Circular 106/25/2019 dated June 29, 2020** as has been argued by the Revenue, has been answered by this Court, as the aforementioned circular has also been discussed in the judgment rendered by **Bombay HC in case of Sandeep Patil [TS-790-HC-2019(BOM)-NT].**
- HC noted that the question posed qua entitlement of refund of taxes in respect of goods and services provided at international airport would be applicable to outgoing international tourist i.e. departure area in view of the Circular 106/25/2019 dated June 29, 2020 as has been argued by the Revenue, has been answered by this Court, as the aforementioned circular has also been discussed in the judgment rendered by Bombay HC in case of Sandeep Patil [TS-790-HC-2019(BOM)-NT].
- HC noted **that the expressions 'import' and 'export' defined under Customs Act, 1962 have been identically defined in IGST Act, 2017. Invoices issued by DFSs at the time of sale of goods to the outgoing passengers are duly signed by both the passengers and the cashier.**
- **HC further noted that the invoice envisages a condition that the passenger will not consume the goods until he lands at the final destination outside India.**
- HC noted assessee's prayer wherein a declaration has been sought to the effect that the CGST Act, 2017, the IGST Act, 2017 and the KGST Act, 2017 and the rules thereunder do not apply to the supply of goods and services effected by the assessee in the arrival and departure DFS at Calicut International Airport in terms of the Concession Agreement. It was further prayed, issuance of direction to the respondents not to apply the aforementioned Acts to the DFS operated by the petitioner and to quash Exhibits P-3 & P-10 to the extent of levying CGST and IGST on the revenue sharing in terms of the Concession Agreement.
- HC held as per the reasoning assigned in para 37 of the judgment referred to above in Sandeep Patil, the assessee shall pay the GST on input services including Concession Fee to Airport Authority and claim ITC of the entire tax amount and thereafter claim refund of the same by following the procedure prescribed under Section 54(3) of the CGST Act/KGST Act read with Rule 89 of CGST Rules/KGST Rules.

Comments:

The ruling of the Kerala High Court further establishes the long contention of the Duty Free Shops thereby ensuring that they get their eligible refund.

17.**UFV India Global Education vs. Union of India & Ors - Provisional bank account attachment 'patently illegal' when proceedings initiated u/s 67 stood concluded.**

TS-778-HC-2020(P and H)-NT

Punjab and Haryana High Court

GST - Officials of DGGSTI visited the premises of Assessee and recorded statements of its Associate Directors and all the required documents were given access to in pursuant to which they **attached Assessee's Bank Account u/s 83 of the CGST Act on the rationale of protecting the Government's revenue**

Held-

- HC observed that bare reading of Section 83 of the Act would show that the Commissioner has to **form an opinion** that for the purpose of protecting the interest of the Government revenue, it is necessary to provisionally attach either the property or the bank account belonging to the taxable person by passing an order in writing but this **exercise can be made by the Commissioner when any proceedings under Sections 62 or 63 or 64 or 67 or 73 or 74 is pending.**
- HC stated that the L**egislature has cautiously used the word "or" for each and every Section of the Act for he purpose of giving powers to the Commissioner to initiate proceedings to provisionally attach the property or the bank account of the taxable person but it is not provided anywhere that the property or the bank account can remain attached under the order passed under Section 83 of the Act if the proceedings initiated under Section 67 is culminated into the proceedings under Section 63 or Section 74.**
- HC opined that the effect of Section 83 of the Act shall **come to an end as soon as the proceedings pending in any of the aforesaid Sections i.e. 63 or 64 or 67 or 73 or 74 are over because pendency of the proceedings is the sine qua non.** HC however held that in case the Commissioner still feels or is of the opinion that it is necessary so to do in the interest of protecting the Government revenue, it still can pass an order in writing to attach any property or even the bank account of the taxable person if the proceedings are initiated in any of the aforesaid provisions and are pending but for the provisions in which the proceedings have earlier been initiated and are over.
- HC held that the impugned orders passed by the Revenue are patently **illegal** specially when the proceedings initiated under Section 67 of the Act had already been over and hence, set them aside. HC directed Revenue to release the aforesaid bank account of the Assessee forthwith which has been provisionally attached.

Comments:

The Department has often construed provisions to suit their requirement and read law beyond its scope. This ruling is just another example that establishes the same.

18.Capgemini Technology Services India Ltd. - Enhancement of dues in SVLDRS-3 absent hearing-opportunity "grossly in violation" of natural justice principle.TS-814-HC-2020(BOM)-NT

Bombay High Court

GST – The department enhanced dues from Rs. 71 lacs (approx.) (as accepted by assessee in Form SVLDRS-2A) to

Rs. 2.19 crores (approx.) in FORM SVLDRS-03 issued by Revenue, without giving an opportunity of being heard.

Held-

- That authorities need to keep in mind "the twin objectives of liquidation of past disputes pertaining to central excise and service tax on the one hand and disclosure of unpaid taxes on the other hand.
- Both are equally important: amicable resolution of tax disputes and interest of revenue"; Further remarks if "Designated Committee wanted to increase the payable amount, the least they should have done was to give an opportunity of hearing to the Petitioner after affording the Petitioner an opportunity to review the report of the jurisdictional divisional commissioner".
- Find the explanation by Revenue regarding non-issuance of order or FORM SVLDRS-03 on the rectification application made by assessee under section 128 as "unacceptable" & "in breach of Rule 6(6) of the SVLDR Rules";
- Consequently, directs the Designated Committee to give an opportunity of hearing to the assessee and after considering all the material furnished and submissions made by the assessee as well as the payment made under protest, issue appropriate orders as per law including issuance of revised Form SVLDRS-3 and Form SVLDRS-4.

Comments-

This ruling gives sigh of relief to the assessees who had no option but to situation.

19.Ashok Kumar Vs Commissioner Of CGST & CE - Supreme Court Larger Bench dismisses petition for pre arrest bail after Bombay High Court had rejected the bail plea in fraudulent ITC case.

2020-TIOL-150-SC-GST-LB

Supreme Court of India

GST - Circular Trading - Allegation is that applicant's firm after availing the ITC of Rs.53.50 crores without any actual receipt of goods has also passed on the said ITC of Rs.53.50 crores to six firms, out of which five firms, namely M/s. Chandan Enterprises, M/s. Sheela Sales Private Limited, M/s. Chandan Sagar Sales Pvt. Ltd. M/s. Chandan Sagar Constructions Pvt. Ltd and M/s. Structeco Infrastructure Pvt. Ltd are closely held entities of M/s. Sheela Sales Corporation, inasmuch as **proprietor or partner or a Director are common and are related to each other** - Investigation also revealed that above referred five firms have availed and passed on the said credit of **Rs.63.50 crores to 360 other firms located in various parts of the country** - applicant no.1 in his statement dated 9th December, 2019 and 20th January, 2020 admitted that none of his firms had received goods from M/s. Bajrang Traders on which invoices they have availed ITC of Rs.53.63 crores; and that none of his firms has made payment to M/s. Jai Bajrang Traders - Apprehending arrest on accusation of having committed a non-bailable offence in terms of Section 132(1)(b) and (c) read with Section 132(5) of the CGST Act, 2017), **applicants had sought directions under Section 438 of the Criminal Procedure Code, that in the event of their arrest they shall be released on bail**

Bombay High Court observed that on perusal of file notings and statements of applicant, it prima-facie suggested that applicants' **complicity/involvement in availing fake input tax credit without movement of goods on forged invoices Rs.63.50 crores is in breach of provisions of Section 16 of CGST Act, which is cognizable offence** Section 132(1)(b)(c) read with Section 132(5) of the CGST Act;

that the applicants had failed to produce unique E-way bill number (EBN) particulars, transporter's details, proof of receipt of goods either by himself

or his agent or warehouse keeper and payment proof either by himself or by agent or otherwise - That the contention of respondents that fraudulent ITC claim of Rs.63.53 crores is a matter of grave concern and requires thorough investigation for which applicants' presence is absolutely necessary is well-founded; that many of the vehicle numbers are bogus and vehicle's registration date is latter then the lorry receipt dates - that in view of the facts of the case and in the larger interest of the public and the State, in serious cases like this, Bench is not inclined to exercise discretion under Section 439 of the Criminal Procedure Code in favour of applicant no.1 that applicant's detention in custody is necessary to prevent him from causing the evidence of the offence to disappear or tampering such evidence is well founded - accordingly, the pre-arrest bail application of the applicant was rejected by the Bombay High Court - aggrieved, the applicant filed a special leave petition before the Supreme Court.

Held:SLP is dismissed and as a sequel to the same, pending interlocutory applications stand disposed of: Supreme Court Larger Bench- Petition dismissed: SUPREME COURT OF INDIA

Comments:

The Courts have once against come down heavily on those defying laws and indulging in circular trading.

20.Nadiya Timbers Vs. STO. - For avoiding a show cause notice is one that is optional to an assessee, the assessee has either to opt for it or look away from it.

2020-TIOL-1656-HC-KERALA-GST

Kerala High Court

GST- Petitioner impugns Ext.P1 intimation that was issued to her in terms of **Section 74(5) of the KGST Act read with Rule 142(1A) of the SGST Rules**, whereby she was intimated of the tax, penalty and interest payment that she was required to make in the event of her opting to make such payment to avoid a show cause notice under **Section 74(1) of the Act** - In the writ petition, it is the case of the petitioner **that although she has paid the tax amount intimated in Ext.P1, she ought not to be mulcted with a liability to pay interest thereon and 15% of the penalty, inasmuch as the tax amount conceded by her has become payable only from the date on which the intimation was issued to her.**

Held –

- The Contention of the petitioner that she should be exempted from the requirement of paying interest and penalty while availing the option of payment of tax for the purposes of avoiding the show cause notice cannot be accepted.
- The scheme of making a payment of tax together with interest and 15% of the amount as penalty envisaged under Section 74 is for the purposes of enabling an assessee to avoid the show cause notice contemplated under the said provision.
- What is offered to the petitioner under the provision is an option of either

(i) paying the tax intimated by the statutory authorities, together with interest thereon and a fixed amount towards penalty, in which event a show cause notice would not follow; or

(ii) denying her liability to tax, interest and penalty and contest the show cause notice that would follow.

- The petitioner, however, wants to get the best of both worlds by opting for the former course and simultaneously obtaining an exemption from the requirement of payment of interest and penalty amounts intimated to her by the Department.
- Such an exercise is not permissible in terms of the Statute.

- When the scheme under Section 74 for avoiding a show cause notice is one that is optional to an assessee, the assessee has either to opt for it or look away from it.
- If she opts for the scheme, she has to comply **with the terms under which the option is made available under the statute, she cannot seek a variation of the said scheme.**
- **Writ petition is, therefore, dismissed.**

Comments:

Law cannot be read to mean something which it does not clearly say. There has never been a waiver of pending interest and penalty if tax is deposited under the general provisions of law.

21.Jaitron Communication Pvt Ltd vs. State of UP and ors. - Quashes tax liability order, cites improper determination, remands matter for fresh adjudication

[TS-838-HC-2020(ALL)-NT]

- Allahabad HC holds that Revenue's exercises of detention of goods and the orders passed therein as regards liability, weren't carried out in the manner expected by it in accordance with law, and therefore, quashes the orders, remands matter to the Revenue, for proper and expeditious determination
- Notes that Assessee's vehicle was detained by GST authorities on Yamuna Expressway while it was transporting a drilling machine, and on finding no tax invoice, chalan, hard copy etc. in the vehicle, Revenue held it to be violation of Rule 138 of the G.S.T. Rules, and hence detained the vehicle
- Considers Assessee's submission that the e-way bill available with the vehicle at the time of detention did not contain the correct description of the transaction for which the machine itself was being transported and the movement of machine was for performance of contract to supply services, and not for any other purpose
- Assessee claimed that therefore, by virtue of Section 7, 9 and 13 r/w 31 of the Act, the nature of transaction as also the liability to pay tax has to be determined, and that no liability to pay tax has arisen as yet, since the contract of service is yet to be performed and no payment for services has been received; In the facts and circumstances of the case, and perusing the orders issued by Revenue.
- HC **observes that the claim set up by the assessee with regard to transportation of machine for performance of job work has not been examined on merits; Thus, remarking that, "The proper Officer in terms of the scheme was expected to examine the specific defence set up by the petitioner and consequently determine the liability of tax payable by the petitioner.",** Court orders the proper Officer to examine the Petitioner's defence and thereafter determine the liability in accordance with law: Allahabad HC

Comments :

In the above ruling, The High Court stressed on the importance of proper assessment by the tax officers and puts a check on the otherwise adamant departmental officers.

21.Gulshan Kapoor vs. Commissioner of Delhi Goods & Services Tax & Ors. - Directs Revenue to adjudicate expeditiously on impugned SCN, deficiency memo and refund order.

TS-839-HC-2020(DEL)-NT

Delhi High Court

- Delhi HC disposes of petition with a direction to Assessee to present all its pleas in the replies to the show cause notice, deficiency memo and representation seeking credit of refund in his account, before the Revenue;
- Further directs Revenue to **decide the**

issues expeditiously after giving hearing opportunity to Assessee and that the latter need not appear personally;

- Assessee, in the instant writ, challenged the Deficiency Memo issued by Revenue as well as SCN qua refund application and Refund Sanction **Order crediting the refund claimed, to the Consumer Welfare Fund, instead of the Assessee'saccount**;
- Records Assessee's claim that despite **all documents being available in the records of the Revenue, they are asking for them to be furnished once again, and that in the present case no precise reason of satisfaction for inadmissibility of refund was recorded;**
- The Court states, **"…the said respondents are held bound the same.", and clarifies that the replies and representations filed by Assessee shall not be rejected/dismissed on the ground of limitation:** Delhi HC

Comments :

There have been innumerable instance where assesses have suffered due to the qualms of the officers who ask for documents to be submitted physically in spite of all information being available on the portal. This ruling shall put such officers to check. Further whether issue of deficiency memo results in new application filing and thereby the due date of refund is to be reckoned from the new refund application would also be checked by the above ruling.

22.Mahadev Trading Co. vs. UOI – Gujarat High Court Quashes 'vague' SCN and order for cancellation of registration absent hearing opportunity

TS-861-HC-2020(GUJ)-NT

Gujarat High Court

GST – Wrongful Cancellation of GST Registration - Gujarat HC quashes show cause notice and subsequent order for cancellation of GST registration, holds that "…the **notice is as vague as possible and does not refer to any particular facts much less point out so as to enable the noticee to give his reply.**"; Petitioner pleaded that without waiting for any reply to be filed, the cancellation order was passed; Remarks that the notice itself cannot be sustained, therefore, the cancellation of registration resulting from the said show cause notice also cannot be sustained; Clarifies in respect of other consequences that the "…parties would be at liberty to take appropriate steps."

Comments:

The department has time and again passed unfavourable orders without even considering the merit of the matter hand. Assessee should not have to move to High Court for frivolous matters.

23.Skoda Auto Volkswagen India Pvt. Ltd. vs. Principal Commissioner of Central Excise –CESTAT rejects assessable value between two Indian subsidiaries of an overseas parent; holds that companies are artificially created to maintain lower selling price for payment of excise duty.

2020-TIOL-1471-CESTAT-MUM

In the instant case the taxpayer was engaged in manufacturing and production of two car models, as per the designs and specifications of their parent company in Germany. The taxpayer only sold these cars in India to the other subsidiary of its parent company (marketing subsidiary). The marketing subsidiary is responsible for the promotion, advertisement, after sales support and distribution of the cars to the dealers. For this purpose, the taxpayer

entered into a Service and Distribution Agreement with the marketing subsidiary. The marketing company also received reimbursement of a part of the marketing and sales promotion expenses from their parent company. The sale price between the taxpayer and the marketing subsidiary was attained by following the 'Retail Minus method', i.e., price after subtracting the marketing subsidiary's margin from the retail sale price. The excise duty was paid on such sale price, treating it as the assessable value. The Revenue authorities rejected the assessable value, alleging that the subsidiaries were inter-connected undertakings and had mutuality of interest in each other's business.

The CESTAT held that value of goods cleared by the taxpayer to the marketing subsidiary has to be determined on the basis of sale price by the marketing company to independent dealers, by treating the sale price as cum duty price. However, the penalties were set aside on the ground of limitation and no suppression of facts as the issue involved interpretation of statues .

24.**Venus Enterprises vs. The Assistant State Tax Officer & Ors. – Kerala High Court Directs release of Assessee's goods subject to Bank Guarantee, detention not unjustified**.

TS-863-HC-2020(KER)-NT

Kerala High Court

Kerala HC directs Revenue to **release Assessee's (Petitioner's) goods subject to him furnishing a bank guarantee** for the amount demanded and thereafter pass the final order in GST MOV-09 u/s 129(3) of the GST Act;

Notes that Petitioner's goods were detained for the reason that **while the e-way bill was produced, a copy of the invoice that ought to have accompanied the transportation of the goods** wasn't presented;

However, observing that although the Petitioner subsequently submitted the soft copy of the invoice, the invoice itself showed that it was generated after commencement of the transportation, HC opines that the detention cannot be said to be unjustified: Kerala HC

Comments:

It is important to note that goods can be released on furnishing the bank guarantee and that challan payment is not necessary in cases of detention.

25.Thoppil Agencies vs. The Assistant Commissioner of Commercial Taxes &Anr. - HC: Quashes penalty order being against natural justice principles, remits matter for fresh consideration

TS-862-HC-2020(KAR)-NT

Karnataka High Court

Karnataka HC **sets aside Revenue's penalty order holding that it clearly contravened the principles of natural justice** and remits the same for fresh consideration with a direction to the Revenue to provide reasonable sufficient opportunity to the Assessee;

Perusing the available records, observes that while passing the impugned order, **several documents and circumstances which were neither referred to nor enumerated in the SCN had been relied upon by Revenue**;

Finds that several documents relied upon by the Revenue were neither brought to the notice of the Assessee nor was it permitted to cross-examine the witnesses with reference to the said documents;

Further observes that **no opportunity of personal hearing was given to the**

Assessee before passing the impugned order moreover, no opportunity to provide additional documents was given;

Thus, **grants liberty to the Assessee to cross-examine any witness** with reference to any documents and orders Revenue to dispose off the matter afresh, bearing in mind the Circular dated December 31, 2018 issued by the Central Govt. u/s 168 of the CGST Act: Karnataka HC

Comments:

The principles of natural justice has always been the benchmark set by courts of law and therefore any judicial body which does not exercise the same has to be face the wrath of the higher judicial bodies. The above case is a fit example for the same.

26.**Assistant Commissioner of CGST and Central Excise and Ors. vs. Sutherland Global Services Pvt. Ltd. & 2 Ors.- Madras HC (Division Bench) disallows transition of Cesses into GST, holds same to be 'dead-claim'**.

[TS-878-HC-2020(MAD)-NT]

The issue for consideration before the Madras HC was whether the Assessee is entitled to utilise and set off the accumulated unutilised amount of Education Cess (EC), Secondary and Higher Education Cess (SHEC) and Krishi Kalyan Cess (KKC), all jointly referred to as the "Cess" against the Output GST Tax Liability after the switch over of Indirect Taxation System to GST Regime with effect from July 01, 2017, which GST (Goods and Services Tax) levy subsumed within its fold 16 indirect taxes earlier leviable like Excise Duty, VAT, etc.

The high Court held as follows:

There is no intendment or equity about taxation and both the charging provisions as well as the exemption provisions in taxing statutes have to be strictly construed and the Golden Rule of Interpretation of plain language being given plain meaning is the cardinal principle applicable to taxing statutes.

W.r.t. Section 140 - The Explanation 1 to Section 140 confines "Eligible Duties" to seven specified duties. Therefore, only the seven specified duties as "Eligible Duties" in respect of inputs held in stock on the appointed date will be eligible to be carried forward and adjusted against GST Output Tax Liability with reference to Explanation 1.

- HC opined that specifying that any kind of Cess will be excluded for the purpose of Section 140, makes the intention of the Legislature very clear and Sub-section (8) of Section 140, which was emphasized by the learned counsel for the Assessee before us, is not excluded from the effect and operation of Explanation 3, because the exclusion is of any Cess which has not been specified in Explanations 1 and 2, Education Cess and Secondary and Higher Education Cess and Krishi Kalyan Cess are not included in Explanations 1 and 2 at all. Therefore, the exclusion of Education Cess and Secondary and Higher Education Cess for the purpose of carry forward and set off under Section 140 is specifically provided in Explanation 3, which is clearly applicable to gather the legislative intent, irrespective of piecemeal enforcement of Explanations 1 and 2 by the Legislature. Explanation 3 has its own force and application and does not have a limited application only via the route of Explanation 1 and Explanation 2.
- Merely because the assessee has "taken" in his Electronic Credit Ledger the amount of such Education Cess and Secondary and Higher Education Cess, it does not entitle him to utilize the said unutilised

amount of Education Cess and Secondary and Higher Education Cess against the Output GST Liability. The "taking" of the input credit in respect of EC and SHEC in the Electronic Ledger after 2015 does not even permit it to be called an input CENVAT Credit and therefore, mere such accounting entry will not give any vested right to the assessee to claim such transition and set off against such output GST liability. Carry forward in Electronic Ledger and filing of Form TRAN-1 will not confer any such right on the assessee.

- The words "taken" or "availed" in contrast with the words "utilised", "adjusted" or "set off" are rather synonymous in the context of controversy whether the the set-off, adjustment or utilisation of the Input Tax Credit (ITC) of Cess paid at the time of manufacture or import by the assessee can be allowed

- HC relied on **Unicorn Industries v. Union of India** [TS-1108-SC-2019-EXC] which was rendered after the judgment of the Ld. Single Judge, wherein SC decision in Union of India v. Modi Rubber Limited [(1986) 4 SCC 66] was followed.

- HC relied on **Union of India v. Uttam Steel Limited**[TS-237-SC-2015-EXC] **and Jayam and Co. v. Assistant Commissioner and Others** [TS-330-SC-2016-VAT] to hold that CENVAT credit or ITC under the GST Regime is a concession and a facility and not a vested right. Even if one were to rank such a right of CENVAT credit on the pedestal of a statutory right, even that right can be curtailed and regulated by conditions for availing such right.

Division Bench of HC thus set-aside the judgment of the learned Single Judge dated September 05, & held that the Assessee was not entitled to carry forward and set off of unutilised Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess against the GST Output Liability with reference to Section 140 of the CGST Act, 2017.

Thereby, HC allowed the appeal of the Revenue.

27.Asharaf Ali K H Vs Assistant State Tax Officer – Mis-classification of the goods cannot be a reason for detaining the consignment under Section 129 of the GST Act.

2020-TIOL-1717-HC-KERALA-GST

Gujarat High Court

GST - Petitioner contends that the alleged **mis-classification of the goods cannot be a reason for detaining the consignment under Section 129 of the GST Act.**

Held: If the respondents feel that there has been a mis-classification of the goods, then it is for them to **prepare a report based on the physical verification** done by them, get the petitioner to sign on the same after recording his objections, if any, to the findings recorded therein, and thereafter forward a copy of the said report to the Assessing Officer of the petitioner, who can consider the said report and objections at the time of finalizing the assessment in relation to the petitioner - **The detention of the goods in transit, therefore, cannot be justified** - Ext.P7 notice quashed and the respondents directed to forthwith release the goods and vehicle: High Court [para 3]

Comments:

Classification of goods is more of an interpretational issue and as mis-classification is one of the most common grounds of detaining goods so detailed report should be prepared before detention. This judgement will help many

assessee whose consignment gets delayed due to detention.

28.**Malayalam Motors Pvt Ltd Vs ASTO –Amidst the Covid pandemic tax liability can be discharged in equal monthly installments.**

2020-TIOL-1711-HC-KERALA-GST

GST - It is the case of the petitioner that though the Company filed GSTR-1 returns for the months of February, 2020 to May, 2020, due to Covid pandemic, **could not generate funds to make lump sum payment of the admitted tax** - Petitioner is not disputing its liability to tax, or the quantum thereof, for the period in question - It only **seeks an instalment facility to pay the admitted tax, together with interest thereon**, in view of the financial difficulties faced by it during the Covid pandemic situation, when its business has come to a total standstill - Respondent Revenue would point out that the **provisions of the Act do not provide for the payment of the admitted amount shown in the return in instalments**, and hence the relief sought for by the petitioner cannot be granted in view of the express provisions of the statute.

Held: Court in W.P.(C) No.14275/2020 [2020-TIOL-1302-HC-KERALA-GST], in similar circumstances, directed the respondent tax authority to accept the belated returns and permitted the petitioner therein to discharge the balance tax liability in equal monthly instalments - respondent is directed to accept the belated return filed by the petitioner for the period from February, 2020 to April, 2020, without insisting on payment of the admitted tax declared therein - The petitioner shall be **permitted to discharge the tax liability, inclusive of any interest and late fee thereon, in equal successive monthly instalments commencing from 15th November, 2020 and culminating on 15th August, 2021 - It is made clear that if the petitioner defaults in any single instalment, the petitioner will lose the benefit of this judgment and it will be open to the respondent to proceed with recovery proceedings for realization of the unpaid tax, interest and other amounts, in accordance with law.**

Comments:

The global outbreak of COVID-19 has significantly affected businesses and so allowing the businesses to discharge their liability in equal monthly installments is a great initiative by the Government to remove some of the hardships faced by the taxpayers. The GST law also contains provisions regarding installment facility for payment of GST subject to approval of the jurisdictional Commissionerate. However most often the assessees do not get approval for the same and hence the above judgment may be a good case for the assessee to seek installment payment facilities.

29.Scribetech India Healthcare Pvt Ltd Vs CCT - Interest for Delayed refund – From the date of application or date of order?

2020-TIOL-1550-CESTAT-BANG

The Bangalore CESTAT ordered for the interest for a delayed refund on the expiry of period of three months from the date of receipt of application, following the decision Supreme Court in the case of Ranbaxy Laboratories Ltd. 2011-TIOL-105-SC-CX in service tax and excise related matters.

Comments

Section 56 of the CGST Act provides interest if the amount not refunded within sixty days from the date of receipt of application. In general, the refund application is followed with a show-cause notice, adjudication, and appeal thereon. Finally, the refund is granted if eligible. In this context, the SC decision helps to claim the interest from the refund application's date.

Action point

Interest payment is not automatic. Hence, an application has to be made for claiming the interest in all cases where the refund is granted beyond 60days from the date of refund application.

30.Bagmane Developers Pvt. Ltd. – Challenging the validity of the provisions of Section 17(5)(c) & (d), 16(4), 61(5), 50 and 164(3) – Notice issued

WP 9430/2020

The petitioner asserts that it is engaged in taxable services such as commercial/industrial construction service, works contract services, repair services and renting of immovable properties. The petitioner has filed returns in GSTR – 3B and GSTR – I for the period between July 2017 and April **2019 but without availing Input Tax credit on goods and services utilized in construction of commercial complexes which are rented after completion.** The petitioner has filed GSTR – 3B for the month **of May 2019 availing substantial Input Tax Credit prompting the fourth respondent to issue the impugned notice dated 6.3.2020**. The petitioner has impugned the notice dated 06.03.2020 **challenging the validity of the provisions of Section 17[5][c] & [d], 16[4], 61[5], 50 and 164[3] of the CGST Act, 2017 with the alternative prayer** for reading down the provisions of Section 17[5][c] & [d] and 16[4] of the CGST Act permitting the use of input tax credit on goods and services used in the construction in "business-to-business" cases with the denial for input tax credit only in "business-to-consumer" cases.

Karnataka High Court observed that:

§ The rival submissions have received this Court's anxious consideration. In the light of the rival submissions, this Court will have to examine the validity of the provisions of Section 17[5][c][d], 16[4] of the CGST Act and the other impugned provisions thereof in the light of the decision by the Division Bench of the Orissa High Court in Safari Retreats Private Limited supra.

§ This Court will also have to examine whether the input tax credit under the CGST Act is contemplated as a mere concession or as a right that accrues if the conditions stipulated under Section 16 of the CGST Act are satisfied, and if it is a right that accrues, whether such right could be extinguished prescribing the time limit within which such right has to be exercised.

§ However, these questions are being examined at the behest of the petitioner who, without reporting availment of the input tax credit for over 24 months, is putting the issue at stake by filing GSTR – 3B availing very substantial input tax credit only in the month of May 2019 resulting in the impugned notice and the present challenge to the provisions under Section 17 [5] [c] and [d] of the GST Act. The challenge to the provisions of Section 16(4) and other related provisions of the GST Act is in aids of its primary challenge.

§ At this stage, the Department's interest will have to be in the balance while considering the interim prayer for stay of the impugned notice. Further, if the impugned show cause notice had resulted into a demand, and if the petitioner had to avail a statutory remedy and be entitled for an interim protection pending adjudication of remedy, statutorily such protection to the petition could only be conditional.

§ In this context the provisions of Section 107 (6) of the GST Act are noticed: an assessee, when he files an appeal against crystallized demand, will have to deposit in full the undisputed amount and a sum equal to ten percent of the amount in dispute.

§ For the foregoing, this Court doth order that, subject to further orders of this Court, there shall be stay of the impugned show cause notice dated 6.3.2020 as per Annexure –F on the condition that the

Petitioner shall maintain a minimum of the 10% of the disputed availment in its electronic credit ledger subject to the outcome of the writ petition.

§ **THIS MATTER IS LISTED ON 20.11.2020 IN PRELIMINARY HEARING – B GROUP BEFORE THE KARNATAKA HIGH COURT**

Comments:

There have been countless discussions and debate on the matter across all forums. This case will finally conclude the matter and needs to be keenly followed. The Orissa high Court in Safari Retreat case has allowed a similar petition by reading donw section 17(5)(c) and 17(5)(d) of the CGST Act, 2017 against which the department has filed an appeal before the Hon'ble Apex Court.

31.**Wild Tree Resorts By The Legend Pvt Ltd Vs STO –The proper officer may initiate proceedings and recovery under CGST Act if returns not filled within 30 days of assessment order.**

2020-TIOL-1728-HC-KERALA-GST

GST - Petitioner had received the assessment orders under **Section 62** of the GST Act, on 04.10.2019, and the returns that had to be filed within **30 days** after receipt of the order for getting the benefit of setting aside the orders in terms of Section 62 of the GST Act were **filed only on 21.11.2019** - Inasmuch as, admittedly, the said returns were filed more than 30 days after the receipt of the orders by the petitioner, the petitioner cannot be heard to contend that Ext.P2 series of orders ought to be set aside in terms of Section 62 of the GST Act - Writ petition is dismissed - However, recovery steps in respect of the confirmed amounts shall be kept in abeyance for a period of three weeks so as to enable the petitioner to avail appellate remedy, in the meanwhile.

Judgement

1. The petitioner has approached this Court aggrieved by Ext.P2 series of assessment orders that have been passed under Section 62 of the GST Act. While various contentions have been raised in the writ petition, it is evident from the averments in the writ petition that the petitioner had received the assessment orders under Section 62 of the GST Act, on 04.10.2019, and the returns that had to be filed within 30 days after receipt of the order for getting the benefit of setting aside the orders in terms of Section 62 of the GST Act were filed only on 21.11.2019. Inasmuch as, admittedly, the said returns were filed more than 30 days after the receipt of the orders by the petitioner, **the petitioner cannot be heard to contend that Ext.P2 series of orders ought to be set aside in terms of Section 62 of the GST Act.**

2. Accordingly, without prejudice to the right of the petitioner to impugn Ext.P2 series of assessment orders before the appellate authority under the GST Act, the writ petition in its challenge against the said orders is dismissed. **Recovery steps for recovery of the amounts confirmed against the petitioner by EXt.P2 Series of assessment orders shall, however, be kept in abeyance for a period of three weeks from the date of receipt of a copy of this judgment, so as to enable the petitioner to avail his appellate remedy in the meanwhile.**

Comments:

Returns filled after 30 days of assessment order under Section 62 of CGST Act will not be sustainable and the proper officer may initiate proceedings and recovery

under CGST Act. There are remedies in law which is to be used within the prescribed limits.

32.**The State of Madhya Pradesh and ORS vs Bherulal –**

2020-TIOL-160-SC-MISC

Limitation - SLP has been filed with a delay of 663 days and the explanation given for such delay by the State of Madhya Pradesh is "due to unavailability of the documents and the process of arranging the documents"; that "bureaucratic process works, it is inadvertent that delay occurs"

Held:

- Bench is constrained to pen down a detailed order as it appears that all the counselling to the Government and the Government authorities have fallen on deaf ears i.e. the Supreme Court of India cannot be a place for the governments to walk in when they choose ignoring the period of limitation prescribed;
- That if the **government is so inefficient and incapable of filing appeals/petitions in time, the solution may lie in requesting the Legislature to expand the time period for filing appeals/petitions by government authorities because of their gross incompetence and since that is not so, till the statute subsists, the appeals/petitions have to be filed as per the statutes prescribed**

  No doubt, some leeway is given for the government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the government [Collector, Land Acquisition, Anantnag & And. vs. Mst. Katiji&Ors - 2002-TIOL-444-SC-LMT; Chief Post Master General & Ors. vs. Living Media India Ltd. &Anr. - 2012-TIOL-123-SC-LMT]
- Aforesaid approach is being adopted in what we have categorised earlier as **'certificate cases' - The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest court has dismissed the appeal - It is to complete this formality and save the skin of officers who may be at default that such a process is followed.**
- Bench has on earlier occasions also strongly deprecated such a practice and process but there seems to be no improvement – The purpose of coming to this Court is not to obtain such certificates and if the government suffers losses, it is time when the concerned officer responsible for the same bears the consequences - The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing
- It is **presumed that this Court will condone the delay and even in making submissions**, straight away counsels appear to address on merits without referring even to the aspect of limitation - Where there are such inordinate delays, the government or State authorities must pay for wastage of judicial time which has its own value, and such costs can be recovered from the officers responsible.
- Looking to the period of delay and the casual manner in which the application has been worded, Bench considers it appropriate to **impose cost** on the petitioner-State of Rs.25,000/- to be deposited with the Mediation and Conciliation Project Committee - The

amount is to be deposited in four weeks and is to be **recovered from the officers responsible for the delay** in filing the special leave petition and a certificate of recovery of the said amount is also to be filed in this Court within the said period of time.

- Special leave petition is dismissed as time barred - If the aforesaid order is not complied within time, Bench would be constrained to initiate contempt proceedings against the Chief Secretary, State of Madhya Pradesh: Supreme Court

Comments:

Revenue cannot always getaway with inordinate delays. This is a much welcome decision by the taxpayers. Revenue has most of the time got away with delay but not anymore. The Supreme Court came down heavily on Revenue and ensured that the concerned officials are penalized.

32.Cosmo Films India vs. Union of India & Ors – Rebate-denial to Advance-Authorisation holders operates prospectively w.e.f. October 23, 2017, dismisses challenge to Rule 96 (10)

[TS-925-HC-2020(GUJ)-NT]

Gujarat HC upholds validity of sub - rule (10) of Rule 96 of CGST/GGST Rules substituted vide Notification No.54/2018-Central Tax and corresponding State Tax Notification dated October 9, 2018, to the extent it denies rebate (refund) claim on goods imported under Advance Authorisation (AA) License.

However, rules that Notification no. 54/2018 is required to be made applicable prospectively only w.e.f. October 23, 2017 and not prior thereto from the inception of Rule 96(10) w.e.f. July 01, 2017.

Notes that Assessee

I. Is the holder of AA license granted in terms of FTP issued and was entitled to import raw materials without payment of IGST under said licenses and

II. Had received benefits of rebate of IGST at relevant point of time, however, vide retrospective amendment it was provided that rebate on exports cannot be availed by the Assessee, if the inputs procured have enjoyed AA benefits or Deemed export benefits;

Highlights recent amendment made vide **Notification No. 16/2020-CT dated March 23, 2020**, inserting explanation to Rule 96(10) of CGST Rules, by virtue of which option ofclaiming refund was not restricted to **Exporters who only avails BCD exemption and pays IGST on the raw materials thereby exporters who wants to claim refund under second option can switch over now.**

Explicates that "amendment is made retrospectively thereby avoiding the anomaly during the intervention period and exporters who already claimed refund under second option need to payback IGST along with interest and avail ITC".

Succinctly quotes that "In view of above amendment, the grievance of the petitioner raised in this petition is therefore taken care of".

Notes **Petitioner's averments** that

I. Revenue's action suffers from the vices of excessive delegation by notifications denying benefit of 'Zero - rated' exports conferred upon the petitioner through Section 16(3)(b) of CGST Act

II. Neither Section 16 of IGST Act nor Section 54 of CGST Act prescribes any power to issue impugned notifications

III. Petitioner is put at a disadvantageous position against regular exporters, thus discriminated qua others who have not availed benefits of AA Scheme and

IV. Deemed exports provisions under Rule 89 specifically provide that AA License holder should not claim ITC; Petitioner further placed reliance on the Circular No.

45/19/2018 -GST dated May 30, 2018 and more particularly para 7.1 thereof which emphasizes the objective of introduction of sub-rule (10) of Rule 96;

Rejects Assessee's contention that the Rule 96(10) is ultra vires the GST Act, the CGST Rules and Article 14 of the Constitution of India perceiving that on conjoint reading of provision of Section 16 of the IGST Act, Section 54 of the CGST Act and Rule 96(10), it was apparent that the person who has availed the benefits of Notification No. 48/2017 and other Notifications as stated in sub-rule 10 shall not have benefit of claiming refund of IGST paid on exports of goods or services.

Comments:

The above judgment provides partial relief to the petitioner by stating that the amendment in the CGST Rules, 2017 cannot be held to be retrospective and hence the rebate for the period 01/07/2017 to 22/10/2017 has to be given even to advance authorisation holders.

GST Circular October, 2020

CA Ankit Kanodia

Topic: CBIC clarifies on ITC-restriction prescribed under Rule 36(4) cumulatively for February '2020 to August'2020 (Circular No. 142/12/2020 - GST dated. 09th October,2020.)

Background: Clarification relating to application of sub-rule (4) of rule 36 of the CGST Rules, 2017 for the months of February, 2020 to August, 2020.

Comments:

1.Vide Circular No. 123/42/2019 – GST dated 11th November, 2019, various issues relating to implementation of sub-rule (4) of rule 36 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the CGST Rules) relating to availment of input tax credit (ITC) in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the CGST Act) were clarified.

2. Keeping the situation prevailing in view of measures taken to contain the spread of COVID-19 pandemic, vide notification No. 30/2020-CT, dated 03.04.2020, it had been prescribed that the condition made under sub-rule (4) of rule 36 of the CGST Rules shall apply cumulatively for the tax period February, March, April, May, June, July and August, 2020 and that the return in FORM GSTR-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months.

3. To ensure uniformity in the implementation of the said provisions across the field formations, the Board, in exercise of its powers conferred under section 168(1) of the CGST Act hereby clarifies certain issues in succeeding paragraphs.

3.1 **It is re-iterated that the clarifications issued earlier vide Circular No. 123/42/2019 – GST dated 11.11.2019 shall still remain applicable, except for the cumulative application as prescribed in proviso to sub-rule (4) of rule 36 of the CGST Rules**. Accordingly, all the taxpayers are advised to ascertain the details of invoices uploaded by their suppliers under subsection (1) of section 37 of the CGST Act for the periods of February, March, April, May, June, July and August, 2020, till the due date of furnishing of the statement in FORM GSTR-1 for the month of September, 2020 as reflected in GSTR-2As.

3.2 Taxpayers shall reconcile the ITC availed in their FORM GSTR-3Bs for the period February, 2020 to August, 2020 with the details of invoices uploaded by their suppliers of the said months, till the due date of furnishing FORM GSTR-1 for the month of September, 2020. The cumulative amount of ITC availed for the said months in FORM GSTR-3B should not exceed 110% of the cumulative value of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37 of the CGST Act, till the due date of furnishing of the statements in FORM GSTR-1 for the month of September, 2020.

3.3 It may be noted that availability of 110% of the cumulative value of the eligible credit available in

respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37 of the CGST Act does not mean that the total credit can exceed the tax amount as reflected in the total invoices for the supplies received by the taxpayer i.e. the maximum credit available in terms of provisions of section 16 of the CGST Act.

3.4 The excess ITC availed arising out of reconciliation during this period, if any, shall be required to be reversed in Table 4(B)(2) of FORM GSTR-3B, for the month of September, 2020. Failure to reverse such excess availed ITC on account of cumulative application of sub-rule (4) of rule 36 of the CGST Rules would be treated as availment of ineligible ITC during the month of September, 2020.

Topic: Eway Bill generation to be blocked from Oct 15 for specified taxpayers (Update dated 10th October,2020)

Background: EWB generation to be blocked from Oct 15 for specified taxpayers for GSTR-3B default

Comments:

Finance Ministry clarifies that taxpayers are **required to report only values pertaining to Financial Year 2018-19 and values pertaining to Financial Year 2017-18 which may have already been reported or adjusted are to be ignored while filing Annual Return for 2018-19.**

No adverse view would be taken in cases where there are variations in returns for taxpayers who have already filed their GSTR-9 of Financial Year 2018-19 by including the details of supplies and ITC pertaining to Financial Year 2017-18 in the Annual return for FY 2018-19.

Topic: Annual return 2018-2019 clarification (Press Release dated 1st October,2020)

Background: Clarification regarding values pertaining to FY 2017-18 not to be included in Annual-Return of FY 2018-19

Comments:

Finance Ministry clarifies that taxpayers are **required to report only values pertaining to Financial Year 2018-19 and values pertaining to Financial Year 2017-18 which may have already been reported or adjusted are to be ignored while filing Annual Return for 2018-19.**

No adverse view would be taken in cases where there are variations in returns for taxpayers who have already filed their GSTR-9 of Financial Year 2018-19 by including the details of supplies and ITC pertaining to Financial Year 2017-18 in the Annual return for FY 2018-19.

GST Notification No. 74/2020 Dated 15th October, 2020

CA Ankit Kanodia

1.The Central Government, on the recommendations of the Council, hereby notifies the registered persons **having aggregate turnover of up to 1.5 crore rupees** in the preceding financial year or the current financial year, as the class of registered persons who shall follow the special procedure as mentioned below for furnishing the details of outward supply of goods or services or both.

2. The said registered persons shall furnish the details of outward supply of goods or services or both in **FORM GSTR-1** under the Central Goods and Services Tax Rules, 2017, effected during the quarter as specified in column (2) of the Table below till the time period as specified in the corresponding entry in column (3) of the said Table, namely:-

Sl.No	Quarter for which details in FORM GSTR-1 are Furnished	Time period for furnishing details in FORM GSTR-1
(1)	**(2)**	**(3)**
1	October, 2020 to December, 2020	13th January, 2021
2	January, 2021 to March, 2021	13th April, 2021

3. The time limit for furnishing the details or return, as the case may be, under sub-section (2) of section 38 of the said Act, for the months of October, 2020 to March, 2021 shall be subsequently notified in the Official Gazette.

Notification No. 75/2020 Dated 15th October, 2020

1. The Commissioner, on the recommendations of the Council, hereby extends the time-limit for furnishing the details of outward supplies in **FORM GSTR-1** of the Central Goods and Services Tax Rules, 2017,by such class of registered persons having aggregate turnover of **more than 1.5 crore rupees** in the preceding financial year or the current financial year, for each of the months from October, 2020 to March, 2021 till the eleventh day of the month succeeding such month.

2. The time-limit for furnishing the details or return, as the case may be, under subsection (2) of section 38 of the said Act, for the months of October, 2020 to March, 2021 shall be subsequently notified in the Official Gazette.

Notification No. 76/2020 Dated 15th October, 2020

1. The Commissioner, on the recommendations of the Council, hereby specifies that the return in **FORM GSTR-3B** of the said rules for each of the months from October, 2020 to March, 2021 shall be furnished electronically through the common portal, on or before the twentieth day of the month succeeding such month.

Provided that, for taxpayers having an aggregate turnover of up to five crore rupees in the previous financial year, whose **principal place of business is in the States of Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu**

and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep, the return in **FORM GSTR-3B** of the said rules for the months of **October, 2020 to March, 2021** shall be furnished electronically through the common portal, on or before **the twenty-second day of the month succeeding such month.**

Provided further that, for taxpayers having an aggregate turnover of up to five crore rupees in the previous financial year, whose principal place of business is in the States of **Himachal Pradesh, Punjab, Uttarakhand, Haryana,**

Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha, the Union territories of Jammu and Kashmir, Ladakh, Chandigarh or Delhi, the return in **FORM GSTR-3B** of the said rules for the months of **October, 2020 to March, 2021** shall be furnished electronically through the common portal, on or before the **twenty-fourth day of the month succeeding such month.**

2. Payment of taxes for discharge of tax liability as per FORM GSTR-3B. – Every registered person furnishing the return in **FORM GSTR-3B** of the said rules shall, subject to the provisions of section 49 of the said Act, discharge his liability towards tax by debiting the electronic cash ledger or electronic credit ledger, as the case may be and his liability towards interest, penalty, fees or any other amount payable under the said Act by debiting the electronic cash ledger, not later than the last date, as specified in the first paragraph, on which he is required to furnish the said return(i.e. on or before the twentieth day of the month succeeding such month)

Notification No. 77/2020 Dated 15th October, 2020

The Central Government, hereby makes the following amendment in the notification of Government of India in the Ministry of Finance, (Department of Revenue), No**. 47/2019 –** Central Tax dated the 9th October, 2019.

In the said notification in the opening paragraph, for the words and figures "financial years 2017-18 and 2018-19", the words and figures "financial years 2017-18, 2018-19 and **2019-20"** shall be substituted.

- **Notification No. 47/2019 Dated 9th October,2019**.
- The Central Government, on the recommendations of the Council, hereby notifies those registered persons whose aggregate turnover in a financial year **does not exceed two crore** rupees and who **have not furnished the annual return** under sub-section (1) of section 44 of the said Act read with sub-rule (1) of rule 80 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as the said rules) before the due date, as the class of registered persons who shall, **in respect of financial years 2017-18 and 2018-19**, follow the special procedure such that the said persons shall have the option to furnish the annual return under sub-section (1) of section 44 of the said Act. Provided that the said return shall be deemed to be furnished on the due date if it has not been furnished before the due date.

Notification No. 78/2020 Dated 15th October, 2020

The Central Board of Indirect Taxes and Customs, on the recommendations of the Council, hereby makes the following amendment in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.12/2017 – Central Tax, dated the 28th June, 2017.

This Notification will be effective from 01st April,2021

Sl.No	Aggregate Turnover in the preceding Financial Year	Number of Digits of Harmonised System of Nomenclature Code
1	Up to rupees five crores	4
2	more than rupees five crores	6

Notification No.12/2017 Central tax dated 28th June,2017

SL.No	Aggregate Turnover in the preceding Financial Year	Number of Digits of Harmonised System of Nomenclature Code
1	**Upto rupees one crore fifty lakhs**	**NIL**
2	**more than rupees one crore fifty lakhs and upto rupees five crores**	**2**
3	**more than rupees five crores**	**4**

Provided that a registered person having aggregate **turnover up to five crores rupees** in the previous financial year may not mention the number of digits of HSN Code, as specified in the corresponding entry in column (3) of the said Table in a tax invoice issued by him under the said rules in **respect of supplies made to unregistered persons.**

Notification No. 79/2020 Dated 15th October, 2020

Amendments in CGST Rules, 2017:

Rule	**Amendments**
Rule 46: (Tax Invoice)	**Substitution of First Proviso** "Provided that the Board may, on the recommendations of the Council, by notification, specify- the number of digits of Harmonised System of Nomenclature code for goods or services that a class of registered persons shall be required to mention; or a class of supply of goods or services for which specified number of digits of Harmonised System of Nomenclature code shall be required to be mentioned by all registered taxpayers; and the class of registered persons that would not be required to mention the Harmonised System of Nomenclature code for goods or services".
Rule 67A: (Manner of furnishing of return or details of outward supplies by short messaging service facility)	**Substitution of Rule 67A** "Notwithstanding anything contained in this Chapter, for a registered person who is required to furnish a Nil return under section 39 in **FORM GSTR-3B** or a Nil details of outward supplies under section 37 in **FORM GSTR-1** or a Nil statement in **FORM GST CMP-08** for a tax period, any reference to electronic furnishing shall include furnishing of the said return or the details of outward supplies or statement through a short messaging service using the registered mobile number and the said return or the details of outward supplies or statement shall be verified by a registered mobile number based One Time Password facility. Explanation - For the purpose of this rule, a Nil return or Nil details of outward supplies or Nil statement shall mean a return under section 39 or details of outward supplies under section 37 or statement under rule 62, for a tax period that has nil or no entry in all the Tables in **FORM GSTR-3B** or **FORM GSTR-1** or **FORM GST CMP-08**, as the case may be." *Comment:-This amendment has been made to allow **SMS Facility** for filing of **Nil Return in case of FORM GST CMP-08 also**.*
Rule 80: (Annual Return)	**Substitution of Proviso in sub-rule (3)-** "Provided that for the financial year 2018-2019 and 2019-2020, every registered person whose aggregate turnover exceeds five crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in **FORM GSTR-9C** for the said financial year, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner." *Comment:-This amendment has been made to extend the applicability of **threshold of Rs.5 Crore for Fling GSTR-9C for the Financial Year 2019-20 also**. Earlier the threshold of Rs. 5 Crore was applicable for F.Y. 2018-19 only.*

Rule 138E: (Restriction on furnishing of information in **PART A of FORM GST EWB-01**)	**Insertion of Proviso after the third proviso-** "Provided also that the said restriction shall not apply during the period from the 20th day of March, 2020 till the 15th day of October, 2020 in case where the return in **FORM GSTR-3B** or the statement of outward supplies in **FORM GSTR-1** or the statement in **FORM GST CMP-08**, as the case may be, has not been furnished for the period February, 2020 to August, 2020" *Comment:-This amendment has been made to provide relaxation from the aforesaid restriction for the period specified.*
Rule 142: (Notice and order for demand of amounts payable under the Act)	**Amendment in sub-rule (1A)-** i. for the words "proper officer shall", the words "proper officer may" shall be substituted; ii. for the words "shall communicate", the word "communicate" shall be substituted. ***Comments- By this amendment, the pre SCN notice has been made optional to be given by the department in FORM DRC 01A.***
FORM GSTR-1:	In the said rules, in FORM GSTR-1, against serial number 12, in the Table, in column 6, in the heading, for the words "Total value", the words "Rate of Tax" shall be substituted.
Changes in Form	Substitution of New **Form GSTR-2A** in place of earlier one. Further, changes have been made in the following form: FORM GSTR-5, FORM GSTR-5A, FORM GSTR-9, FORM GSTR-9C, FORM GST RFD-01, FORM GST ASMT-16, FORM GST DRC-01, FORM GST DRC-02, FORM GST DRC-07, FORM GST DRC-08, FORM GST DRC-09, FORM GST DRC-24, FORM GST DRC-25:

Notification No. 80/2020 Dated 28th October, 2020

CBIC notifies extension in time limit for furnishing of the annual return specified for the FY 2018-2019 till **December 31, 2020**.

Before Government had extended the time limit till **30th September,2020** through principal Notification No.41/2020 dated 5th May,2020, which was further extended till **31st October,2020** through Notification No.69/2020 dated 30th September,2020.

COMPANY LAW UPDATES

CA Mayur Agrawal

Reference	Date	Topic	Description
General Circular No. 36/2020	20-10-2020	Special measures under the Companies Act 2013 and LLP Act 2008 In view of COVID-18 outbreak-Extension –reg.	It has been decided to allow companies to conduct their EGM through video conferencing (VC) or other audio visual means (OAVM), transact items through postal ballot inaccordance with the framework provided in the earlier circulars up to 30th September, 2020. http://mca.gov.in/Ministry/pdf/GeneralCircularNo.36_20102020.pdf

General Circular No.36/2020

File No.2/01/2020-CL-V
Government of India
Ministry of Corporate Affairs

5th Floor, 'A' Wing, Shastri Bhawan,
Dr. R. P. Road, New Delhi-110001.

Dated: 20th October, 2020

To

The DGCoA,
All Regional Directors,
All Registrar of Companies,
All Stakeholders.

Subject: Special Measures under the Companies Act, 2013 and Limited Liability Partnership Act, 2008 in view of COVID- 19 outbreak – Extension – reg.

Sir/Madam,

In continuation to General Circular No. 11/2020 dated 24th March 2020, keeping in view the requests received from various stakeholders seeking relaxation from the residency requirement of 182 days in a year and after due examination, it is hereby clarified that non-compliance of minimum residency in India for a period of at least 182 days in a year, by at least one director in every company, under section 149 of the Companies Act, 2013 shall not be treated as non-compliance for the financial year 2020-2021 also.

2. This issues with the approval of the competent authority.

Yours faithfully,

(KMS Narayanan)
Assistant Director (policy)

Copy forwarded for information to:-

1. e-governance section and web contents officer to place the circular on MCA website.

2. File No.7/26/2020-CL-I and 3. Guard file.

Companies (prospectus and allotment of securities) Rules 2020, Dated 16.10.2020

Relaxation in case of offer or invitation of any securities to qualified institutional buyers. Now it shall be sufficient if the company passes a previous special resolution only in a year for all the allotments to such buyers during the year.

http://mca.gov.in/Ministry/pdf/SecuritiesAmendmentRules_16102020.pdf

[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]

MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION

New Delhi, the 16 October, 2020

G.S.R. …….. (E).—In exercise of the powers conferred by section 26, sub-section (1) of section 27, section 28, section 29, sub-section (2) of section 31, sub-sections (3) and (4) of section 39, sub-section (6) of section 40 and section 42 read with section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies (Prospectus and Allotment of Securities) Rules, 2014, namely:-

1. Short title and commencement.- (1) These rules may be called the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2020.

(2) They shall come into force from the date of their publication in the Gazette.

2. In the Companies (Prospectus and Allotment of Securities) Rules, 2014, in rule 14, in sub-rule (1), after third proviso, the following proviso shall be inserted, namely: -

"Provided also that in case of offer or invitation of any securities to qualified institutional buyers, it shall be sufficient if the company passes a previous special resolution only once in a year for all the allotments to such buyers during the year.".

[F. No. 1/21/2013-CL-V-part]

(K.V.R. MURTY)

Joint Secretary to the Government of India

Note : The Principal rules were published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* notification number G.S.R. 251(E), dated the 31st March, 2014 and were subsequently amended:-

SEBI Updates

Standardization of timeline for listing of securities issued on a private placement basis, Dated 08.10.2020

SEBI has standardized the time period within which securities issued on private placement basis under SEBI ILDS, SEBI NCPRS, SEBI SDI and SEBI ILDM Regulations need to be listed after completion of allotment.

https://www.sebi.gov.in/legal/circulars/oct-2020/standardization-of-timeline-for-listing-of-securities-issued-on-a-private-placement-basis_47790.html

Contribution by Issuers of listed or proposed to be listed debt securities towards creation of "Recovery Expense Fund", Dated 22.10.2020

In order to enable the Debenture Trustee(s)to takeprompt actionforenforcement of security in case of 'default'in listed debt securities,a'Recovery Expense Fund'(REF)shall be createdwhich shall be used in the manner asdecided in the meeting of the holders of debt securities. Manner of creation and utilization of REF has been detailed in the scheme.

https://www.sebi.gov.in/legal/circulars/oct-2020/contribution-by-issuers-of-listed-or-proposed-to-be-listed-debt-securities-towards-creation-of-recovery-expense-fund-_47939.html

RBI Updates

Scheme for grant of ex-gratia payment of difference between compound interestand simple interest for six months to borrowers in specified loan accounts(1.3.2020 to 31.8.2020), Dated 26.10.2020

The Government of India has announced the Scheme for grant of ex-gratia payment ofdifference between compound interest and simple interest for six months to borrowers inspecified loan accounts (1.3.2020 to 31.8.2020) (the 'Scheme') on October 23, 2020,which mandates ex-gratia payment to certain categories of borrowers by way of creditingthe difference between simple interest and compound interest for the period betweenMarch 1, 2020 to August 31, 2020 by respective lending institutions. The details of theScheme are available at:

https://financialservices.gov.in/sites/default/files/Scheme%20Letter.pdf

https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI612B155289A6084BF180E687C96DCB6DC1.PDF

UPDATE ON CODE OF ETHICS OF ICAI

CA Sumantra Guha

FAQs on Communication

Q. Whether Incoming Auditor may communicate with the Retiring Auditor on E-mail?

A. The revised Code of Ethics to be effective w.e.f 1st July, 2020 has permitted communication vide E-mail also. However, in view of difficulty of communication through physical modes during lockdown, the Institute has permitted prior applicability of the provision entitling communication through E-mail. Please refer to the Announcement issued by the Institute on 1st May, 2020 at https://www.icai.org/new_post.html?post_id=16470&c_id=219

Q. Whether communication on E-mail would suffice the requirement of Clause (8) of Part-I of First schedule to The Chartered Accountants Act, 1949?

A. The requirement of communication under Clause (8) of Part-I of First Schedule to The Chartered Accountants Act, 1949 is deemed to be complete on the delivery of communication to the Retiring Auditor. Accordingly, members are required to communicate in such a manner as to retain in their hands positive evidence of the delivery of the communication to the addressee. With regard to communication through E-mail, the communication would be deemed as complete on receipt of acknowledgement from the Retiring Auditor's E-mail address registered with the Institute or his last known official E-mail address.

Q. Has the communication vide E-mail replaced the other modes of communication?

A. No. The earlier modes of communication continue to be valid. The communication vide E-mail is only an additional alternative mode of communication. Accordingly, henceforth, the requirement of positive delivery of communication would be deemed to be fulfilled either by (i) a letter sent "Registered Acknowledgement due", or (ii) by hand against a written acknowledgement, or (iii) by Acknowledgement from retiring auditor's vide E-mail address registered with the Institute or last known official E-mail address.

Q. How can the Incoming Auditor know the E-mail id. of Retiring Auditor?

A. The Incoming Auditor may seek the E-mail id. from the Retiring Auditor on phone, or from the client.

Q. Which of the two mail ids – registered with the Institute, or last known official id. Is preferable for communication?

A. The member may communicate on either of the two. There is no order of the preference.

Q. Whether communication on E-mail would be valid only where post offices or offices of CA Firms are not open?

A. No, the members may use the option of E-mail irrespective of opening of post office or CA Firm.

Q. What will be the position if the Incoming Auditor sends an E-mail, however, does not receive an acknowledgement from the Retiring auditor?

A. In such situation, it would not be reckoned as valid communication, as the positive evidence of delivery is not available.

Q. What kind of acknowledgment from the Retiring Auditor will be deemed as valid to qualify for positive evidence of delivery?

A. Any kind of acknowledgement would be

deemed as positive evidence of delivery, e.g. writing “ok”, “Received”, etc.

Q. Whether the Incoming Auditor can send request for acknowledgement of receipt of communication from the Retiring Auditor?

A. Yes, the Incoming Auditor can send request for acknowledgement of receipt of communication from the Retiring Auditor. However, it would be deemed as positive evidence of delivery only if the Retiring Auditor accepts the request, and sends acknowledgement.

Q. Whether the Incoming Auditor may commence the Audit immediately after receiving acknowledgement from the Retiring Auditor?

A. As the communication through E-mail is instant, the receipt of acknowledgement will be a valid proof of delivery as well as entitlement to, acceptance of the Audit, unless of course, the Retiring Auditor has raised some objection(s) to such change.

Q. What are the professional reasons for not accepting Audit?

A. The professional reasons for not accepting an audit are:

(i) Non-compliance of the provisions of the Companies Act as mentioned in Clause (9);

(ii) Non-payment of undisputed audit fees by auditees other than in case of sick units; and

(iii) Issuance of a qualified report.

In the first two cases, an auditor who accepts the audit would be guilty of professional misconduct.

In the last case, however, he may accept the audit if he is satisfied that the attitude of the retiring auditor was not proper and justified. If, on the other hand, he feels that the Retiring auditor had qualified the report for good and valid reasons, he should refuse to accept the audit.

Q. In case of appointments done by Government entities/Companies/Banks or their Branches, the time for acceptance of audit is sometimes so little that there is no time to wait for the reply of the Retiring auditor. What should be the recourse in such case?

A. In case the time schedule given for the assignment is such that there is no time to wait for the reply from the Retiring auditor, the Incoming auditor may give a conditional acceptance of the appointment and commence the work which needs to be attended to immediately after he has sent the communication to the Retiring auditor in accordance with this clause. In his acceptance letter, he should make clear to the client that his acceptance of appointment is subject to professional objections, if any, from the Retiring auditor and that he will decide about his final acceptance after taking into account the information received from the Retiring auditor.

Q. Whether communication with the Retiring Auditor is permissible vide sms or WhatsApp?

A. No, communication vide sms or WhatsApp is not permissible as an evidence of communication being sent , as required under Clause (8) of Part-I of the First Schedule to the Chartered Accountants Act, 1949.

Audit Process Flow

CA Suman Choudhury

PARTICULARS

KNOWLEDGE OF THE CLIENTS BUSINESS

(For first timers, with respect to audit executives)

Documents to be obtained

i) Soft Copy

Previous years audit working files (to be obtained from our office).

ii) Hard Copy

MOA, AOA, Agreements with Inter-Group companies, Service providers, Suppliers, Distributors, Previous Years Audit Reports .Previous audit working papers (to be obtained from our office)

Process

Discuss the audit with the team leader, who had previously handled the audit, and obtain his views on the same.

Read all the documents, mentioned above, Refer the Tally. Discussion with Accountant of the Client company for understanding and also for latest changes made.

Follow up for Previous Audit Process

Check whether all the mistakes found at the time of previous audit are corrected or not.

- If not, get clarification for the same.
- PREPARE THE CHECKLIST-CUM-STATUS OF WORK
- OPENING BALANCE VERIFICATION

Documents to be obtained

Soft Copy :- Accounting Software

Hard Copy :- Copy of PY's Signed Balance Sheet.

Process

Whether all balances, as per the previous audited balance sheet have been, correctly carried forward to the current year records?

Whether there are any opening balance differences, which have been kept unreconciled over a period of time.

CASH VOUCHING

Documents to be obtained

- Soft Copy

Obtain a relevant extract from the accounting software.

- Hard Copy

Cash Payment Vouchers for the audit Period.

Get the specimen signature of the Authorized Signatory

Process

Whether the vouchers are duly authorized and filed in order, and supported by external evidences?

Confirm that, the person approving the payment had the necessary authorization.

Whether the vouchers are numbered serially ,and match with the accounting software

Whether contra entries for cash withdrawals and deposits are made and are they on the samedate

Whether any cash payments exceed Rs. 10000/-

If cash payments exceeding Rs. 5000/- have been stamped?

Whether cash payment has been made to any party where in general only bank payments are made

Whether more than one payments have been made to as a person by cash in one single day

Check whether the expense accounted under the correct ledger head.

Accounting Period - Relates to which financial year.

BANK VOUCHING

Documents to be obtained

- Soft Copy:-

  Travel policy of the company
- Hard Copy :-

  Bank Payment Vouchers for the audit Period.

Process

1. Check Date, Party Name or Expense Head, Amount, Narration and cheque number matched between voucher and Tally.
2. Were the vouchers duly authorized and filed in order and supported by external evidences
3. Whether the person approving the payment had the necessary authorization.
4. Whether the vouchers are numbered serially and match with the accounting software
5. Whether the cheques are issued in order

6. Whether any old cheques are released towards recentpayments
7. Any cancelled cheques / payment vouchers filed inorder
8. Any personal transactions have been made through company's bankaccount
9. Check whether the expense accounted under the correct ledger head.
10. Accounting Period - Relates to which financial year.

JOURNALVOUCHING

Documents to be obtained Soft Copy or Hard Copy :-

Travel Policy of the Company, Journal Vouchers

Process

1. Whether the Journal Entries passed are authorized and passed under properauthorization.
2. Whether the Account Heads under which the Journals are passed are proper
3. Whether entries of previous audit period are passednow
4. All vouchers are supported by necessary explanations and documentaryevidences

PURCHASEVOUCHING

Documents to beobtained

· Purchase Invoices, GRN's Purchase Orders made.

Process

1. Purchase requisition has been prepared by the respectivedepartments.
2. Purchase order has been raised ornot?
3. GRN (Good received note) are prepared and security acknowledges isavailable
4. Whether contra entries for cash withdrawals and deposits are made and are they on the samedate
5. All invoices are supported with DC, GRN, QC report and authorized signatory and same have been properly filed ornot?
6. Trade Discount if any for bulk purchases?
7. Purchase returns are properlyaccounted?
8. Whether they have booked in FOB value ornot?
9. Whether Input credit is properly accounted in books?

SALESVOUCHING

Documents to be obtained Soft Copy & Hard Copy

· Sales Invoices ,Delivery challan and Purchase orders received Further Discount Policy, Approved Price List as on date of verification.

Process

1. Purchase order has been raised or not?
2. Check whether physical invoices are matching withTally.
3. Check whether prices charged as per Approved PriceList
4. Check whether discounts are given as per companypolicy
5. Check whether GST whichever is applicable is raised at applicablerate

BANK RECONCILIATION STATEMENT

Documents to be obtained Soft Copy:- Tally

Hard Copy :-Bank Statement (For all bank accounts)

Process

1. Compare the bank balance in Bank statement and in Tally after Reconciliation

2. Check for the stale cheques if any, If not tallying get the reason for the difference.

IX STATUTORY COMPLIANCES

Collection and Remittance of GST

a) Documents to be obtained

Soft Copy & Hard Copy

CST (Form 1) & VAT (Form I)GST Monthly / Quarterly Returns (GSTR-3B,GSTR-1,GSTR-4)

Process

IGST

i) Check the Invoice with Tally and ensure that IGST accounted correctly

ii) Check whether sale transaction attracts IGST or not?

iii) Check IGST Rate

iv) Check whether IGST Remitted within due date or not?

v) Check whether monthly / Quarterly Return filed within due date

CGST & SGST

i) Whether the CGST & SGST has paid in accordance with the rates applicable

ii) Whether the figures as per returns match with the

book figures

iii) Whether the returns are filed within due date

iv) Whether revised return amendment has been filed and if yes whether duly authorized

· Collection of Goods & Services Tax

a) Documents to be obtained

Soft Copy or Hard Copy

Monthly Returns GST Monthly / Quarterly Returns (GSTR-3B, GSTR-1, GSTR-4)

Process

i) Check whether service supplied transaction attracts GST or not?

ii) Check Rate at which invoice raised.

iii) Check whether only collectedfiled amount in GSTR-3B matched withremittedor invoiced amount remitted.

iv) Check whether Remitted GSTR Filed within due date

v) Check whether monthly / Quarterly Returns filed within due date

Deduction and Remittance of TDS

a) Documents to be obtained

Soft Copy or Hard Copy

Details of Deductees , TDS Remittance Challans, Quarterly TDS Returns(Form 24Q and 26Q and Form 27 A)

Process

i) Whether the TDS payments made match with the provisions made, challan remitted and returns filed.

ii) Any transactions has been noted where TDS is applicable but no tax has been deducted

iii) Whether the rates applied for transactions are as per the recently amended rates

iv) Whether the remittances are made within the duedatev) Whether interest has been calculated and remitted in case late remittance of TDS has beenmadevi) Whether challan copies for all remittances areavailablevii) Any un reconciled pending amount is standing as provision in the TDS account

Deduction and Remittance of Provident FundDocuments to be obtained SoftCopy or Hard Copy PF Remittance Challans, PF Returns,Process

1. Whether all eligible employees have been included in the computation of PFliability
2. Whether the Employer's share and Employee's share has been computedaccurately
3. Whether any deduction in excess of statutory requirement has been made, and if yes whether approvals areavailable
4. All remittances match with the actually ability
5. All remittances are made within the due date
6. The monthly returns are being submitted within the duedate
7. Any unreconciled pending amount is standing as provision in the PF account

SECRETARIAL COMPLIANCES –

Documents to be obtained Soft Copy or Hard Copy Resolutions FIRC, Copy of Forms filed with ROC

Process

Check whether forms under Companies Act 2013 filed with ROC within due date, wherever necessary

SHARING O FEXPENSES

Documents to be obtained SoftCopy

Their workings

Hard Copy

Process

i) Check the expenses which is compare the Excel with Tally, Each companies ledger in each companies

Books.

Ii) Compare with previous and check whether consistency followed or not

SALARY PROCESSING

Documents to be obtained SoftCopy

Monthly Salary Workings File

Hard Copy

Process

Check whether TDS ,PF ,PT deducted as per statutory regulation or not.

Check the Bonus & Incentive in case of Full & Final Settlements made.

Compare Excel workings with Tally afterverification

Salary summary and wage summary are matching with the actual amount paid to employees as salary and wages

Whether records for all attendance, overtime and leaves approved maintained inorder

Whether the salary paid is as per the appointment order /increment letter issued to the employees

Whether any casual workers were employed and salary was paid to them as per statutory requirements?

All Statutory deductions like TDS ,PF ,ESI, PT and loan recovery as per company policy made at the time of making payment

Other allowances, discounts etc. are as per company policy

DEBITNOTE

1. Documents to be obtained SoftCopy
2. Their workings of Forex Transactions
3. Hard Copy Debit Notes file, their workings

Process

Compare the Debit Note/Credit Note with that company's book of account.

Books of account with necessarysupporting.

Check the mail confirmation.

Check whether the transaction relating this company. Check the date oftransaction.

STOCK VALUATION

Documents to be obtained SoftCopy

Inventory

Process

1. Value the stock at FIFOMethod.
2. Check whether the opening stock value is matching with audited balancesheet.
3. Check whether all purchases are updated stocksheet.
4. Check whether all sale transaction updated in stocksheet.

LEDGER SCRUTINY

Documents to be obtained SoftCopy

Updated Tally

Process

Classification of accounts - Group wise and ledgerwise.

Accountingperiod

AbnormalTransactions

Balance Sheet Item Profit / Loss Items

UPDATION OF MASTERDATA

Documents to be obtained SoftCopy

Hard Copy

Original certificates

Process

Note the details which is required for Master Data Updation , as and when you crossing the abovementioned processes.

Working Papers and Files

Take Notes for Tax Audit & Finalization

For the documentation purpose and also to avoid conflicts, sent your all queries to client through ours webmail marking CC to your teamleader.

In case of conflicts between our team and Clients persons, get the Managements Representation.

Insolvency Resolution Process for Personal Guarantors to Corporate Debtors

CA Binay Kumar Singhania

The insolvency and Bankruptcy Code, 2016 along with Body Corporates is also applicable on Individual and partnership firms.

Part III of Code deals with Insolvency Resolution and Bankruptcy for Individual and partnership firm.

Ministry of corporate affairs has notified several sections of Insolvency and Bankruptcy Code, 2016 vide Notification dated 15/11/2019 insofar they relate to "Personal guarantor to corporate debtor" with effect from 01/12/2019. Sections which are notified are as under

i. Clause (e) of Section 2;

ii. Section 78 (except with regard to fresh start process) and Sections 79;

iii. Sections 94 to 187 (both inclusive);

iv. Clause (g) to Clause (i) of sub-section (2) of Section 239

v. Clause (m) to Clause (zc) of sub-section (2) of Section 239;

vi. Clause (zn) to Clause (zs) of sub-section (2) of Section 240;

vii. Section 249.

Personal Guarantor has been defined in Rules as under :

"a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part"

As per sec 60(2), adjudicating authority in relation to Personal Guarantor is NCLT, in case the guarantee has been given for corporate person and corporate insolvency resolution process or liquidation process is going on for said corporate debtor.

Important Definitions :-

QUALIFYING DEBTS

Qualifying debt means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time and does not include—

(a) An excluded debt;

(b) A debt to the extent it is secured; and

(c) Any debt which has been incurred three months prior to the date of the application for fresh start process

EXCLUDED DEBTS

"Excluded debt" means—

(a) liability to pay fine imposed by a court or tribunal;

(b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation

(c) liability to pay maintenance to any person under any law for the time being in force;

(d) liability in relation to a student loan

(e) any other debt as may be prescribed

EXCLUDED ASSETS

Excluded assets for the purposes of this part includes—

1. unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for

the purpose of his employment, business or vocation,

2. unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;
3. any unencumbered personal ornaments upto the value of 1 lac, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;
4. any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and
5. an unencumbered single dwelling unit owned by the debtor of not more than 25 lacs for urban and Rs. 10 lacs for rural areas.

INTERIM MORATORIUM PERIOD

Commences upon submission of application

During the interim-moratorium period,—

1. any legal action or legal proceeding pending in respect of any of his debts shall be deemed to have been stayed; and
2. no creditor shall initiate any legal action or proceedings in respect of such debt.

MORATORIUM PERIOD

Commences upon admission of application

During the moratorium period—

1. any pending legal action or legal proceeding in respect of any debt shall be deemed to have been stayed; and
2. The creditors shall not initiate any legal action or proceedings in respect of any debt.
3. the debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein;

Insolvency Resolution Process

A debtor, commits default in repayment of his debt is entitled to make an application for a insolvency resolution process. If debtor is a partner of a firm, application can be submitted to the AA in respect of the firm if majority of the partners of the firm file the application jointly.

The application can only be filed against debts which are not **excluded debts**.

Who is eligible to file an application of Insolvency Resolution?

A debtor shall not be entitled to make an application of insolvency resolution process, if he is :-

1. an undischarged bankrupt;
2. undergoing a fresh start process;
3. undergoing an insolvency resolution process; or
4. undergoing a bankruptcy process.

5. ***Submission of report for admission / rejection***

A debtor shall not be eligible to apply if an application has been admitted in respect of the debtor during the period of twelve months preceding the date of submission of the application.

Upon application being made under section 94 or section 95 of the code, Resolution Professional is appointed. Within 10 days from appointment the RP is required to submit report to AA, recommending approval or rejection of the application.

Within 14 days from submission of report, Adjudicating Authority rejects or admits the application.

Rejection of application by Adjudicating Authority.

Section 102: Issue/ Availability of Public Notice

The application referred to in section 94 or 95 may be rejected by the Adjudicating Authority on the basis of report submitted by the resolution professional that the application by debtor was made with the intention to defraud his creditors or the resolution professional, the order is recorded

that the creditor is entitled to file for a bankruptcy order.

The Adjudicating Authority on passing of moratorium shall issue a public notice within seven days of passing the order under section 100 inviting claims from all creditors within twenty-one days.

The notice shall be—

(a) published in at least one English and one vernacular newspaper which is incirculation in the state where the debtor resides

(b) affixed in the premises of the Adjudicating Authority; and

(c) placed on the website of the Adjudicating Authority.

CONTENTS OF PUBLIC NOTICE

The notice as per section 102(1) should include—

(a) details of the order admitting the application;

(b) particulars of the resolution professional with whom the claims are to be registered; and

(c) the last date for submission of claims.(Within 21 days of issue of notice)

FORMATION OF COMMITTEE OF CREDITOR

VERIFYING CLAIMS AND PREPARATION OF LIST OF CREDITOR

The resolution professional shall commence the verification of each claim as soon as it is received, and prepare a list of creditors reflecting the name of the creditors, amount claimed, amount admitted, and security interest in respect of the claims, if any, within the time period stipulated in Section 104 (2).

The resolution professional shall file a report certifying the constitution of a committee of creditors on the preparation of the list of creditors, to the Adjudicating Authority.

CONSTITUTION OF COMMITTEE OF CREDITOR

A committee of creditors formed under Regulation 6(2) shall consist of the following members

1. ten largest creditors by value;
2. one representative elected by all workmen other than those workmen included in 1
3. one representative elected by all employees other than those employees included in 1

In the event the number of creditors is less than ten, the committee shall include all such creditors.

REPAYMENT PLAN

The Debtor in consultation of the Resolution Professional shall draft a repayment plan post preparation of the final list of creditors on the basis of the claims received upon issuance of public notice by adjudicating autority.

The repayment plan once approved by the Adjudicating authority is adopted for the purpose of Insolvency Resolution of the individual or partnership firm.

The repayment plan shall include the following, namely:—

(a) justification for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan;

(b) provision for payment of fee to the resolution professional;

(c) such other matters as may be specified

The repayment plan may authorise or require the resolution professional to carry on the debtor's business or trade on his behalf or in his name or realize the assets of the debtor; or administer or dispose of any funds of the debtor.

CONTENTS OF REPAYMENT PLAN

The repayment plan as per draft regulations 22 should include the following -

1. the duration of the repayment plan;
2. implementation schedule for the repayment plan, including the proposed dates of distributions to creditors, with estimates of their amounts;
3. source of funds for the insolvency resolution process costs and their payment in priority to all other payments under the repayment plan;
4. minimum budget for the survival of the debtor and immediate family for the duration of the repayment plan;
5. the manner in which funds held for the purposes of the repayment plan are to be banked, invested or otherwise dealt with, pending distribution to creditors
6. a comprehensive list of all the creditors of the debtor
7. the functions which are undertaken by the resolution professional, including supervision and implementation of the repayment plan
8. variation of the terms of a contract or transaction involving the debtor;
9. that **excluded assets** will not be transferred or sold;
10. financing required for the insolvency resolution process; and
11. terms and conditions for the discharge of the debtor

SUBMISSION OF THE REPORT ON REPAYMENT PLAN TO ADJUDICATING AUTHORITY

The resolution professional shall submit the repayment plan under section 105 along with his report on such plan to the Adjudicating Authority within a period of twenty-one days from the last date of submission of claims under section 102

CONTENTS OF THE REPORT TO BE SUBMITTED BY RP (SECTION 106)

The report is required to be submitted to the Adjudicating Authority by the RP along with the repayment plan should contain the following:-

(a) *the repayment plan* ***is in compliance with the provisions of any law*** *for the* time being in force;

(b) *the repayment plan* ***has a reasonable prospect of being approved*** *and* implemented; and

(c) *If there is a* ***necessity of summoning a meeting*** *of the creditors, if required, to* consider the repayment plan where the resolution professional recommends that a meeting of thecreditors is not required to be summoned, reasons for the same shall be provided.

The *report* shall also specify the date on which the meeting should be conducted *along with* the time and place of meeting if he is of the opinion that a meeting of the creditors should be summoned.

MEETING OF THE CREDITORS

In the situation where RP specifies the date on which the meeting of the creditors is to be held the meeting date should not be not less than fourteen days and not more than twenty eight days from the date of submission of report under Section 106.

NOTICE

- The resolution professional shall issue a notice calling the meeting of the creditors at least fourteen days before the date meeting of creditor.

- the notice of the meeting to be delivered to the list of creditors prepared under section 104 by hand or registered post or courier or speed post, even through electronic means .
- The proxy voting, including electronic proxy voting and shall take place in such manner and form as may be specified.

CONDUCT

- In the meeting of the creditors, the creditors may decide to approve, modify or reject the repayment plan.
- The resolution professional shall ensure that if modifications are suggested by the creditors, consent of the debtor shall be obtained for each modification.
- The resolution professional may for a sufficient cause adjourn the meeting of the creditors for a period of not more than seven days at a time.

DECISION MAKING

- Any decision *other than for approval or modification of the repayment plan* shall require approval of *more than fifty per cent in value of the creditors present and voting.*
- *Resolution plan should be approved* by a majority of *more than three-fourth in value of the creditors present in person or by proxy and voting* on the resolution in a meeting of the creditors.

CALCULATION OF VOTING SHARE

- A member of the committee shall be having voting share in proportion of the debt due to such creditor or debt represented by a representative, as the case may be, to the total debt.

- Order approving Repayment plan

The debt due to any creditor shall be calculated as on the insolvency commencement date, on the basis of the claims admitted.

The Adjudicating Authority by an order may approve or reject the repayment plan on the basis of the report of the meeting of the creditors submitted by the RP under section 112

Where the Adjudicating Authority is of the opinion that the repayment plan requires modification, it may direct the RP to re-convene a meeting of the creditors for reconsidering the repayment plan with modifications.

The order of the Adjudicating Authority approving the repayment plan may also provide for directions for implementing the repayment plan.

Where the Adjudicating Authority has **approved** the repayment plan under section 114, such repayment plan shall—

a) take effect as if proposed by the debtor in the meeting; and

b) be binding on creditors mentioned in the repayment plan and the debtor.

Where the Adjudicating Authority rejects the repayment plan under section 114, the debtor and the creditors shall be entitled to file an application for bankruptcy.

A copy of the order passed by the Adjudicating Authority shall be provided to the Board, for the purpose of recording an entry in the register referred to in section 196.

Completion of Repayment plan

The resolution professional shall within fourteen days of the completion of the repayment plan, forward to the persons who are bound by the repayment plan under section 115 and the Adjudicating Authority, the following documents, namely:—

a) a notice that the repayment plan has been fully implemented; and

b) a copy of a report by the resolution professional summarising all receipts and payments made in pursuance of the repayment plan and extent of the implementation

c) of such plan as compared with the repayment plan approved by the meeting of the creditors.

The resolution professional may apply to the Adjudicating Authority to extend the time of 14 days for such further period not exceeding seven days.

Premature end of Repayment plan

A repayment plan shall be deemed to have come to an end prematurely if it has not been fully implemented in respect of all persons bound by it within the period as mentioned in the repayment plan

Where a repayment plan comes to an end prematurely under this section, the resolution professional shall submit a report to the Adjudicating Authority which shall state—

a) the receipts and payments made in pursuance of the repayment plan;

b) the reasons for premature end of the repayment plan; and

c) the details of the creditors whose claims have not been fully satisfied.

b) The Adjudicating Authority shall pass an order on the basis of the report submitted

c) by the RP that the repayment plan has not been completely implemented and there is premature end of the repayment plan.

d) The debtor or the creditor, whose claims under repayment plan have not been fully satisfied, shall be entitled to apply for a bankruptcy order.

Discharge Order

On the basis of the repayment plan, the resolution professional shall apply to the Adjudicating Authority for a discharge order in relation to the debts mentioned in the repayment plan and the Adjudicating Authority may pass such discharge order.

The repayment plan may provide for—

(a) early discharge; or

(b) discharge on complete implementation of the repayment plan.

The discharge order shall be forwarded to the Board, for the purpose of recording

entries in the register referred to in section 196.

The discharge order) shall not discharge any other person from any liability in respect of his debt.

Ref. No. DTPA/Rep/20-21/2 **26th September 2020**

To,

Smt. Nirmala Sitharaman

Hon'ble Finance Minister

Ministry of Finance, Govt. of India

North Block, New Delhi-110001

fmo@nic.in

Sub: **Request to consider extension in the dates of furnishing of Tax Audit Report under section 44AB of the Income Tax Act and the due date of filing ITR of A Y 2020-21**

Respected Madam,

Established in the year **1982** and with the present strength of over 1725 members comprising of Chartered Accountants, Advocates &Tax Practioners, we "**DIRECT TAXES PROFESSIONALS' ASSOCIATION**" feel great pleasure in introducing ourselves as one of the premier professional Association in Kolkata, We have been organizing seminars and conferences on topics of professional interest and have also been sending representations to the Government on various economic and taxation issues .

First of all We wish to thank you for fully appreciating the problems faced by Trade Commerce and Industry and allowing necessary extensions in all matters since the announcement of Lockdown 1.0

Madam , we further wish to appraise you that in West Bengal, more particularly in and around Kolkata normalcy in operations is yet to set in as most of the working force commutes by local train and the local train service has not yet resumed. Most of the offices therefore are just working almost paralysed and the Businessmen and we Professionals are barely able to manage the working aspects.

Furnishing of Tax Audit and submission of ITR

Madam , As you are aware that the accountants are normally preparing all audit and tax returns data and Audit Assistants of Audit firms do check the same , the compliances related Tax Audit Report under section 44AB of the Income Tax Act and ITR submission can not be completed in spite of best intentions of the owners to do so , as the staff of their offices and also the trainees in the offices of the Professionals are not being able to attend offices.

In so far as Companies cases are concerned , their due date of holding AGM has been allowed 3 months extension by MCA and therefore almost all companies are likely to hold AGM by 31st December 2020 and since a copy of the audited report is also attached with the Tax Audit Report , it in nearly impossible to complete the furnishing of Tax Audit .

Therefore we sincerely request you to extend the due date of furnishing of Tax Audit Report be extended to 31st January 2021 and for the ITR to 28th February 2021.

We would also appreciate if your good self would make an early announcement in this matter so that the entrepreneurs and professionals do not unnecessary expose themselves to too much stress and risk .

Madam , these are difficult times for the country and the country will certainly look upto you for addressing these issues .

Thanking you,

Yours faithfully,

CA N K Goyal	**Adv Paras Kochar**
President	**Chairman- Direct Tax Sub Committee**

Direct Taxes Professionals' Association

CC To:

1 Sri Anurag Singh Thakur
The Hon'ble Minster of State For Finanace

2 Shri P.C.Mody,
Chairman,
Central Board of Direct Taxes,

Ref. No.- DTPA/Rep/20-21/5 **Dated 2nd November, 2020**

To

Mrs. Nirmala Sitharaman,
Hon'ble Finance Minister,
Ministry of Finance,
Government of India,
North Block, New Delhi 110 001

Respected Madam,

Sub: Representation for widening the scope of Vivad Se Vishwas Scheme and also for increasing the monetary limit for initiating prosecution complaints in Income tax matters etc.

Our Association having about 1700 members, dealing in tax matters would like to make the following **Representation for widening the scope of Vivad Se Vishwas Scheme and also for increasing the monetary limit for initiating prosecution complaints in Income tax matters etc.** for your Honour's kind consideration.

A. REGARDING INITIATION OF PROSECUTIONS AND PENDING PROSECUTIONS

1.0 At the outset, we would like to bring to your attention that when the whole mankind is taken aback by the COVID-19 pandemic and when everyone has suffered from financial or personal losses in these troubled times the already stressed business community is very much concerned about the trivial addition of cases where prosecution has been initiated and they have to appear before the District Court. The taxpayers against whom prosecution

proceedings were filed were initially delighted when the Vivad se Vishwas Scheme was announced however it was disheartening to note that it did not apply to such assessees.

1.1 Your Honours will appreciate that making of additions does not necessarily make a person such a chronic defaulter that he should be sent behind the bars especially when most of the additions are based on deeming provisions without enough evidence, surmises, conjectures, and preponderance of probabilities. Be that as it may, it may be appreciated that the prosecutions have been initiated indiscriminately by the Income tax department.

1.2 We also invite your attention to the **CBDT Circular 24/2019 dated 09.09.2019**, which considered the issue of premature initiation of prosecution i.e. before the issue is tested in appellate proceedings and CBDT has provided specifically that the prosecution complaint should not be launched unless penalty is confirmed by the Income tax Appellate Tribunal.

CBDT Circular 24/2019 dated 09.09.2019 :

CBDT has issued the said Circular 24/2019 dated 09.09.2019 with an objective of removal of doubts which shows that it is a clarificatory Circular.

The said Circular dated 9.9.2019 states that prosecution can be launched only in following cases:

1. **If tax sought to be evaded is more than Rs.25 Lakhs and**
2. **Prosecution should be launched only after the penalty is confirmed by the ITAT**
3. Prosecution is a criminal proceeding. Therefore, based upon evidence gathered, offence and crime as defined in the relevant provision of the Act, the **offence has to be proved beyond reasonable doubt.** To ensure that only deserving cases get prosecuted the Central Board of Direct Taxes also instructed that prosecution may be initiated only with the previous administrative approval of the Collegium of two CCIT/DGIT rank officers as mentioned in Para 3 of the Circular.

The said Circular is available on the Government website at following link:

https://www.incometaxindia.gov.in/communications/circular/circular-24-2019-11-09-2019.pdf

This Circular is curative, clarificatory and remedial in nature and it ought to be given retrospective effect and apply to all pending cases where the complaint is filed and should not be restricted only to those pending cases where complaint is yet to be filed. It is a settled law that a curative, clarificatory and remedial amendment must be given retrospective effect. For this proposition reliance is placed on following judicial pronouncements:

a) When a provision is inserted/deleted to remedy unintended consequences it should be given a retrospective effect - **CIT vs. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC)**.

b) When a provision is inserted/deleted so as to mitigate hardship caused to the assessee, it should be given retrospective effect - **CIT vs. Calcutta Export Company [2018] 404 ITR 654 (SC).**

Accordingly, we request that CBDT should issue a clarification that the said circular will apply to all matters which are pending in Courts and the complaints already filed may be withdrawn based on any undertaking or conditions, as may appear just and equitable to Your Honours.

1.3 The limit prescribed under the said Circular **"the tax sought to be evaded is more than Rs.25 Lakhs" is on the lower side considering the diminishing value of money.** Therefore, **our humble suggestion is that the Monetary limit should be revised to at least Rs.1 Crore of tax for initiating any prosecution.**

B. REQUEST FOR ENLARGING THE SCOPE OF VIVAD SE VISHWAS SCHEME BY PERMITTING CERTAIN CASES IN WHICH PROSECUTIIN HAS BEEN INITIATED:

2.1 The Vivad se Vishwas Scheme states that cases wherein prosecution is instituted are not eligible for the scheme. In this regard we are of the view that cases where the complaint is merely filed and charges have not been framed and have NOT been taken cognizance by the District Court, should be allowed to avail the benefit of Scheme as in such cases prosecution would not be considered as **instituted**. The word "institution of a case" as per Wharton's Law Dictionary is defined as:

"A case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein"

Accordingly mere filing of complaint should not be considered as a bar to be deprived from the Dispute resolution scheme.

2.2 We would like to submit that the issues on which prosecution has been launched have been decided in favour of both sides by different judicial forums, which makes the addition debatable. The additions made by the Assessing Officers are largely based on deeming provisions without adequate evidence, presumptions, probabilities and surmises on which prosecution is not called for. In cases of offences, under the tax laws, it would be improper for the revenue department to rush with the prosecution without a proper determination by a competent authority, under the Act, of liability which is sought to be made the basis for initiating prosecution, even though such prosecution may not be incompetent in the absence of such determination as held in case of **PNB Finance & Industrial Ltd. v. Miss Gita Kripalani, ITO [1986] 157 ITR 385 (Delhi).**

Admittedly when penalty cannot be levied on debatable issues, filing of complaint for prosecution before District Court is highly unwarranted and will cause unimaginable hardship to taxpayers.

2.3 Our humble suggestion, without prejudice to above, is that Scope of The Vivad se Vishwas Scheme, 2020 should also be permitted in cases where prosecution has been initiated and the alleged tax evasion is within Rs.5 Crore (as is the limit in Search cases). The **tax payable may be prescribed at the rate of 125 per cent of tax involved in the case, as is applicable in search cases**. Further we urge that cases where the complaint is merely filed and charges have not been framed and have NOT been taken cognizance by the District Court, should be allowed to avail the benefit of Vivad se Vishwas Scheme.

2.4 The suggestion for expanding the Scope of Vivad se Vishwas Scheme by permitting certain cases in which prosecution has been initiated, will considerably help in reducing unnecessary litigation and at the same time it will help in collection of revenue.

C. DECLARATION IN CASE WHERE DEPARTMENT HAS FILED APPEAL OR DEPARTMENT MAY FILE AN APPEAL:

In many cases where assessee has won in appeal before CIT (A) or before ITAT and the assessee wants to file declaration

under Vivad se Vishwas Scheme if department has preferred an appeal or may prefer an appeal. The assessee does not know the appeal number and date of filing such appeal by department, and in absence of filling up such detail the declaration Form No. 1 is not being accepted in the system. We request you to please modify the utility so that such declarations are accepted even without fillip up such detail of appeal by the department whether filed or may be filed.

D. ISSUE OF FORM 3 BY THE CIT:

In many cases where the declaration has been filed the CIT has not yet sent Form 3 under Vivad Se Vishwas Scheme to the assessee declarant. It is desirable that the Form 3 is issued at earliest in all cases by CITs in exercise of the powers conferred by sub-section (1) of section 5 of the Vivad Se Vishwas Act, 2020.

E. CONCLUSION:

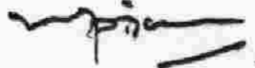
In view of above, we humbly request that our submissions in Paragraph A as well as Paragraph B, C and D may kindly be considered as soon as possible, particularly in view of the fact that the last date for filing declaration under Vivad se Vishwas Scheme is 31st December, 2020, which is approaching fast. We would like to mention that provisions of prosecution under many sections of the Companies Act, 2013 have already been omitted by the Government. Our suggestions are in line with the thinking of the Government to minimize litigations.

For this act of kindness, we shall remain grateful to you.

With Best Regards,

Yours faithfully,

DIRECT TAXES PROFESSIONALS' ASSOCIATION



CA N.K. Goyal
President

Adv Narayan Jain
Chairman
Representation Committee

Ref. No. DTPA/Rep/20-21/3

Date: 22.10.2020

To,
Smt. Nirmala Sitharaman
Hon'ble Union Finance Minister,
Ministry of Finance, Govt. of India
North Block, New Delhi-110001

Respected Madam,

Subject- <u>Representation on the Settlement Scheme-2020 introduced in terms of Regulation 26 of the SEBI (Settlement Proceedings) Regulations, 2018 vide Public Notice dated July 27, 2020</u>

This has reference to the "Settlement Scheme 2020" introduced by the Securities and Exchange Board of India (SEBI) in terms of Regulation 26 of the SEBI (Settlement Proceedings) Regulations 2018 vide Public Notice dated July 27, 2020 providing one time settlement opportunity to the entities who have executed trade reversals in the stock options segment of the BSE Limited between the period 1st April 2014 to 30th September, 2015 and against whom enforcement proceedings were initiated by SEBI.

In view of the same, we would like to make the following representations and humbly request your goodself to kindly consider the same:

1. **<u>Validity of the Settlement Scheme-</u>**
   The Settlement Scheme, 2020 provides onetime settlement period which commenced from 1st August, 2020 and could be availed till 31st October 2020 (inclusive of both days).
   Our Representation:
   We request that, the period of onetime settlement should be extended till 31st March 2021 due to Cororna Pandemic.
   Justification for the representation:

   Due to the outbreak of COVID-19, many companies had faced difficulties in sustaining their businesses and with no other option left were forced to shut down their business operations during the period of lockdown and even thereafter. The complete or partial lockdown had not only affected the principal activities of the businesses but also affected the artillery activities associated with the entities.

As things have begun to partialy normalize, the entities should be allowed to avail the benefits of the Settlement Scheme 2020 by way of extending the end period of the onetime Settlement Scheme from October 31, 2020 to March 31, 2021.

2. **Settlement Amount-**

To arrive at the Indicative Settlement Amount, three parameters were considered by the Board:

(a) artificial volume

(b) number of non-genuine trades and

(c) number of contracts

resulting in creation of artificial volume/non-genuine trades.

Moreover, a uniform consolidated Settlement factor of 0.55 in all cases wherein the entities had executed reversal trades would be applicable while arriving Indicative Settlement Amount.

Our Representation:

We humbly request you to consider and revise the Settlement Amount up to a moderate limit, which may be at best uniform consolidated Settlement factor of 0.20 of net Profit or Loss in all cases. Settlement amount in all cases, should be based on the resultant NET profit or loss from transactions during the year/ period. The Settlement Amount should not be left to the discretion of the Adjudicating Authority or any other authority.

Justification for the representation:

Amount to be paid by the entities under the Settlement Scheme 2020 are hefty in terms of cost to be paid as Settlement Amount. The amount should be definite based on NET Profit/ Loss which resulted from the transactions.

3. **Action against entities not availing the Scheme-**

The Scheme clarifies that after expiry of the Scheme, entities who do not avail the onetime settlement opportunity shall be liable for action as per Section 15-I of the SEBI Act, 1992.

Our Representation:

The action should be limited to monetary fine only.

4. **Immunity from penalty and prosecution against entities availing the Scheme-**

We request you to grant immunity to the **entities availing the Scheme** and persons associated with the said entities as mentioned in the Settlement Scheme from any

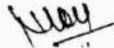
inquiry, prosecution, punishment or disciplinary proceedings under the SEBI Act, 1992 or any other Act. Those availing the said Settlement Scheme should also be allowed immunity from penalty and prosecution under other laws including the Income Tax Act, the Companies Act and Prevention of Money Laundering Act, 2002 (PMLA) .

Justification for the representation: The entities who have entered such transactions should be encouraged to avail the settlement scheme as the purpose of the Government is not to prosecute entities. The immunity from penalty and prosecution under various laws is justified as one can not be punished twice for the one default and such immunity, as prated for will have tremendous positive impact for the success of scheme.

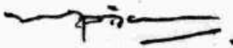
We request you to kindly consider the above representations favourably and we shall be pleased & obliged .

Thanking you

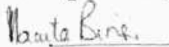
Yours truly



CA Narendra Goyal, President, DTPA



Advocate Narayan Jain,
Chairperson, DTPA Representation Committee



Dr. (h.c) Advocate Mamta Binani (B.Com, FCS)
Co-Chairperson, DTPA Representation Committee
President (2016) of The Institute of Company Secretaries of India (ICSI)
Insolvency Law Award Winner (India) for 2020
Handphone: +91 9831099551

C C to

1. Sri Anurag Singh Thakur
   The Hon'ble Minster of State For Finanace
2. Sri Rajesh Verma
   Secretary, MCA
3. Shri Ajay Tyagi, IAS
   Chairman, Securities and Exchange Board of India
   SEBI Bhawan, Plot No.C4-A, 'G' Block
   Bandra-Kurla Complex, Bandra (East),
   Mumbai - 400051

Ref. No. DTPA/Rep/20-21/2

Date: 22.10.2020

To,

Smt. Nirmala Sitharaman

Hon'ble Union Finance Minister,

Ministry of Finance, Govt. of India

North Block, New Delhi-110001

Email : fmo@nic.in

Respected Madam,

Ref: **Request to consider extension in the dates of furnishing of Tax Audit Report under section 44AB and audit report under sec. 92E of the Income Tax Act and the due date of filing ITRs of A Y 2020-21**

Established in the year **1982** and with the present strength of over 1725 members comprising of Chartered Accountants, Advocates & Tax Practioners, we "**DIRECT TAXES PROFESSIONALS' ASSOCIATION**" feel great pleasure in introducing ourselves as one of the premier professional Association in Kolkata. We have been organizing seminars and conferences on topics of professional interest and have also been sending representations to the Government on various economic and taxation issues from time to time.

First of all we wish to thank you for fully appreciating the problems faced by Trade, Commerce and Industry and allowing necessary extensions in all matters since the announcement of Lockdown 1.0

Respected Madam, we further wish to appraise your goodself that in West Bengal, like most of the other States, normalcy in operations is yet to set in as most of the working force commutes by local train and the local train service has not yet resumed. Many of professionals as well as their staff have suffered

infection from Covid -19. Therefore in most of the offices working is almost paralysed and the Businessmen as well as Professionals are unable to function.

Furnishing of Tax Audit etc. and submission of ITRs

Respected Madam , As you are aware that the accountants are normally preparing all audit and tax returns data and Audit Assistants of Audit firms do check the same, the compliances related **Tax Audit Report under section 44AB as well as audit report under sec. 92E** of the Income Tax Act and ITR submission can not be completed in spite of best intentions of the owners to do so, as the staff of their offices and also the assistants in the offices of the Professionals are not being able to attend offices.

In so far as Companies cases are concerned, their due date of holding AGM has been allowed 3 months extension by MCA and therefore almost all companies are likely to hold AGM by 31st December 2020 and since a copy of the audited report is also attached with the Tax Audit Report, it in nearly impossible to complete the furnishing of Tax Audit Report. The Form 3CD for Tax Auditt Report under sec. 44AB as well as Form 3CEB for Report in case of International and specified domestic transactions under sec. 92E have also been recently modified vide Notification No.82/2020 dated 1.10.2020.

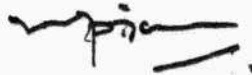
Respected Madam in view of the aforesaid situation, we humbly request to extend the due dates of furnishing Tax Audit Report in Form 3CD as well as Audit Report under sec. 92E to 28th February, 2021 and also pray for extension of date for furnishing the Income Tax returns to 31st March, 2021.

Since the specified date and due date are approaching soon, we would appreciate if your good self would could make an early announcement in this matter so that the entrepreneurs and professionals do not unnecessarily expose themselves to too much stress and risk of Pandemic.

Respected Madam , these are difficult times for the country and the country will certainly look upto your help for addressing these issues.

Thanking you,

Yours faithfully,



CA N K Goyal
President

Adv Narayan Jain
Chairman- Representation Sub Committee
Direct Taxes Professionals' Association

CC To:

1 Sri Anurag Singh Thakur
The Hon'ble Minster of State For Finanace

2 Sri Ajay Bhushan Pandey
Revenue Secretary, Ministry of Finance

3 Shri P.C.Mody,
Chairman,
Central Board of Direct Taxes

Ref. No. DTPA/Rep/20-21/1 **26th Sept 2020**

To,
Smt. Nirmala Sitharaman
Hon'ble Finance Minister
Ministry of Finance, Govt. of India
North Block, New Delhi-110001
fmo@nic.in

Sub: **Humble Request to consider extension in the dates of compliance of furnishing GSTR 9, GSTR 9A and GSTR 9C**

Respected Madam,

Established in the year **1982** and with the present strength of over 1725 members comprising of Chartered Accountants, Advocates &Tax Practioners, we **"DIRECT TAXES PROFESSIONALS' ASSOCIATION"** feel great pleasure in introducing ourselves as one of the premier professional Association in Kolkata, We have been organizing seminars and conferences on topics of professional interest and have also been sending representations to the Government on various economic and taxation issues.

First of all We wish to thank you for fully appreciating the problems faced by Trade Commerce and Industry and allowing necessary extensions in all matters since the announcement of Lockdown 1.0

Madam, we further wish to appraise you that in West Bengal, more particularly in and around Kolkata normalcy in operations is yet to set in as most of the working force commutes by local train and the local train service has not yet resumed. Most of the offices' working therefore is almost paralysed and the owners are barely able to manage the working aspects.

GSTR-9, GSTR 9A and GSTR 9C:

Madam, the time limit for filing of Annual Return (GSTR 9) and Reconciliation Statement (GSTR 9C) expires on 30.09.2020. While we appreciate the increase in monetary limit for mandatory filing of GSTR 9C reconciliation statement from

Rs. 2 crores to 5 crores, one more extension of 3 months till 31.12.2020 is requested in the matter :

- The offices' working is badly effected due to COVID.
- In cases where turnover for F.Y. 2017-18 was below Rs. 2 crores but for F.Y. 2018-19, it crosses Rs. 2 crores, GST portal is not allowing such persons to file their GSTR 9 Annual return.
- In EWB portal, E-Way bill data is available for one year only at any given point of time. So, if one wants to reconcile outward supplies with EWB data for F.Y. 2018-19, then as on 30.09.2020, we will have EWB data up to 30.09.2019 only and not beyond that.
- In GSTR 9 for F.Y. 2018-19, there are no tables/rows to reflect the carry over data from F.Y. 2017-18. Further, no guideline has been issued in this regard. In the absence of it, taxpayers are facing hard time to prepare GSTR 9.
- Due dates of filing GSTR-3B for availing nil/reduced interest rate of 9% also expires in Sept'20. This is putting additional burden on taxpayers.

It is therefore earnestly requested to extend the timeline of compliance by 3 months to 31/12/2020.

We would also appreciate if your good self would make an early announcement in these matters so that the entrepreneurs and professionals do not unnecessary expose themselves to too much stress and risk.

Madam, these are difficult times for the country and the country will certainly look up to you for addressing these issues.

Thanking you,
Yours faithfully,

CA N K Goyal
President
Direct Taxes Professionals' Association
+91 9831046053

CA D S Agarwal
Chairman- GST Committee

CC To:

1 Sri Anurag Singh Thakur
The Hon'ble Minster of State For Finance

2 Shri Ajit Kumar
Chairman,CBEC,

URGENT

Ref. No.- DTPA/Rep/20-21/4 **23rd October 2020**

To,

Smt. Nirmala Sitharaman,

Hon'ble Finance Minister

Ministry of Finance, Govt. of India

North Block, New Delhi-110001

Email : fmo@nic.in

Sub: **Humble Request to consider extension in the dates of filing of GST Annual Return GSTR 9, 9A and Reconciliation Statement GSTR 9C**

Respected Madam,

Established in the year **1982** and with the present strength of over 1725 members comprising of Chartered Accountants, Advocates & Tax Practitioners, we "**DIRECT TAXES PROFESSIONALS' ASSOCIATION**" feel great pleasure in introducing ourselves as one of the premier professional Association in Kolkata. We have been organizing seminars and conferences on topics of professional interest and have also been sending representations to the Government on various economic and taxation issues.

At the outset, we thank you for fully appreciating the problems faced by Trade, Commerce and Industry and allowing necessary extensions in all compliance matters from time to time.

Respected Madam, we wish to appraise you that in the entire country including West Bengal, normalcy in operations is yet to set in as most of the executives and

office staff commute by local trains and the local train service has not yet resumed. Most of the offices therefore the working in almost all offices is paralysed and the taxpayers are unable to manage the working of their concern. Moreover, the number of persons being affected by Covid in West Bengal as well as other States still not under control and in West Bengal it is coming to an alarming situation now due to increased crowd in Puja and festive season. The tax payers and the professionals are not able to operate normally due to the aforesaid factors making it very difficult to comply with the statutory compliances. In these circumstances we would like to make following suggestions for your kind consideration.

1. Filing of GST Annual Return (GSTR-9, GSTR 9A) and Reconciliation Statement (GSTR 9C)

Respected Madam, we appreciate that the Due Date of filing of above mentioned Returns/Statements related to F.Y. 2018-19 had been extended earlier with the last extension notified vide CGST Notification no. 69/2020 **till 31st October 2020**.

However as mentioned above, since the working in offices of taxpayers as well as professionals is badly paralysed due to COVID, it is almost impossible to file the GST Annual Return and Reconciliation Statement within 31st October 2020, especially because the regular GST returns and statements are also to be filed simultaneously.

Hence we humbly request you to allow filing of GSTR 9, 9A and 9C for the F.Y. 2018-19 at least till 31st December 2020 and kindly waive the late fees and penalty till then.

2. Input Tax Credit of Invoices pertaining to FY 2019-20

Section 16 (4) of the CGST Act, 2017 states that Input Tax Credit in respect of any invoice or debit note cannot be taken after the due date of the return for

September following the Financial Year to which such document relates or before filing the annual return for the FY to which the document relates to, whichever is earlier.

The claim of credit by recipient depends on the timely compliance by the supplier and in the current pandemic scenario many supplier taxpayers are not able to file their returns/statements in time due to which the recipients are not able to avail the credit. Moreover, the reconciliation of the credit claimed vis-à-vis GSTR 2A consumes a lot of time and effort, and if any credit is not claimed in the return of September 2020, it will be lapsed.

Hence the time limit to claim credit on the invoices pertaining to FY 2019-20 as envisaged in Section 16(4) of CGST Act, 2020 may kindly be extended till 31st March 2021 by way of issue of Removal of Difficulties Order.

3. Extension of Relaxation of date for Input Tax Credit restriction upto 10% of GSTR 2A for Invoices not reflecting in GSTR 2A

Rule 36 (4) of the CGST Rules, 2017 provides that Input Tax Credit to be availed by a taxable person in respect of which the supplier has not furnished details u/s 37 (1) shall not exceed 10% of the eligible credit available in respect of details furnished by suppliers in GSTR1 and reflecting in GSTR 2A of recipient.

Although the aforesaid rule was relaxed till the filing of return for September 2020, still most of the taxpayers are grappling with the reconciliations and the credit is not reflected in GSTR 2A of recipients as many supplier tax payers have not filed their up to date returns/statements. This creates a huge blockage of funds for such recipient tax payers which is detrimental in the current economic scenario.

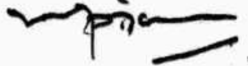
Hence the relaxation to comply with provisions of Rule 36 (4) may kindly be further extended up to 31st March 2021.

We would also appreciate if your honour would kindly make an early announcement in these matters so that the taxpayers and professionals do not unnecessary expose themselves to too much stress and risk.

Respected Madam, these are difficult times for the country and the country will certainly look up to your goodself for addressing these issues.

Thanking you,

Yours faithfully,



CA N K Goyal
President

Adv Narayan Jain
Chairman
Rep. Sub-Committee
Direct Taxes Professionals' Association

CC To:

1 **Sri Anurag Singh Thakur**
The Hon'ble Minster of State For Finance
Ministry of Finance, Govt. of India
North Block, New Delhi-110001

2 **Shri Ajit Kumar**
Chairman, CBEC
Ministry of Finance, Govt. of India,
North Block, New Delhi-110001

PRE-BUDGET MEMORANDUM
ON
DIRECT TAXES

UNION BUDGET 2021-22
(Issues & Justification)

DIRECT TAXES PROFESSIONAL'S ASSOCIATION
3, GOVERNMENT PLACE(WEST)
INCOME TAX BUILDING
KOLKATA-700001
Ph: 033-22420638
email: dtpakolkata@gmail.com

Ref. No.- DTPA/Rep/20-21/6 8th November, 2020

To,
The Hon'ble Union Finance Minister,
North Block,
New Delhi.

Respected Madam,

At the outset we convey your honour our **Congratulations** on introducing Faceless Assessment and Faceless Appeal Schemes and also introducing new Taxpayers Charter. Direct Taxes Vivad Se Vishwas Scheme is also a commendable step to reduce litigations. We assure your honour of our full support in the implementation of the same.

We would like to make the following suggestions as our Pre Budget Memorandum for 2021-22:

1. **Personal Income tax**:

We appreciate the alternate tax regime offered for personal taxation under section 115BAC. However Personal Income TaxExemption Limit and Slab Rates needs to be reviewed. It will be appropriate if exemption limit is across the board fixed at Rs. 4 Lakhs and Tax Rate for the Slab Rs. 5 Lakhs to 10 Lakhs is considered and fixed at 10 per cent; next slab may be Rs. 10 Lakhs to 20 Lakhs with tax rate of 15 per cent and on income in excess of Rs.20 Lakhs tax may be charged at 25 per cent. Such a tax regime will help in developing tax culture and true disclosure of income by all.

2. **Minimum Alternate Tax**

   a) Recommendation:

   We suggest an alternate to MAT.

   It may be provided that the aggregate exemptions and deductions allowable to any taxpayer will be pegged to 80 per cent of gross total income. Meaning thereby that all taxpayers contribute

some tax to the Government. For making the new system workable exemptions and deductions may be placed under Chapter VIA of the Income Tax Act. Adoption of this approach will help in reducing litigation and help in better tax collection. Even the Charitable Societies, Hospitals etc. making profit will also pay tax in this process.

b) Without prejudice to the above suggestion, we feel that with phasing out of exemptions and incentives under the Act, the current rate of MAT of 18.5% is quite high and has impacted significantly cash flow of companies who otherwise have low taxable income or have incurred tax losses. With the phasing out of exemptions and deductions available under the Act, the burden of MAT should also be gradually reduced from the current levels of 18.5 per cent to a rate which will be commensurate with the phasing out of tax exemptions and incentives.

c) Presently, the amount of loss brought forward or unabsorbed depreciation whichever is less as per books of account is allowed as a deduction while computing book profit for the purpose of MAT. The said provision adversely affects companies which have huge book losses and less unabsorbed depreciation as they will have to pay MAT despite having ample amount of book losses thereby affecting their cash flows. It is suggested to review the provision to make it liberal. Both depreciation and brought forward losses should be fully allowed even for the purpose of MAT. The methodology for computing loss brought forward and unabsorbed depreciation as per books of account may be specifically provided in section 115JB of the Act.

3. Allow deduction for corporate social responsibility expenditure

a) At present the Income Tax Act provides that the expenses incurred by the taxpayer on the activities relating to CSR referred to in Section 135 of the Companies Act, 2013 shall not be deemed to be incurred for the purpose of business and hence, shall not be allowed as a deduction for computation of income. The corporate sector spend is for laudable purpose and effectively assisting the Government in undertaking social projects for the country. Therefore, making such an express provision for not allowing a deduction for the purpose of Income tax is unfair.

b) **Recommendation: It is recommended that a deduction of CSR expenses incurred by the taxpayers pursuant to provisions of the Companies Act should be allowed in computing business income.**

4. **Increase threshold limit under Section 80C of the Act**

Over the years, investments made in various avenues available under Section 80C of the Income Tax Act have has been helping the Government to raise funds as well as the individuals to save tax. The Government may look at increasing the overall deduction limit to at least Rs 250,000 to boost further investment and increase tax savings for the individual and HUFs.

5. Scope of Section 207(2) may be extended to HUFs

Section 207 (2) of the Income tax Act provides that: The provisions of sub-section (1) [relating to payment of advance tax] shall not apply to an Individual residents in India, who –

a) Does not have any income chargeable under the head “Profits and gains of business or profession”; and

b) Is of age of 60 years or more at any time during the previous year.

Recommendation: For many provisions including section 80C the HUFs are treated at par with Individual tax payers. We recommend that sub-section(3) may be inserted to section 207 to provide

that the provisions of sub-section (1) of section 207 shall not apply to Hindu Undivided Family if it does not have any income chargeable under the head "Profits and gains of business or profession" and the Karta of the HUF is of age of 60 years or more. Such provision will immensely help the HUFs being looked after by senior citizen as its Karta. The Courts have also held that HUF is in fact represents its individual members.

6. Amendment of section 56

The receipts excluded from the purview of section 56 (2) should also include the amount received by a member of Hindu Undivided Family (HUF) from the HUF. There are considerable litigations on the point. These are unnecessary and may be stopped by inserting above amendment.

7. Section 50C: In section 50C it is provided that the value arrived at by DVO will be taken as conclusive in case the assessee claims the value as per stamp authorities is more or excessive.

Suggestion: In such cases the value arrived at by a Registered valuer should also be acceptable and at par with the DVO

8. **Weighted deduction on scientific research expenditure**

It is well recognised that scientific research is the lifeline of business in all countries of the world. Indian residents are paying huge sums by way of technical services, fees to foreign technicians to upgrade their products and give the customers what latest technology gives globally. If in-house research is continuously encouraged, outgo on account of fees for technical services will reduce and this will help indigenous businesses to grow. Like made in India, ease of doing business and encouragement to start up initiatives of the government, innovation and scientific research initiative should be given equal weightage.

Withdrawal of weighted deduction in respect of scientific research expenditure will put a dent to the **'Make in India'** initiative of the Government.

Recommendation: It is recommended that weighted deductions allowed under the Income Tax Act, 1961 to various modes of scientific research expenditure should be continued. The Government can also consider introducing benefits in the form of Research Tax Credits which can be used to offset future tax liability (like those given in developed economies).

9. Presumptive Income is case of professionals

The Presumptive Income is case of professionals is considered under section 44ADA at the rate of 50 per cent of gross receipts which is quite excessive even while we compare with the presumptive income of 8 per cent or 6 per cent , as the case may be, for computing profit and gains of business, as prescribed under section 44AD. The presumptive income in case of professionals **should be at the rate of 30 per cent of gross receipt.** It may be noted that RV Easwar Committee had suggested the rate of one third of gross receipt of professional receipts. The realistic presumptive rate will encourage more and more professional to opt for the scheme under section 44ADA.

10. **Monetary Limit for Tax Audit of Accounts:**

We would like to bring to your kind notice that eligible business for the purpose of section 44AD is considered if total turnover or gross receipt in the previous year does not exceed Rs. 2 Crore. That means that if they opt for presumptive Income scheme, the tax audit is not required even if the gross turnover is uptoRs. 2 Crore. Considering the inflation, the Monetary Limit for Tax Audit of Accounts under section 44AB should be reviewed and increased to Rs. 2 Crore in place of present Rs. 1 Crore.

11. **Section 10(10) – Regarding exemption in respect of Gratuity**:

As per present section gratuity is exempt in respect of Central Government employees as is received by them under the rules or gratuity received under the Payment of Gratuity Act or gratuity received by employees of other organizations as is calculated as per the prescribed method subject to limit as may be prescribed by the Central Government by notification in the official gazette, having regard to the limit applicable to Central Government employees.

In view of aforesaid language used in respect of employees other than the employees of the Government department and employees covered under the Payment of Gratuity Act, notification is required to be issued from time to time by the Central Government.

Recommendation: It is suggested that the requirement of separate notification by the Central Government in respect of employees other than the employees of the Central Government can be done away by straightaway providing the limit as is applicable to Central Government employees or as is provided in Payment of Gratuity Act.

[It may be stated that presently the notification increasing the exemption limit to Rs.20 lacs has not been issued for the purpose of clause (iii) of section 10(10) of Income-tax Act whereas the limit for the Central Government employees as well as under Gratuity Act has been raised quite some time ago and employees as well as employers are in difficulty in the absence of the notification increasing the exemption limit. Such problems can be avoided if necessary amendment, as suggested above, is made in the section.]

12. **Section 10(10B) – Exemption in respect of compensation received on retrenchment**:

The section provides that compensation received on retrenchment by a worker under the Industrial Dispute Act or under any other Act or Contract of Service, etc. subject to the limit of the amount as calculated as per section 25F of Industrial Dispute Act or amount as may be notified which at present is Rs.5 lacs. The term 'worker' has been defined to mean the worker under the Industrial Dispute Act, 1947.

In case the exemption is available only to a worker covered under the Industrial Dispute Act, then compensation has obviously to be paid to such workmen u/s 25F of Industrial Dispute Act and, accordingly, there is no need of any other limit prescribed under this section. Further, reference to any other Act, Contract, Award, etc. is redundant.

Recommendation : It is suggested that the scope of section 10(10B) should be extended to all the employees whether under the Industrial Dispute Act or not and a limit for the purpose of exemption should be prescribed, may be the limit on the basis of retrenchment compensation for which a workman is entitled u/s 25F of Industrial Dispute Act or any other limit as may be considered appropriate.

13. **Restructuring of provisions regarding charitable institutions:**

Presently there are different provisions applicable to charitable institutions u/s 10(23C) and section 11 to 13 of the Act. Definition of term 'charitable purpose' has been given in section 2(15) of the Act. There is lot of litigation presently as regards the definition of charitable purpose as well as of application of income etc. As per the existing provisions a charitable institution is permitted to accumulate its income for a period of five years and income applied for capital expenses is also allowable as deduction. In view of the fact that capital expenditure is allowed as application towards charitable purpose, it has become a general phenomenon that educational institutions, hospitals, etc. in some cases, are being run as industry and are charging high fees for the services provided by them and amount is accumulated and is spent for setting up another school, college or hospital. Accordingly, the whole purpose of the institution, being charitable, has been defeated in many cases and practically they are being run as commercial

institution. Inspite of amendment in the definition of the term 'charitable purpose' in section 2(15) of Income-tax Act, the purpose has not been served.

Recommendation : In order to avoid the litigation and also to create a situation that institution really works as a charitable institution it is suggested that:-

(i) The objects and purpose of an institution be examined in detail while granting registration to a charitable institution by the Commissioner of Income-tax. For this purpose, detailed guidelines as regards the charitable purpose should be there by way of notification in the rules. The Commissioner once examine and grant registration, the institution will continue to be recognised as charitable. May be for this purpose an independent authority known as a 'Charity Commissioner' be appointed by the Government, as it exists in certain states. The system of fresh registration and renewal introduced by the Finance Act, 2020 seems unnecessary and needs review.

(ii) As at present 15% of income should be permitted to be accumulated without any condition. Any excess over and above the same should be chargeable to tax, may be at a concessional rate of, say, 20%. Such provision will also discourage the institutions to charge higher fees for the services rendered. Accordingly, over a period of time income and expenditure of charitable institutions would by and large match and as a result real charitable purpose would be served.

(iii) If any charitable institution wants to opt out of the specific provisions, an option should be available to it and in that case the institution will be chargeable to tax as a commercial concern and assessment will be made in accordance with general provisions of the Act.

(iv) The restriction, as at present, that no charitable institution can carry on the business unless specific conditions provided under section 11(4A) are complied with, should be done away with. Income of a business, applied for a charitable purpose, should be considered as receipt of charitable institution. In respect of the business separate books of account have to be maintained and the income arising from the business has to be considered as receipt / income for the purpose of charitable activities being run by the institution.

14.**Taxability of income on notional basis:**

The concept of taxability of income on notional basis either under the head 'income from house property' or under other provisions of Income-tax Act should be done away. Only the actual income received by an assessee should be chargeable to tax.

Similarly, no disallowance of any expenditure actually incurred by an assessee as per the method of accounting employed by it should be made and for this purpose provisions like section 43B etc. should be deleted.

15.**Time limit for carrying out Rectification or appeal effectby the Assessing Officer orpassing Order by Appellate Authority:**

Presently, the Act provides for time limit for completing assessment by the Assessing Officer. There is no doubt as regards the legal position that in case the assessment order is not framed within the specific time limit, the Assessing Officer cannot make the assessment order thereafter. Similar should be the position in regard to **Rectification or appeal effect**. In case the Assessing Officer does not take the necessary action within the stipulated time limit, the action will be deemed to have resulted in favour of the assessee and no adverse order can be passed. Otherwise, placing time limits for rectification or appeal effect, etc.

have not brought any effective result and still the matters continue to be pending with the Assessing Officer for quite long time.

Recommendation : In case the appeal is not decided by CIT(A) within the time limit u/s 250(6A) of the Act, the appeal should be deemed to be allowed.

Making the aforesaid provisions in the Act will not in any way bring any adverse result for the obvious reason that when there is compulsion under law the Assessing Officer or the CIT(A) will definitely take the necessary action within the stipulated time limit. It will bring a discipline in the performance of the officers.

16. Block Assessment 153A :

Recommendation:

(1) The provision with respect to recording of statement on oath during the search operation should be deleted as the statement in most of cases is imposed and under coercion.

(2) The extended period of 10 years in search cases as brought in the Finance bill 2018 should be abolished and the block period should be restricted to 5 years in view of the fact that assessments are being completed faster over last 3 years

(3) There should be no need of a return under section 153A if no immunity is granted from prosecution and penalty. The amount included in these return in pursuance of disclosure under section 132 (4) should be excluded from penalties and prosecution as it was in earlier provisions.

17. **Exercising of powers u/s 147, 154 and 263 of the Act:**

(a) It is being practically seen that powers u/s 154 or 147 as well power u/s 263 are exercised in a routine manner and in spite of detailed submissions or legal requirements, no care is taken by the concerned officers. It is necessary that the provisions should be more specific, duly supported by the necessary guidelines for exercising the powers under these sections. For this purpose, there should also be proper training and also check within the department so that actions taken are upheld in appeals. It is well known that because of casual approach of the officers' actions taken under above sections in most of the cases fail in appeals.

(b) **Time within which these sections to be invoked** also needs a specific mention and review as the time limit has remained unchanged for years where as the time line foe completion of assessment has been significantly reduced over the years . Therefore to avoid unwarranted age old litigation and provide peace of mind in respect of completed assessments , the time should be revised at a substantially earlier period of may be 1 year in case of 263 and 2 years in case of 147 proceedings . This also justifies the point that when a team is assessing the income under faceless scrutiny why should there be a requirement of 147 or 263.

18.**Avoidance of Repetitive Appeals on the same issue:**

In regard to repetitive appeals though there are presently provisions of sections 158A and 158AA of the Income-tax Act, but these provisions are not effective and same are not being used at all.

Recommendation : It is suggested that the law should clearly provide that in case an issue has been decided either in favour or against the assessee in an earlier year, there will be no need to file appeal either by the assessee or the department in a subsequent year in case the issue is identical. Provisions of section 154 of the Act should be applicable in such cases to rectify all subsequent assessments in the light of decision in respect of appeal in earlier year by ITAT, High Court or the Supreme Court. In other words, in case an issue has been decided by CIT(A) in favour of the assessee, in subsequent years it should not be

necessary for the assessee to file the appeal before CIT(A) and the order for a subsequent year should be rectifiable in the light of decision of higher authorities. **The Assessing Officer in the assessment may make an addition in respect of particular issue but will not raise the demand in case the issue is already in favour of the assessee. Similarly, if the issue is against the assessee and he is agitating in further appeals, the order of higher authorities will be applicable to subsequent years also.**

19.**Provisions regarding levy of penalty for concealment of income:**

As is well known there had been substantial litigation in respect of provisions of section 271(1)(c) of the Act. Provisions of section 270A have been inserted w.e.f. A.Y. 2017-18. The terms 'under-reporting' or 'mis-reporting' are likely to be subject matter of litigation. Further, it is also not clear that at what stage the Assessing Officer will levy the penalty and will determine whether it is a case of under-reporting or mis-reporting. Accordingly, provisions need to be simplified so as to avoid litigation in this regard.

Recommendation : It is suggested that:-

(i) As a general principle penalty will be leviable only after the decision in appeal by ITAT, which is against the assessee and the issue has not been admitted by the High Court as substantial question of law. In case the issue has been admitted by the High Court as substantial question of law, as a matter of principle, it cannot be said that penalty is leviable in respect of the same. Further, in case the tribunal has allowed the deduction for an expenditure, penalty will not be leviable even if the department is contesting in the High Court.

(ii) In case the addition has been upheld by ITAT, as a simplification of the penalty provisions it should be provided that penalty will be leviable equivalent to, say, 30% of the tax amount payable on such addition. The law straightaway should provide that assessee has to pay 30% of tax as additional amount in the nature of penalty. In case addition made by the Assessing Officer has been deleted in appeals, the assessee should equally be entitled to compensation for the harassment and cost of litigation and for this purpose a straightaway tax rebate of, say, 20% of the amount of tax leviable on such addition should be allowed to the assessee.

20. **Initiation of prosecution:**

20.1 We welcome the **CBDT Circular 24/2019 dated 09.09.2019**, which considered the issue of premature initiation of prosecution i.e. before the issue is tested in appellate proceedings and CBDT has provided specifically that the prosecution complaint should not be launched unless penalty is confirmed by the Income tax Appellate Tribunal.

The said Circular dated 9.9.2019 broadly states that prosecution can be launched only in following cases:

1. **If tax sought to be evaded is more than Rs.25 Lakhs and**
2. **Prosecution should be launched only after the penalty is confirmed by the ITAT**
3. Prosecution is a criminal proceeding. Therefore, based upon evidence gathered, offence and crime as defined in the relevant provision of the Act, the **offence has to be proved beyond reasonable doubt.** To ensure that only deserving cases get prosecuted the Central Board of Direct Taxes also instructed that prosecution may be initiated only with the previous administrative approval of the Collegium of two CCIT/DGIT rank officers as mentioned in Para 3 of the Circular.

The said Circular is available on the Government website at the link:https://www.incometaxindia.gov.in/communications/circular/circular-24-2019-11-09-2019.pdf

This Circular is curative, clarificatory and remedial in nature and it ought to be given retrospective effect and apply to all pending cases where the complaint is filed and should not be restricted only to those pending cases where complaint is yet to be filed. It is a settled law that a curative, clarificatory and remedial amendment must be given retrospective effect. For this proposition reliance is placed on following judicial pronouncements:

i) When a provision is inserted/deleted to remedy unintended consequences it should be given a retrospective effect - **CIT vs. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC)**.

ii) When a provision is inserted/deleted so as to mitigate hardship caused to the assessee, it should be given retrospective effect - **CIT vs. Calcutta Export Company [2018] 404 ITR 654 (SC).**

Accordingly we request that CBDT should issue a clarification that the said circular will apply to all matters which are pending in Courts and the complaints already filed may be withdrawn based on any undertaking or conditions, as may appear just and equitable to Your Honours.

20.2 The limit prescribed under the said Circular **"the tax sought to be evadedis more than Rs.25 Lakhs" is on the lower side considering the diminishing value of money.**Therefore**our humble suggestion is that the Monetary limit should be revised to at least Rs.1 Crore of tax for initiating any prosecution.**

20.3 Your honour has taken commendable steps by removing prosecution provisions under the Companies Act, 2013. On the same line, it is appropriate time that prosecution provisions under the Income tax Act also should be omitted. There are enough provisions for levy of penalty in appropriate cases.

21. Tax under sec. 115BBE

Earlier the assessee was not concerned whether the department is treating it as deemed income or business income as the income was taxable maximum at the rate of thirty percent. But after amendment in section 115BBE from assessment year 2017-18 this matter has become very important and if the department treats surrendered income as deemed income it will be subject to tax at the rate of 60 per cent plus 25 per cent surcharge and education cess. The effective aggregate rate u/s 115BBE now 78 per cent. If the A.O. makes addition penalty under section 271AAC may also be levied @ 10 per cent of tax, which will make the overall burden @84 per cent on assessee. It is prohibitive and needs urgent review.

It is desirable that tax under sec. 115BBE should be at best 30 per cent or the maximum marginal rate. The rate was basically increased drastically due to demonetisation. It should be brought back to pre asst. year 2017 -18 level.

22.**Initiation of proceedings against directors u/s 179 of the Income-tax Act:**

In many cases provisions of section 179 are being resorted by the Assessing Officer even prior to decision in appeal by CIT (A) or ITAT and also without firstly exhausting its remedy for recovery of tax demand against the company. Provisions of section 179 are to be resorted to only if the demand has been finally settled and the Assessing Officer is not able to recover the same from the company. Proceedings are not to be used for harassment of the directors or threatening them by attaching their personal bank accounts.

Necessary clarification or specific provision needs to be made in the section to this effect.

23.**Specific provisions in the Act for payment or refund of interest to and from department:**

As per the existing legal position any interest paid by theassessee to the department is not allowable whereas any interest received from the department is chargeable to tax. Difficulty, however, arises in the case where the department has allowed the interest to an assessee on the amounts of refund but subsequently as a result of appeal order, such interest has to be paid back to the department.

Recommendation :

a) There should be specific provisions in the Act that any repayment of interest earlier allowed by the department and included in the taxable income is allowable as deduction in the year such interest is re-paid to the department.

b) Further, it should be specifically provided in the Act that amount of interest allowed by the department will be chargeable only in the year in which amount is actually received by the assessee by way of cheque or credit in the bank account or on intimation or information is received for adjustment of refund against any demand. Similarly, deduction is to be allowed in the year the assessee has actually repaid the interest to the department.

c) As a matter of clarification it may also be specifically provided under law that any interest paid by theassessee to the department will not be allowable as deduction and any refund out of the same received in subsequent year will not be included in the taxable income.

24. Widen the definition of professions for the purpose of sec 44AA, 44ADA and 194J

For the purpose of Sec 44AA of Income Tax Act, 1961, only some legal, medical, engineering, architectural, accountancy, technical consultancy, interior decoration, or any other notified profession (i.e., authorised representative, film artist, company secretary and information technology) are specified professions.

For this purpose, Authorised representative means a person who represents any other person, on payment of any fee or remuneration, before any Tribunal or authority constituted or appointed by or under any law for the time being in force, but does not include an employee of the person so represented or a person carrying on legal profession or a person carrying on the profession of accountancy.

Suggestion: We suggest that all professions (including management consultancy, financial consultancy, economic consultancy, media and PR consultancy should be covered within the meaning of section 44AA as the same is also applicable for the purpose of section 44ADA and 194J.

25. Section 45(5A)

Section 45(5A) intends to provide special taxation regime for transfer of land or building or both by an Individual or HUF under a specified agreement and charges the capital gains in the year in which the completion certificate in respect of the project is received based on the stamp duty value on that day.

Recommendation: There should be a level playing field and Provision should be extended to all assessee just like Section 50C and section 43CA are applicable to all assessee.

26.Withdrawal of cases initiated against limited companies after winding up order.

Section 279 of the Companies Act 2013 provides for stay of suits etc. against a limited company after passing of Winding up order. It is apparent that after passing of such order the directors of the company

will have no powers to deal with the properties of the company.

But unfortunately, it has been observed that cases have been initiated u/s 276C(2) of Income Tax Act for non-payment of tax by passing ex-parte orders u/s. 144/147 of Income Tax Act against the companies and their directors even after the appointment of Official Liquidator and passing of Winding up Order. Suitable instructions may kindly be passed to the appropriate authorities by way of CBDT Circulars/ notifications/amendments etc. to kindly withdraw such cases to save the time of the courts and harassment of the directors of the companies under winding up.

2 Multiple compliance forms for companies like ITR-6, 61A (IT), AOC-4, MGT-7/8 (MCA), etc. be clubbed into single unified form to be filed annually.

27. **TAXING THE TAX FREE/ EXEMPT INCOME-** Agricultural income and Tax Free/ Exempt Incomes as covered in section 10 above a sum Rs 25 lakhs needs to be brought under tax net.

28**ENHANCING SCOPE OF ALTERNATE TAX REGIME -** The benefit of 15% tax rate under section 115BAA, for new projects should also be extended to all formats of business whether partnership firm, LLP or Proprietary entity .

29**Recording of statement should not be carried out and Video Recording should be allowedin survey and searchcases**: In view of general coercive measures taken in such recording and rather the assessee should be served an online response form through a neutral unit of income tax department after the survey or search team submits its preliminary report. The statement of the assessee whether u/s 131 or u/s 133A or u/s 132(4) should not be taken on computer. It should always be recorded hand written. Further, Video Recording should be allowed to be run during search and seizure or survey operation.

CBDT Instruction dated March 23, 2003:

In the light of the statements recorded followed by retractions on the ground of coercion and threat in the course of search and survey operations, the Board issued the Instructions F.No. 286/2/2003 – IT (Inv.) dated March 23, 2003 stating as follows:

"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess undisclosed income during the course of the search and seizure and survey operation. Such confession, if not based on credible evidence, are retracted by the concerned assessees while filing return of income. In these circumstances, confession during the search and seizure and survey operation do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax department. Similarly, while recording statement during the course of search and seizure operation, no attempt should be made to obtain confession as to the undisclosed income."

The above Instruction is not being followed in cases of Survey and Search.

Thereforeeither the said Instruction must be strictly followed and the officers flouting the same should be subjected to serious action. The disclosure obtained in violation of said Instruction should be treated as non-est. Alternatively the recording of statement itself may be prohibited. If any person wants to make any disclosure, he may be permitted to make the same before filing his Income Tax Return and show the income in his Return.

30.**Standard deduction on house property** should be increased to 40% to give support to real estate sector. More importantly because that unsold stock of flats has been brought in under notional taxation.

31.**The rate of interest of interest charged under section 234A, 234B and 234C and for refund u/s 244A** should be decreased by 3% in view of falling rates of interest on bank deposits and RBI lending rate.

32**EXEMPTION IN RESPECT OF INCOME OF MINOR INCLUDED OF** Rs.1500/- per child should be raised to Rs.10,000/-per child.

33**To give special relief to Corona effected assesses**, COVID should be included in Rule 11DD as specified decease for giving benefit to the assesses under section 80 DDB of Income Tax Act.

Kindly consider the above suggestions. We assure your honour of our full co-operation in encouraging taxpayers to make proper tax compliance.

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CC To :

1 **Sri Anurag Singh Thakur**
The Hon'ble Minster of State For Finance

2 **Sri Ajay Bhushan Pandey**
Revenue Secretary, Ministry of Finance

3 **Shri P.C.Mody,**
Chairman,
Central Board of Direct Taxes

PRE-BUDGET MEMORANDUM
ON
INDIRECT TAXES
(Goods & Services Tax)

UNION BUDGET 2021-22
(Issues & Justification)

DIRECT TAXES PROFESSIONAL'S ASSOCIATION
3, GOVERNMENT PLACE(WEST), INCOME TAX BUILDING, KOLKATA-700001
Ph: 033-22420638
email: dtpakolkata@gmail.com

Ref. No.- DTPA/Rep/20-21/5 **8th November, 2020**

To,
The Hon'ble Finance Minister,
Govt. of India,
North Block
New Delhi-110001

Sub: HUMBLE SUGGESTIONS ON GST LAW FOR PRE-BUDGET MEMORANDUM

1. **ITC availment Restriction limit**

   Rule 36(4) of CGST Rules, 2017 specifies that Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 10 per centof the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.

   Issue: There are several reasons due to which it is practically difficult to reconcile the ITC claimed vis-a-vis that appearing in GSTR 2A like:

   - The recipient is filing monthly return but the supplier is filing quarterly return;
   - It is a very cumbersome process to always reconcile the GSTR2A especially in cases where the supplier uploads its GSTR 1 with delays.
   - This rule is creating huge working capital blockage for tax payers who are not being able to claim ITC due to the fault of the supplier in spite of the fact that in many cases such tax payer has already paid to his supplier.

   Suggestion: This Rule imposingrestrictions limiting input credit at 10% of ITC appearing in GSTR 2A should be dispensed with.

2. **Input Tax Credit**

   Section 17(5) of the CGST/SGST Act provides that 'Input tax credit shall not be available in respect of the:

……

(*c*) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(*d*) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Issue - Input Tax Credit on works contract and construction services are not allowable except in case where similar service provided. This can cause a genuine hardship to the persons who shall be using such goods/services for construction of their factory, or those persons who shall be constructing a property for letting it out. In such cases the rentals would be charged with full rate of GST, but there won't be any allowability of credit of GST paid on construction services/goods.

Suggestion – *It is suggested that credit of goods/services acquired in the construction of immovable property should be allowed without any restrictions, in one go or in staggered manner.*

3. **GST Rates**

There are multiple GST rates on various goods and services at present leading to complexities and ambiguities. Moreover classification issues are also prevalent in many sectors.

Suggestion

The number of GST Rate slabs should be reduced and brought down to two rates only, with separate rate for demerit goods.

4. **Invoicing**

Issue –Section 31(3)(g) of CGAT Act, 2017 requires issuance of payment vouchers at the time of making payments to such vendors.

These compliances create huge burden on the registered person.

Suggestion -Issuance of payment voucher should be done away with.

Delivery Challan

Issue -Rule 55 of CGST Rules require issuance of delivery challan for transport of goods without issue of invoice. The prescribed particulars to be mentioned on such delivery challan include *taxable value*. However, it is practically difficult in most of the cases to provide the taxable value of goods being transported for reasons other than supply such as job work, etc.

Suggestion -Mentioning of taxable value should not be mandatory on delivery challan (for all registered persons or for those having aggregate turnover below a specified threshold) and the relevant rules should be modified accordingly.

Alternatively, a specific valuation mechanism should be specified in the valuation rules for the taxable value to be mentioned in case of delivery challan for goods sent to job worker.

5. **Section 9(3) of CGST Act, 2017**

The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

Issue:

An unregistered recipient of specified categories of goods or services or both, shall be liable to pay tax on such goods and services, as if he is the person liable to pay tax. For the purpose of paying the tax, he shall be liable to get registered under the Act. And once he gets registered under the Act, he shall be liable to comply all the provisions of the Act, which are applicable to a registered person:

a) File all the periodical returns from time to time

b) Pay tax on reverse charge basis under section 9(4) - at present suspended till 31st March,2017

Suggestion:

Up to a certain threshold of tax liability (say 50,000/- in a year), the recipient should be given a facility of paying tax through a challan cum return mode as is available to a deductee under the Income Tax Act, 1961. Whenever a person purchases an immovable property exceeding Rs. 50 lakhs, he is liable to deduct 1% of the total consideration paid to the seller under section 194-IA of the Income Tax Act. After deducting the tax, he has to pay the tax to the credit of the Central Government. Without taking registration under the provisions of TDS, he is given the facility of paying the tax through Challan cum Statement of Deduction of Tax in Form 26QB of Income Tax Rules.

Similar facility can be provided in the GST law, so that any person liable to pay tax under section 9(3) of the Act, can do the same without being liable to comply with several provisions of the Act which have been mentioned above.

6. Place of Supply

Section 12 of IGST Act, 2017 prescribes the determination of place of supply of services where both service provider and service recipient are located within India.

Issue - It has been observed that in many cases such as Accommodation services in Hotels, the place of supply has been specified to be the location of such hotel. Hence the service provider is charging CGST and SGST in such cases. However there are situations where the service recipient is registered in some other state outside the state where such hotel is located and hence such recipient is not getting the credit of such tax paid.

Suggestion – It is suggested that place of supply of services covered under Section 12 of IGST Act, 2017, should be specified to be the place of registration of the service recipient in case of registered persons and address on record in case of unregistered persons, and where no address is available for such unregistered recipients, then place of supply can be deemed to be location of service provider.

7. Refund in case of accumulated Credit where input tax credit amount is higher than tax liability.

Sec 54(3)(ii) of CGST Act provides that no refund of unutilised input tax credit shall be allowed in cases other than where the credit has accumulated on account of **rate of tax on inputs** being higher than the rate of tax on **output supplies** (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council.

Issue:

A manufacturer or a service provider may have accumulated credit balances for the reason that he is availing input services which attract at higher rate of GST (say, 18% or 28%) whereas the final product or output service attracts GST rate of 18% or 28%. However, this provision allows refund benefits only if the input is subject to higher rate of GST and not in case where the input service attracts higher rate of GST. If a strict interpretation is taken that refund would be allowed only if the GST rate of input is higher without considering the rate of input service, then the very object of the provision would stand defeated.

Suggestion

*It is suggested that*the word 'inputs' be replaced with the phrase 'inputs or input services'

Also, the word 'Output Supply' be replaced with the word 'Outward Supply'.

8. **<u>Filing of fresh refund application consequent upon issue of deficiency memo</u>**

Section 54(1) of the CGST Act, 2017 provides that any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, **<u>may make an application before the expiry of two years from the relevant date</u>** in such form and manner as may be prescribed.

Rule 90(3) of the CGST Rules, 2017 provides that where any deficiencies are noticed, the proper officer shall communicate the deficiencies to the applicant in **FORM GST RFD-03** through the common portal electronically, requiring him to file a **<u>fresh refund application</u>** after rectification of such deficiencies.

Issue: When a deficiency memo is issued and applicant is asked to file a fresh refund claim, two years of time limit from relevant date would be considered for fresh application though the original application was filed within the time limit mentioned in the section 54 of the act. Now, there may be a situation where original application for the refund was filed within the last week of the due date and a deficiency memo was issued against the same requiring filing of fresh application. This would invariably result in filing of fresh refund application after the due date. In such a scenario, there is a high probability that refund claim could be treated as time-barred application by the department.

Suggestion: *It is suggested that suitable amendment be made in the rules whereby same application should be moved forward once reply is submitted by the applicant rectifying the deficiency or alternatively, fresh application should be deemed to be filed within two years' time limit if original application has been filed within the said period.*

9. **GST payable under RCM**

Notification No. 07/2019 -CT(RATE) dated 29.03.2019 was issued specifying that the promoters are required to pay GST under Reverse Charge Mechanism (RCM) in respect of shortfall from the minimum threshold of 80% of value of goods or services or both required to be purchased for construction of project from registered suppliers.

For calculating this threshold, the value of services by way of grant of development rights, long term lease ofland, floor space index, or the value of electricity, high speeddiesel, motor spirit and natural gas used in construction of residential apartments in a project shall be excluded.

Issue: As per the above mentioned notification and the FAQ issued by the Government in this regard on 14th May 2019, Inward supplies of exempted goods / services shall be included in the value of supplies from unregistered persons while calculating 80% threshold. However there are expenditures like interest paid on loans which can also be classified as exempt supplies, and taking such supplies for calculation purposes would lead to payment of taxes on such exempt supplies which otherwise do

not attract any GST

Suggestion: Suitable clarification should be issued or notification to be amended to exclude exempt inward supplies for the purpose of computing the minimum 80% threshold.

10. Levy of IGST on Ocean Freight

Sl. No. 10 of N. No. 10/12017- Integrated tax (Rate) dated 28.06.2017 provides that an importer located in the taxable territory shall be liable to pay integrated tax under reverse charge in respect of 'services supplied by a person located in non- taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India. Rate thereof is provided in Sl. No. 9(ii) of N. No. 08/2017-Integrated Tax (Rate) dated 28.06.2017.

Issue: In case of import of goods on CIF (i.e. cost, insurance, freight) basis, the contract is for supply of goods delivered at the Indian port. The transportation of goods in a vessel is the obligation of the foreign exporter and he enters into contract with the shipping line for this purpose. The obligation to pay consideration is also of the foreign exporter.

The importer neither avail the services of transportation of goods in a vessel nor is he liable to pay the consideration for such service. Hence, the importer is not the 'recipient' of the transportation of goods in a vessel service as per Section 2(93) of the CGST Act.

The supply of service of transportation of goods by a person in a non-taxable territory to another person in a non-taxable territory from a place outside India upto the customs station of clearance in India, is neither an inter-state supply nor an intra-state supply. Thus, no tax can be levied and collected from the importer.

Suggestion:*In view of the judgement of the Hon'ble Gujarat High Court in the case of* ***MOHIT MINERALS PVT LTD [2020 (1) TMI 974] dated 23.01.2020*** *and of Hon'ble Calcutta High court in the case of MCPI PRIVATE LIMITED* ***2020 (3) TMI 725]dated 12.03.2020,*** declaring *Notification No.8/2017 – Integrated Tax (Rate) dated 28th June 2017 and the Entry 10 of the N/N.10/2017 – Integrated Tax (Rate) dated 28th June 2017 as ultra vires the IGST Act, 2017 as they lack legislative competency, levy of IGST on ocean freight should be abolished.*

11. Availment of input tax credit on Advance Payments

Issue: Section 12 of CGST Act, 2017 provides for payment of GST on advance payments received by the supplier of services. However, the availment of credits is restricted the time of receipt of services/invoice, which would be at a later date as mandated under Section 16(2)(b). This restriction causes operational difficulties to taxpayers on account of projects with a long gestation period involving advance payments.

Suggestion: The liability of making payment of GST on advances received for supply of services may be removed as in line with the payment of GST on advance received for supply of goods.

12. Payment of GST on collection basis for Not for Profit Associations, MSME enterprises and professionals

Issue: Under the GST regime, the liability to pay tax generally arises / determined at the date of issuance of invoice or receipt of payment whichever is earlier.

Since GST is required to be discharged after issuance of invoice, i.e. even before receipt of consideration in most of the cases, this results into blockage of working capital. Considering that the general rate of GST is 18%, it become a huge chunk of working capital, for not for profit Associations and MSMEs especially the professional services firms like Architects, Engineers, Chartered

Accountants, Company Secretaries, management consultants, etc. are facing this issue of working capital blockage. Under service tax regime also there was an option to pay service tax on receipt basis for small service providers.

Suggestion: It is suggested that the time of supply in case of "not for profit Associations" and taxpayers below a certain threshold of aggregate turnover be specified to be on receipt of consideration.

13. Valuation of land

As per Notification no. 11/2017-Central Tax (rate), the value of land has been prescribed to be 1/3rd of the total amount charged

Issue – The value of land may have huge variations from one place to the other. In certain areas of the metro cities, the value of land may run upto 80% of the total amount charged while in the smaller developing areas, it can be as low as 15% of the total amount charged. So, there can be a huge under or overvaluation of the amount to be charged as GST.

Suggestion – A reasonable basis to determine the value of land should be prescribed. Land values may be prescribed by state authorities on the basis of pin code, area etc. and the same can be considered as a reliable measure of the same.

14. Tax liability on TDR, FSI (additional FSI), long term lease (Notification No. 4/2019, 5/2019, 6/2019 of Central tax (Rate):

Issue - Applicability of tax payable under RCM by promoter on unbooked flats will indirectly lead to levy of tax on sale of such flats post issuance of completion certificate (C/C). **This in effect nullifies the fact that there is no GST on sale of flats post C/C (Schedule III activity).**

Moreover such tax on transfer of development right, if applicable earlier, was a credit to promoters, but now the same has become cost to the extent of unsold flats.

In case of an RREP, even if the rate of tax for commercial apartment would be at 5%, the promoter would have to pay tax on RCM basis to the extent of proportion of commercial area. This has a big cost implication for commercial apartments and effectively would mean double taxation on commercial apartment in an RREP.

Suggestion – GST payable by Developers under RCM pertaining to unsold flats should be removed

The GST exemption on supply of development rights be extended to the commercial apartments in RREP, since they have been treated at par with residential apartments.

15. GST on Leasehold units (Commercial)

Issue - In several cases, Developer constructs a commercial building on a leasehold land (say for 999 years) and transfers units to the buyers with leasehold right in land. As per Explanation (b) to para 2 of Notification no.11/2017 – Central Tax (Rate) dated 28th June 2017, 1/3rd of the total amount charged shall be available as deduction for transfer of such leasehold land before obtaining completion certificate.

Deduction of 1/3rd value from the total amount charged is available on supply of leasehold land involved in construction services before obtaining completion certificate, deeming it as a sale of land and effective rate is 12%. **When the constructed units on such leasehold land are transferred after Completion certificate, how can the same be taxable considering it as a leasing activity at full rate of 18%.**

Suggestion – Transfer of Constructed units on Leasehold land (on long term lease) after completion certificate is obtained where appropriate stamp duty is paid, should be included in Schedule II to CGST Act i.e. activities which are neither supply of goods nor supply of services.

Kindly consider the above suggestions and we shall be grateful for the same.

Yours faithfully,

For DIRECT TAXES PROFESSIONALS' ASSOCIATION

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President	**Chairman**	**Advisor**
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DTPA News Links

The DTPA News has been carried extensively in media. More than 25 newspapers (both English and Hindi), TV News websites and other websites across the nation. Some Links are here. We are thankful to all of them.

DTPA news items were also well covered by Sanmarg, Prabhat khabar, Rajasthan Patrika, Vishwamitra, Sahajsatta, Chhapte Chhapte, Yuva Shakti and other media. Our thanks & gratitude to all media

https://www.business-standard.com/article/economy-policy/direct-tax-practitioners-seek-extension-of-sebi-settlement-scheme-till-mar-120102601429_1.html

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www.business-standard.com › Economy & Policy › News

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Plea for extension of date for SEBI Settlement Scheme
taxguru.in › sebi › plea-extension-date-sebi-settlement-s...

SEBI extends SEBI Settlement Scheme 2020 till 31.12.2020
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Direct tax practitioners seek extension of Sebi settlement ...
littleposts.in › Economy

Direct Tax Practitioners Seek To Extend Sebi Settlement ...
www.thebharatexpressnews.com › Business

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www.latestly.com › Agency News

ITR Date Extension News

Extension of Tax Audit and ITR Due dates is a welcome Move
taxguru.in › income-tax › extension-tax-audit-itr-due-d...

Extend Tax Audit/TP Audit/ITR due date of AY 2020-21
taxguru.in › income-tax › extend-tax-audit-tp-audit-itr-...

Compliance Calendar for November, 2020

Statute	Due dates	Compliance Period	Return	Turnover
Income Tax Act, 1961	7th Nov 2020	Oct-20	TDS/TCS Deposit	
	14th Nov, 2020	Sept, 2020	Issue of TDS Certificate for tax deducted under Section 194-IA	
	14th Nov, 2020	Sept, 2020	Issue of TDS Certificate for tax deducted under Section 194-IB	
	15th Nov, 2020	October, 2020	Furnishing of Form 24G by an office of Government where TDS has been paid without production of a challan	
	15th Nov, 2020	Sept, 2020	Quarterly TDS certificate (in respect of tax deducted for payments other than salary) for the quarter ending	
	30th Nov 2020	FY 2018-19 (AY 2019-20)	Income Tax Return (Belated and Revised)	
	30th Nov, 2020	October, 2020	Furnishing of challan-cum-statement in respect of tax deducted u/s 194-IA	
	30th Nov, 2020	October, 2020	Furnishing of challan-cum-statement in respect of tax deducted u/s 194-IB	
GST	10th Nov 2020	Oct-20	GSTR-7	TDS
	10th Nov 2020	Oct-20	GSTR-8	TCS
	11th Nov 2020	Oct-20	GSTR-1	Above 1.5 Cr
	13th Nov 2020	Oct-20	GSTR-6	ISD
	20th Nov 2020	Oct-20	GSTR-3B	Above 5 Cr
	22th Nov 2020			Below 5 Cr (State-I)*
	24th Nov 2020			Below 5 Cr (State-II)**
	20th Nov 2020	Oct-20	GSTR-5	Non-Resident Foreign Taxpayers
	20th Nov 2020	Oct-20	GSTR-5A	Non-Resident OIDAR Service Provider
*State I includes Taxpayers whose principal place of business is in Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep				
**State II includes Taxpayers whose principal place of business is inHimachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha, the Union territories of Jammu and Kashmir, Ladakh, Chandigarh or Delhi				
Companies Act, 2013	Within 15 Days of AGM	Form ADT-1	Appointment of Statutory Auditor in AGM	
	Within 30 Days of AGM	Form No. AOC-4	Filing of Financial Statement with Roc Companies	
	Within 60 Days of AGM	Form No. MGT-7	Filing of Annual Return with ROC Companies	
	30th Nov 2020		Signing of LLP Statement of Accounts & Solvency for FY 19-20	
ESI, PF & Prof. Tax	10th Nov 2020	Oct-20	Professional Tax Payment	
	15th Nov 2020	Oct-20	PF Payment	
	15th Nov 2020	Oct-20	ESIC Payment	

DTPA "Representation Committee" has been formed to prepare and send representations to Government on various issues including Income Tax, Corporate Law, GST, SEBI, RBI matters.

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CS Mamta Binani, Co-Chairperson
CA Arun Agarwal, Co-Chairman
CA Barkha Agarwal, Convenor

Other Members :

CA Debasish Mitra
CA KP Khandelwal
CA Indu Chatrath
Adv RD Kakra
Adv Paras Kochar
CA Sunil Surana
CA Vikas Parakh
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