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THE CHAMBER'S JOURNAL

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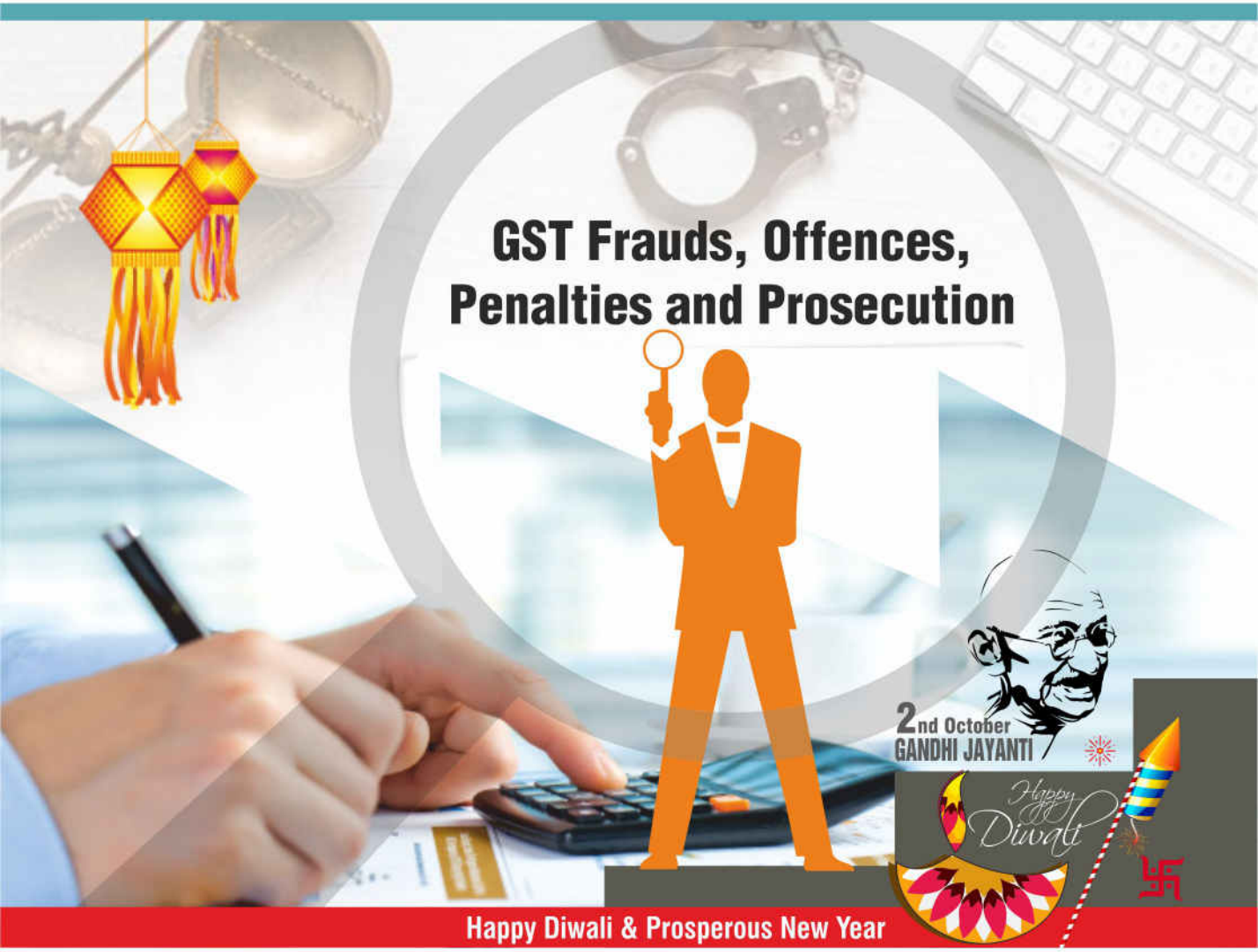
Your Monthly Companion on Tax & Allied Subjects



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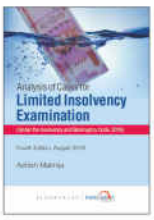

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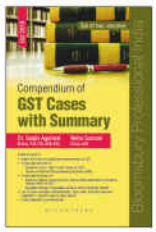

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Vol. **VIII** | No. **1** | **October** – 2019

Contents

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Editorial

GANDHI

No human being in the recent history of India, and probably of the modern world, has been so much admired, revered, venerated, respected, awed or spoken/discussed/written about than this person! His life has been analysed and dissected, sometime with brutal anatomic precision, by hundreds of scholars, thinkers, intellectuals, literary giants and historians, world over. With the annual ritual of onslaught in the form of articles and talks about Him on His birth anniversary falling on 2nd October – this year more so on account of 150th year – there is hardly that is left to be written in a forum like this, that too, in few paragraphs.

Though He is popularly known as a great freedom fighter and believer of truth & non-violence, He was much more. Real greatness of a person lies in his simplicity; that He was full of. Yet, for a common man, to understand his life is like unraveling many layers of a fruit, peeling one by one, spanning various stages of one's life and understanding. With each phase of life and enlightenment, one tends to discover and understand his life with a different angle and a different dimension, sometime changing the entire perception! Such is the multi-layered and multi- dimensional personality of this mystic! To really appreciate His personality and greatness, one needs to reach a certain level of knowledge and understanding. It's like an uncut diamond, a classic piece of art or music that can be really appreciated by very few who are truly knowledgeable to appreciate the greatness thereof. Otherwise, for the rest - the common mortals - the understanding ranges from pure awe to pure ridicule. It's like the classic parable of Blind men and an elephant, where each blind man, who has never come across an elephant, conceptualises the elephant based on his own limited and subjective perception by touching only a part of the elephant! Such was His personality that, being denied Nobel Prize for Peace that he so richly and rightly deserved, Secretary of Norwegian Nobel Committee had to remark, *"The greatest omission in our 106 – year history is undoubtedly that Mahatma Gandhi never received the Nobel Peace prize. Gandhi could do without the Nobel Peace prize, whether Nobel committee can do without Gandhi is the question."* The profound words coming from one of the greatest minds of the century, Albert Einstein, very aptly summarise greatness of this human phenomenon: "Generations to come will scarce believe that such a one as this ever in flesh and blood walked upon this earth!" It may not be surprising if the today's young generation reads his life story as a fairy tale!

This has also made Him, paradoxically, an easy target of ridicule and criticism as well, by few, and has made Him also one of the most misunderstood one! It has become quite easy – and fashionable - to criticize Him and blame Him for various events and failures – pre and post partition, many times out of sheer frustration. This is not to say that He had no faults. He had but had courage to openly

acknowledge. In fact, His weaknesses and faults only make Him a great human being, and not a saint or God.

In a way, one may find uncanny parallels of His life with that of Lord Krishna. Both were men of strong conviction, having unfaltering passion for a just cause. The battle they fought involved complex and difficult human interactions and art of persuasion & negotiation. Both accomplished their respective goal in very challenging circumstances and after long battle/struggle with heavy casualties ultimately. Post their accomplishment, both stood dejected, sad, hurt and dismayed by the behavior of their own people and, consequently, chose isolation path in the last years of their life. Life of both ended under sudden and tragic circumstances; both were killed by an ordinary person unknown to them. What is significant is that both were, ultimately, severely let down by the very people for whom they fought so hard. It is ironic that India, which presented Gandhi to the world, is the place where His name is most misused, and abused!

It is very easy to routinely take shield of the usual escape route: "Oh, in today's world, it is not possible – read 'practical' - to be Gandhi/Gandhian Values." The truth is, nothing can be further from the truth! People want change but do not want to change. If a person imbibes only few minimum basic traits of a good civilized and responsible citizen – which does not entail much sacrifice, pecuniary or otherwise, except a little change in habit/attitude/outlook as a citizen – it will be like paying tribute to the Father of our Nation. The moot question is, are people ready to do even this much bare minimum?

His one saying comes into mind: *"In a gentle way, you can shake the world!"*

Vipul B. Joshi
Editor

From the President

Dear Members,

On October 2, 2019 the Nation celebrated the 150th birth anniversary of the Father of the Nation- Mahatma Gandhi, the most admired and revered human being for over more than a century. He was the propagator of truth and non violence amongst nine other virtues which, according to him, an individual should possess. The true homage to this great individual on his 150th birth anniversary would be to live by the values he propagated.

Cleanliness was an issue very close to Mahatma Gandhi's heart. He once said that cleanliness and sanitation are even more important than political independence! He also said that an ideal village is one where there is perfect sanitation. He led by example by personally cleaning toilets. Prime Minister Narendra Modi very thoughtfully initiated the Swachh Bharat Abhiyan on 2nd October, 2014 with a resolve to make India open-defecation free by 2nd October, 2019. Admirably the mission has been achieved to a great extent, a true tribute to the father of the Nation ! Needless to say, a lot still needs to be done for Swachh Bharat to manifest itself to all.

2nd October was also the 115th Birth Anniversary of the second Prime Minister of India, Lal Bahadur Shastri, another great leader. He was a passionate follower of Gandhian principles and is still remembered for his famously coined slogan 'Jai Jawan, Jai Kisan'. It is unfortunate that his tenure as Prime Minister was short lived. I pay a respectful homage to both these iconic leaders.

While remembering the Mahatma and Shastriji, it is worthwhile to take note of the philanthropic initiative by the noted Billionaire, Azim Premji. He and the promoter group of Wipro Ltd, have sold stock worth over a billion Dollars (₹ 7,800 crore) of which, the bulk will go to his foundation which is one of the five largest foundations in the world and, the biggest in Asia. Azim Premji has demonstrated the traits of a true Mahatma of Modern Era ! I wish that many more billionaires of India emulate Azim Premji. Most of Azim Premji's philanthropic initiatives are for educational purposes, where intervention is most needed, particularly when we see that none of the Indian Universities figure in the top 300 global rankings.

The Finance Minister, Nirmala Sitharaman has come out with a series of measures to give the much-needed impetus to the economy, the major initiative being slashing of corporate tax rates to 22% for companies in general, and 15% for corporates setting up new manufacturing facilities. This is intended to attract more people to come and produce in India and sell the the produce within and outside India, to give a filip to business in India. It's a highly debatable point whether this measure will really give the desired push to the economy. Just a fortnight after the slashing of the corporate taxes, the RBI has in its monetary policy, slashed the repo rate by 25 basis points, bringing the total rate cut since February to 135 basis points. Overall demand continues to be low and therefore, the impact of the newly announced policy measures on the economic performance is anybody's guess. The Government will probably, have to do something really drastic to give the expected push to the economy.

While the overall economy is not doing very well, there is something to cheer about ! India has jumped up 18 places on world tourism index in four years. It now ranks 34 on the World Tourism Index and, the share of travel and tourism industry to India's GDP is 3.6%. With the Government working on this segment also, hopefully there will be more contribution to GDP from Tourism Industry in times to come.

REPRESENTATIONS

1. The Law and Representation Committee made representations for extension of due date of 30th September, 2019 for filing of Tax Audit Reports and thanks to this representation that the much needed extension for filing of tax audits and tax returns has been granted by the CBDT till 31st October, 2019.

2. Due to the difficulty faced by the assesses as well as professionals, representation was also made for necessary changes in ITR 6.

3. A very detailed representation was also made on Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019.

Though the extension for filing of tax audit reports and tax returns is granted till 31st October, professionals should strive to complete their work by 24th October to enjoy the festival of Diwali with family and friends.

EVENTS

The month of September witnessed very good seminars, panel discussions, study circle meetings, webinars etc. The Indirect Tax Committee is always at the forefront in organising programmes in a timely manner. The Finance Minister in her maiden budget in July' 2019 had announced 'Sabka Vishwas' (Legacy Dispute Resolution) Scheme, 2019. No sooner were the rules notified, the

Indirect Tax Committee oragnised a panel discussion, where eminent professionals analysed the scheme threadbare. The panel discussion met with an overwhelming response. For the benefit of the members, the Committee has also brought out a publication on the scheme in a short period of time, thanks to the untiring efforts of CA Abhay Desai and CA Naresh Sheth.

The seminar on Charitable Trusts, jointly with the Bombay Chartered Accountants' Society, also met with such a good response that registrations for the the same had to be closed. Experts on Charitable Trusts were the faculty thereat.

For the benefit of the Student members, Student Committee organised half day workshop on Tax Audit.

For the benefit of outstation members, the Membership and Public Relations Committee organised a seminar on FEMA and recent changes in the the various audit reports, at Nashik.

The Delhi Chapter successfully organised a full day seminar on Mergers and Acquisitions where the experts on the subject addressed the participants.

One of the highlights of this month was the workshop on "Speed Reading" under the Self-Awareness Series, by CA Srinivas Vakati. The workshop was attended, amongst others, by senior professionals and was very well received.

The Direct Tax, Indirect Tax, International Tax, Pune and Bengaluru Study Circles of the Chamber are very active and vibrant. They are the backbone of the educational activities of the Chamber. As many as nine Study Circle/Study Group meetings were arranged during the month of August.

Webinars are the order of the day considering the logistic reasons and time constraints to the professionals Four webinars were organised during the month of which three were by the Accounting and Auditing Committee on very important topics.

One of the most sought after event of the Chamber, 43rd Residential Refresher Course is being held at Coimbatore from 27th February to 1st March, 2020. Detailed announcement is given in the Newsletter as well as on the Chamber's website.

This issue of the Journal is on very important subject of GST Frauds, Offences, Penalties and Prosecution. I compliment and thank everyone involved in designing the issue and thank all the eminent authors for their valuable contribution.

Wishing you and your family a Very Happy Diwali and a Prosperous New Year Vikram Samvat 2076 !

Before I conclude a food for your thought, a Sanskrit Subhashitam.

"विद्या विवादाय धनं मदाय

शक्तिः परेषां परिपीडनाय ।

खलस्य साधोर्विपरीतमेतत्

ज्ञानाय दानाय च रक्षणाय ।।"

To attain knowledge for wrongful arguments, acquire wealth to become arrogant, gain power to persecute others, this is what wicked do. But for those virtuous, knowledge is for knowing the truth, wealth is for charity and power is for protection of weak.

We are here to serve you better. Therefore, I would be too happy to receive any suggestions that you have at president@ctconline.org.

VIPUL K. CHOKSI
President

Offences and Penalties under GST

Gajendra Jain, *Advocate* & CA Raj Khona

Introduction

Goods and Services Tax ("GST") is conceived as a technology driven tax regime to ensure minimum revenue leakages, widened tax base and maximum compliance. To achieve these objectives, the GST law *inter alia* contains provisions related to matching of invoices, generation of electronic way bills for movement of goods and stringent penalty provisions for not complying with the law. "Penalty" and "fine" are terms which always produce fear in the mind of taxpayers. Therefore, they have been used as a governance tool from times immemorial to punish the offenders and prevent others from committing similar frauds. In addition to the penalty provisions, GST law has extremely stringent prosecution provisions.

This article would deal with Chapter XIX of the CGST Act, 2017 (except Sections 129, 130 and 138) which contain provisions relating to penalties & prosecutions proceedings for the offences committed under GST law. The penalty and prosecution provisions under GST law are in line with the subsumed Central laws and VAT laws of various States.

General principles

There are three stages in imposition of tax: (1) declaration of liability; (2) assessment of tax; & (3) methods of recovery where person taxed does not voluntarily pay. Refer: *Kalwa Dewdattam – AIR 1964 SC 880.* All provisions in taxing statute fall in either of three broad stages. The provisions relating to offences and penalty fall in third stage of imposition of tax.

Power to enact provisions to impose tax inheres within it power to enact provisions to check evasion/pilferage of tax. Refer: *State of Rajasthan vs. DP Metals – 2001 (124) STC 611 (SC).* The power to impose penalty, seize & confiscate goods, etc. are intended to operate as deterrent against tax evaders and are therefore ancillary or incidental to the power to impose tax. It may so happen that provisions enacted to check evasion of tax may penalize a person for doing some act (like failure to give information) although he is not directly liable for the tax evaded. Such provisions have been held to be valid. Refer: *Swastik Roadways – 2004 (135) STC 1 (SC).*

Tax and penalty, like tax and interest, are different and distinct concepts in taxing statute. Hence, a penalty provision has to be specifically provided and cannot be inferred.

It is established principle of criminal law that for levy of punishment there should be an element of *mens rea* i.e., presence of guilty mind. However, whether the element of *mens rea* is required in the case of civil proceedings has always been subject of dispute. Considering the language of

Section 11AC of Central Excise Act, 1944, the Full Bench of the Supreme Court in *Dharmendra Textile Processors – 2008 (231) ELT 3 (SC)* held there is no need to examine *mens rea* for breach of a civil obligation and that there is no discretion available on quantum of penalty. However, the Supreme Court in *Sanjiv Fabrics – 2010 (258) ELT 465 (SC)* highlighted on the importance of *mens rea* for levy of penalty under the taxation statute and observed that, "there is a rebuttable presumption that *mens rea* is essential ingredient in every offence. For examining whether *mens rea* is essential for an offence created under a tax Statute, three factors require particular attention, (i) the object and scheme of the Statute; (ii) the language of the section; and (iii) the nature of penalty."

In classic case of *Hindustan Steel Ltd. – AIR 1970 SC 253*, the apex court held that penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty, where there is a technical or venial breach of the provisions of the Act or where the breach flows from *bona fide* belief that the offender is not liable to act in the manner prescribed in the statute.

It is settled law that the burden to prove deliberate nature in evasion of tax lies on Revenue and that no penalty can be imposed unless this burden is discharged.

Lastly, it is established principle of law that penalty provisions must be strictly construed and interpreted as it stands and, in case of a doubt, its benefit must be given to taxpayer. Refer: *Vegetable Products – 1973 (88) ITR 192 (SC).*

Analysis of the legal provisions

Since scope of this article is wide, we are not reproducing the provisions. We would provide brief overview of relevant sections.

Section 122. Penalty for certain offences

- Broadly, this Section provides for 21 different offences which if committed by a taxable person will attract penalty in addition to tax and applicable interest. This Section is by far the most important provision as far as penalty is concerned. In fact, each one of the 21 specified offences is fit to deserve an article.

- The procedure for adjudicating the imposition of penalty is provided under Section 73 and Section 74, although not expressly stated in the Section.

- Section 122(1) provides for imposition of penalty on 21 different kinds of offences which can be committed by a *taxable person* in respect of non-compliance of some of important provisions of the GST like supplying goods without invoice, issuing invoice without goods, collecting tax and not depositing, registration compliance, return filing, refund, maintenance of books of account and returns.

- The term "taxable person" is defined under Section 2(107) of the CGST Act to mean a person who is registered or liable to be registered under Section 22 or Section 24 of the CGST Act. This means that proceedings under Section 122(1) can be initiated even against unregistered person who ought to have obtained registration under GST.

- The amount of penalty prescribed for offences provided under sub-section (1) of Section 122 is equivalent to tax or ₹ 10,000/- whichever is higher in cases where - tax is evaded; tax is not deducted; or short deducted or deducted but not paid to the Government; or tax is not collected (or short collected) or collected but not paid to the Government or input tax credit

availed of or passed on or distributed irregularly or fraudulent claim of refund.

- For most of the offences specified under Section 122(1), prosecution under Section 132 may also be initiated. To avoid repetition, detailed analysis of Section 122(1) is done along with Section 132 which relates to prosecution proceedings.

- Section 122(2) provides for imposition of penalty on a registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised. The amount of penalty is prescribed as follows:

Offence	**Penalty amount**
For reasons other than fraud or any will=ful misstatement or suppression of facts to evade tax	₹ 10,000/- or 10% of the tax due, whichever is higher
Offences involving fraud or any willful misstatement or suppression of facts to evade tax	₹ 10,000/- or tax due, whichever is higher

- Here, it should be noted that Section 122(2) applies only to a registered person which is defined under Section 2(94) to mean a person who is registered under section 25. Now, Section 25(8) read with Rule 16(2) of the CGST Rules, 2017 empowers the proper officer to compulsorily register a person who has failed to obtain registration on *suo motu* basis. So, it is possible that for taking action against such unregistered person under Section 122(2), the department adopts this route of *suo motu* registration and thereafter impose penalty.

- Section 122(3) provides for penalty up to ₹ 25,000/- on any person who:

  a) Aids or abets any of the offences specified under section 122(1) above. Aiding or abetting normally means collusion with another person or to encourage or assist another person to commit an offence. The offences specified under sub-section (1) would require assistance, collusion or connivance and therefore may get covered under Section 122(3) as well.

  b) Acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder.

  c) Receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reason to believe are in contravention of any provisions of this Act or the rules made thereunder.

  d) Fails to appear before the tax officer, when issued with a summon for appearance to give evidence or produce a document in an inquiry.

  e) Fails to issue invoice in accordance with the provisions of this Act or rules made thereunder, or fails to account for an invoice in his books of account

- Now, here it shall be interesting to note that penalty under sub-section (3) of Section 122 can be levied on any person irrespective whether he is registered or not.
- Also, in case of offence specified in points (a) to (c) above, prosecution in terms of Section 132(1)(h), (i) & (l) may also be initiated.

Section 132. Punishment for certain offences

- This Section provides for initiation of prosecution proceedings against the offenders in case of 12 major offence primarily which leads to revenue leakages.
- The prosecution proceedings under this Section are in addition to the penalty imposed under Section 122. Section 132 also prescribes the period of imprisonment and fine which varies depending on the amount of tax evaded or seriousness of the offence.

Offences related to	***Nature of offence specified under Section 122(1) for Penalty***	***Nature of offence specified under Section 132 for Prosecution***	***Imprisonment period with fine***
Issuance of Invoice	Supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply	Supplies any goods or services or both without issue of any invoice ***with the intention to evade tax***	If tax evaded or erroneous refund or wrong ITC availed or utilised is - • More than ₹ 5 crore - up to 5 years imprisonment and fine • Between ₹ 2 crore and ₹ 5 crore – up to 3 years imprisonment and fine • Between ₹ 1 crore and ₹ 2 crore – up to 1 year imprisonment and fine
	Issues any invoice or bill without supply of goods or services or both	Issues any invoice or bill without supply of goods or services ***leading to wrongful availment/utilization of input tax credit or refund of tax***	
	Issues any invoice or document by using the GSTIN of another registered person	Not covered	–
Payment of tax	Collects tax but fails to pay to the Government beyond a period of three months	Same	Same as above

Offences related to	*Nature of offence specified under Section 122(1) for Penalty*	*Nature of offence specified under Section 132 for Prosecution*	*Imprisonment period with fine*
	Collects any tax in contravention of the provisions of this Act but fails to pay to the Government beyond a period of three months	Same	Same as above
	Suppresses his turnover leading to evasion of tax under this Act	Same	Same as above
Tax collection or deduction	Non-deduction or lower deduction of tax deducted at source or not depositing tax deducted at source under section 51	Not covered	–
	Non-collection or lower collection of or non -payment of tax collectible at source under section 52	Not covered	–
Input tax credit	Takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder	**Avails input tax credit based on invoice or bill issued without supply of goods or services or fraudulently avails input tax credit**	Same as above
	Takes or distributes input tax credit in contravention of section 20 read with corresponding rules	Not covered	–
Refund	Fraudulently obtains refund	Same	Same as above
Registration	Fails to obtain registration	Not covered	–

Offences related to	*Nature of offence specified under Section 122(1) for Penalty*	*Nature of offence specified under Section 132 for Prosecution*	*Imprisonment period with fine*
	Furnishes any false information with regard to registration particulars, either at the time of applying for registration or later on	Not covered	–
Maintenance of books of account, records and documents	Falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act	Same	6 months or with fine or both
	Fails to keep, maintain or retain books of account and other documents	Not covered	–
	Fails to furnish information or documents called for by an officer in accordance with the provisions of this Act/ Rules or furnishes false information or documents during any proceedings	Fails to supply any information which he is required to supply under this Act/Rules or ***(unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true)*** supplies false information	
	Transports any taxable goods without prescribed documents	Not covered	-
Other offences	Obstructs or prevents any officer in discharge of his duties	Same	6 months or with fine or both
	Disposes off or tampers with any goods that have been detained, seized, or attached	Not covered	-

Offences related to	*Nature of offence specified under Section 122(1) for Penalty*	*Nature of offence specified under Section 132 for Prosecution*	*Imprisonment period with fine*
	Supplies, transports or stores any goods which he has reasons to believe are liable to confiscation	Not covered	-
	Tampers with, or destroys any material evidence or document	Same	6 months or with fine or both

- Sub-section (2) of Section 132 provides that where any person convicted of an offence under this Section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.
- Sub-section (5) of Section 132 provides that the following offences are cognizable and non-bailable offences under GST, if amount of tax evaded, amount of input tax credit availed, or amount of refund taken is more than ₹ 5 Crore –
  - Supply of goods or services or both without issuance of bill
  - Issuance of bill or invoice without supply of goods or services
  - Avail wrong input tax credit on bills without supply
  - Tax collected but not deposited to the Government.

  This means that all other offences specified under Section 132 are non-cognizable and bailable.
- Prosecutions for offences under GST do not depend upon the completion of assessment and therefore, the argument that there cannot be an arrest before adjudication or assessment, does not appeal to us. Refer: *VS Ferrous Enterprises - 2019 (6) TMI 102* – Telangana & Andhra Pradesh High Court. Similar ratio in *Bharat Raj Punj – 2019 (24) GSTL 321 (Raj.).*
- In many reported decisions involving cases like fake invoices for availing ITC, issuing invoices without corresponding movement of goods, etc., the Courts have been reluctant in granting bail. Though, in some cases, courts have granted anticipatory bail on stringent conditions. The Bombay High Court in *Meghraj Moolchand Burad – 2019 (21) GSTL 125 (Bom.)* refused to grant anticipatory bail in case allegedly involving wrongful utilisation of credit. However, the Supreme Court in *2019 (24) GSTL J82 (SC)* overturned this judgement and granted conditional bail.
- Currently, industry is engaged in practice which is known by different names like Bill trading, accommodation bills, bogus purchases, line sales, bilti sales, round tripping, etc. deserves a separate article and discussion in itself.
- Further, sub-section (6) of Section 132 further provides that every prosecution

proceeding initiated under this Section shall require prior sanction of the Commissioner.

Section 123. Penalty for failure to furnish information return

- Section 150 specifies certain categories of person who shall be required to furnish 'information return' which is expected that this would be used by the Government/s for exchange of information and data analysis.
- Section 123 provides that if the person who is required to file an 'information return' as prescribed under Section 150 has not filed the return within the stipulated period provided thereof i.e., within 30 days or such further period from the date of issue of show cause notice, a penalty of ₹ 100/- per day shall be levied for each day for which the failure continues but not exceeding five thousand rupees.

Section 124. Fine for failure to furnish statistics

- In terms of Section 151 of the CGST Act, the Commissioner may, if he considers that it is necessary so to do, by notification, call upon the concerned persons to furnish such information or returns, in such form and manner as may be prescribed, relating to any matter in respect of which statistics is to be collected.
- Section 124 provides that where information or return is called for under section 151 and the assessee fails to furnish such information or return without reasonable cause or wilfully furnishes false information, penalty up to ₹ 10,000/- may be imposed and where the offence is continuing in nature, a further fine of up to ₹ 100/- for each day after the first day during which the offence continues subject to a maximum limit of ₹ 25,000/-.

Section 125. General penalty

- Section 125 is a general residuary penalty provision for cases where no separate penalty is prescribed under the Act or rules.
- As per this Section, a penalty up to ₹ 25,000/- can be imposed where any person contravenes any of the provisions of the Act or rules made thereunder for which no specific penalty is prescribed.
- This would ensure that an offence does not get let off without penal consequences in absence of a specific penalty provision.

Section 126. General disciplines related to penalty

- This section lays down certain guiding principles to ensure penalty proceedings are not initiated on the taxpayers based on whims and fancies of the tax administration.
- Sub-section (1) to (5) of section 126 specifies the general disciplines to be followed while imposing penalty which are listed below.
  - No penalty is to be imposed for any minor breach (where amount of tax involved is less than ₹ 5,000/-) of provision of law and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.
  - When penalty is still liable to be imposed, it shall be commensurate with the degree and severity of offence. Also, the facts and circumstances of the case should

be taken into consideration while imposing penalty. In other words, the law mandates the taxman to taken note of the "Doctrine of Proportionality" and the constitutional right of equality enshrined in Article 14 of the Constitution while imposing penalty.

- Taxman shall follow the principles of natural justice while imposing penalty. In other words, due legal process shall be followed like issuance of Show Cause Notice, allowing proper hearing in the matter and giving opportunity of being heard to the assessee against whom allegations are levelled.

- The officer should pass a speaking order clearly specifying the nature of the breach and explaining the provision of law under which breach is committed.

- Voluntary disclosure by a person to an officer about the circumstances of the breach prior to the discovery of the breach by the officer may be considered as a mitigating factor for quantifying of penalty.

- Based on the above analysis, it appears that Section 126 has an overriding effect on Section 122 and requires to be followed in all penalty cases.

- Further, sub-section (6) states the provisions of Section 126 shall not apply in cases involving fixed sum or fixed percentage of penalty. The author feels that the section 126 is ambiguous and sub-section (6) makes the entire section redundant because the penalty amount prescribed the CGST Act are either a fixed sum or fixed percentage of tax or value involved.

Section 127. Power to impose penalty in certain cases

- As per Section 127, proper officer may impose penalty even in cases where there are no proceedings pending under any of the provisions of Sections 62, 63, 64, 73, 74, 129 or 130.

- The proper officer may issue a penalty order after giving opportunity of being heard to such person.

- This is an empowering Section which grants power to the officer to initiate separate penalty proceedings even when no proceedings are open about assessment, adjudication, detention or confiscation. This implies that for initiating penalty proceedings, existence of any assessment proceeding is not a pre-requisite.

Section 128. Power to waive penalty or fee or both

- This Section empowers the Government by way of a notification to waive full or part penalty leviable under Section 122 or Section 123 or Section 125 or late fee payable under Section 47 for certain class of taxpayers or under certain circumstances.

- Till now, there are numerous notification issued waiving off or reducing late fees payable under Section 47 for delayed filing of FORM GSTR 3B, GSTR-1, GSTR-5, GSTR-5A, and GSTR-6.

Section 131. Confiscation or penalty not to interfere with other punishments

- This section provides that in addition to confiscation of goods or penalty already imposed, all/any other proceedings may also be initiated or continued under the GST law or any other law, as applicable.

- The other proceedings referred here may include prosecution, arrest, cancellation of registration etc.

Section 133. Liability of officers and certain other persons

- Section 133 mandates the GST officers and agents who have access to the GSTN portal to maintain secrecy and ensure security of the statistical data and information collected by the Government from the assessee through information return under Section 150(1) or statistical data under Section 151 or GST returns furnished under Section 37 to 39 of the CGST Act.
- If the officer wilfully discloses such information, data or contents by any reason other than by reason of his duties cast upon him under the Act, he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ₹ 25,000 or both.
- Further any prosecution under this section would be carried out with the prior sanction of the Government in case of prosecution of a Government Servant and with the sanction of Commissioner in case of others.

Section 134. Cognizance of offences

- This section sets out the manner of taking cognizance of offences.
- Any offence under the Act or Rules can be tried only before a Court not lower than the Court of Judicial Magistrate of First Class. Further, mandatory prior sanction of the Commissioner shall be obtained for initiating any such case.

Section 136. Relevancy of statements under certain circumstances

- Section 70 of the CGST Act grants power to the officer to summon any person to give a deposition, provide evidence and produce documents during an inquiry or an investigation under this Act.
- Section 136 grants sanctity to the statement signed, documents and evidence recorded by such person during the inquiry and investigation proceedings when the matter is being heard in the court of law and that person is a witness for the matter.
- The Section provides that deposition or statement recorded during an investigation proceedings or inquiry will be relevant to prove the truthfulness of facts when the person who gave it is absent during the Court hearing on account of his death, incapacity, prevention by another party or when he absconds or when presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.
- In other words, this Section grants power to the court to admit the signed deposition of the witness as a factual evidence when the witness is absent.

Section 137. Offences by companies

- A company is an artificial juridical person with separate legal existence distinct from its members. The liability of the members in a company is limited to the share capital held by them. So, whenever an offence is committed in the name of the company, the management of that company used to argue that they should not be convicted in a personal capacity since the company has its independent legal existence.

- Section 137 has provided a wider definition of the term company to include within its scope a firm or an association of persons.
- It has made the company as well as the management of the company jointly and severally liable for the offences committed in the name of the company.
- The section provides that where an offence is committed by companies, every person/ director/manager/secretary or any other officer who at the time of commitment of the offence, was in charge of and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of such offence and shall be liable to proceeded against and punished accordingly.
- The section goes further to state that even if the offences are committed by persons being Partnership Firm, Limited Liability Partnership, Hindu Undivided Family or trusts, then the partner or *Karta* or Managing Trustee (as the case may be) shall be deemed to be guilty and liable to be proceeded against and punished.
- Further, if the person accused i.e. the director, secretary, partner, *Karta* etc. proves and establishes that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, then such person shall not punishable under this section.

Section 138. Compounding of offences

- Section 138 deals with the provisions of one-time compounding of specified offences under GST. The procedure to be followed for compounding of offences is prescribed under Rule 162 of the CGST Rules, 2017.
- The term "compounding" has not to be defined specifically under CGST Act or Rules. However, in general Compounding means payment of monetary compensation/fine, instead of suffering prosecution for an offence committed, which warrants such prosecution. In nut-shell, Compounding is simply a compromise or monetary settlement between the offender and the department to not prosecute or arrest the offender.
- The section has provided a list of offences which are stated below under which compounding shall not be permissible.
  - A person who has been permitted to compound offences once in respect of offences specified in clauses (a) to (f) of section 132(1) and offences specified in clause (l) which are relatable to offences specified in (a) to (f).
  - A person who has compounded once in respect of supplies of value exceeding ₹ 1 crore.
  - A person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force.
  - A person who has been convicted for an offence under GST law by a court.
  - A person who has been accused of committing an offence in section 132(1)(g) or 132(1)(j) or 132(1)(k).
  - Any other class of persons or offences as may be prescribed.

- The section 138(2) provides that amount of compounding of offences under this section shall be prescribed through rules or notification but it has provided an inner and outer limit for the same. The section states that prescribed amount of compounding shall be subject to -
  - The minimum amount not being less than ₹ 10,000 or 50% of tax whichever is higher, and
  - The maximum amount not being less than ₹ 30,000 or 150% of tax whichever is higher.
- On payment of the compounding amount, the criminal proceedings initiated by the commissioner, if any, will abate and no further proceedings can be launched.

Procedure for compounding of offences

- Application for compounding of an offence can be either before or after institution of the prosecution proceedings. As per Rule 162 of the GST Law, the application of compounding shall be filed in FORM GST-CPD-01.
- On receipt of the application, the Commissioner shall call for a report from the concerned officer with reference to the particulars furnished in the application or any other relevant information for the examination of such application.
- After providing opportunity of being heard to the applicant and taking into account the contents of the application, if satisfied that the applicant has co-operated in the proceedings before him and has made full and true disclosure of facts relating to the case, Commissioner may by order in FORM GST-CPD-02 allow the application indicating the compounding amount and grant him immunity from prosecution or reject such application within 90 days of the receipt of the application stating the grounds of rejection.
- However, the application shall not be allowed unless the tax, interest and penalty liable to be paid, has been paid in case for which the application has been made.
- The applicant, within a period of 30 days from the date of receipt of order allowing compounding, shall pay the compounding amount as ordered by the Commissioner and shall furnish the proof of such payment to him. However, if the applicant fails to pay the compounding amount within the time specified then the order of Commissioner shall be vitiated and be void.
- Immunity granted to the applicant may, at any time, be withdrawn by the Commissioner, if he is satisfied that such person had, during the compounding proceedings, concealed any material particulars or had given false evidence. Thereupon such person may be tried for the offence with respect to which immunity was granted or for any other offence that appears to have been committed by him in connection with the compounding proceedings and the provisions of the Act shall apply as if no such immunity had been granted.

Conclusion

To conclude, the authorities should use these provisions judiciously especially during initial years since there is lot of ambiguity and uninformedness.

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Concept of '*Mens Rea*' - Applicability in Penalties & Offences under GST

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Introduction

Like any other taxation law, the GST Law also provides for imposition of penalty and order of punishment for committing offences. The penalty is levied by *quasi-judicial* authorities and punishment in the form of imprisonment is ordered by the courts. The debate as to whether presence of *mens rea* is essential for imposition of penalty or for ordering punishment is as old as the taxation law itself. In this article, we are analysing GST Law provisions and the judicial pronouncements on this subject delivered in the context of similar provisions in other laws. Our analysis would be in two parts. First will cover applicability of *mens rea* for imposition of penalty and subsequent part will include its applicability in prosecution cases under the GST law. We will also be exploring concept of Reverse Onus provided under Section 135 of CGST Act.

***Mens rea* and Penalty**

A fundamental principle of common law is that an act alone does not amount to a wrong and must be accompanied by a 'guilty mind'. The Latin maxim *actus non facit reum nisi mens sit rea* means that an act is not wrongful unless accompanied by a wrongful state of mind. Hence, under common law, the general test of guilt requires both, '*mens rea* (literally translated as guilty mind) as well as '*actus reus*' (wrongful act). The Supreme Court has held that *"mens rea is a state of mind. Under criminal law, mens rea is considered as the 'guilty intention' and unless it is found that the accused had the guilty intention to commit the crime, he cannot be guilty of committing the crime*[1]*."*

It is a common understanding that penalty is levied if the violation is intentional. This was the classical view which was adopted by the Hon'ble Supreme Court Way back in 1969, even in the context of taxation law. In *Hindustan Steel Ltd. vs. State of Orissa*[2]*,* the SC held that the liability to pay penalty under the Orissa Sales Tax Act, 1947, does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party either acted deliberately in defiance of the law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. The Court went on to say that even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty if the breach flows from a *bona fide* belief The Court also pointed out that penalty will not also be imposed merely because it is lawful to do so.

1. *Director of Enforcement vs. M.C.T.M. Corpn. Pvt. Ltd.* [AIR 1996 SC 1100]
2. [(1969) 2 SCC 627 = 1978 (2) E.L.T. (J159) (S.C.)]

However, subsequently, in the context of taxation laws, the courts have pronounced a legal dictum of 'strict liability' which means that a statute can provide for levy of penalty regardless of any wrong intention of the accused. In case of *R.S. Joshi vs. Ajit Mills Ltd.*[3], it was held that, *"The classical view that no mens rea, no crime, has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea."*

In another case, it was held that though this is a general principle of penal liability, it is a settled principle of law that a statute may expressly or by necessary implication, create an offence which can be established regardless of the state of mind of the accused[4].

Wherever the law itself provides for existence of *mens rea*, it is onerous responsibility to prove the intentional act by the Department proposing to impose penalty. In *Union of India vs. Rajasthan Spinning and Weaving Mills*[5], the Supreme Court held that penalty under Section 11AC is a punishment for the act of deliberate deception by the assessee with intent to evade duty. Therefore, the Court held that unless there was a conscious and deliberate wrongdoing, the provisions of Section 11AC would not get attracted.

There could be situations where the provisions of the law are ambiguous about the presence of *mens rea* in a penal provision. The Hon'ble Supreme Court in the case of *Commissioner of Sales Tax, U.P. vs. Sanjiv Fabrics*[6], was concerned with a question whether the requirement of mens rea is an essential ingredient for the levy of penalty under Section 10(b) read with Section 10A of the Central Sales Tax Act, 1956 or not. While dealing with such situation, where upon finding that the imposition of penalty under Section 10A was in lieu of prosecution, the Court held that in examining whether mens rea is an essential element of the offence created under a taxing statute, regard must be had to (i) the object and scheme of the statute, (ii) the language of the Section, and (iii) the nature of penalty.

In case of *Bharjatiya Steel Industries vs. Commissioner Sales Tax, U.P.*,[7] the SC held that, *"An assessing authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary implication, the authority may not levy penalty. If it has the discretion not to levy penalty, existence of mens rea becomes a relevant factor."*

The aforementioned judicial analysis elucidate the following principles:

1. Under criminal jurisprudence, presence of *mens rea* is essential to punish a person.
2. In taxation and economic laws, legislature can make provisions to impose penalty without any requirement of *mens rea.*
3. Wherever the law provides for penal action for intentional acts like fraud or misstatements, it is essential to prove *mens rea* before imposition of penalty.
4. Where the law is vague regarding presence of *mens rea* for imposition of penalty, the factors enumerated in *Sanjay Fabrics (supra)* can be used.
5. If there is discretion to levy penalty absolutely or to vary the penalty amount, in such legal provisions *mens rea* is implied.

Requirement of proving *mens rea* for attracting penal provisions under GST Law

Under the GST law, the penal provisions have been enshrined in Sections 122 to 128 which provide for various situations. Section 122(1) enlists and prescribes penalty for 21 offences.

3. AIR 1977 SC 279
4. *Nathu Lal vs. State of Madhya Pradesh [AIR 1966 SC 43]*
5. [(2009) 13 SCC 448 = 2009 (238) E.L.T. 3 (S.C.)]
6. [(2010) 35 VST 1 = 2010 (258) E.L.T. 465 (S.C.)].
7. 2008 (11) SCC 617

Offences have been specified at a micro-level but there is no discretion as regards to the quantum of penalty which is set at ₹ 10,000/ or amount of tax evaded or input tax credit availed or distributed irregularly, whichever is higher. There is no discretion vested with respect to the quantum of penalty. Some of the illustration of the offences are supply of goods without issue of invoice or issue of invoice without supply of goods or failed to take registration. It is interesting to note that in some of the offences listed therein, there is no ingredient of *mens rea* like intention to evade tax. Such cases are like collection of tax amount but not paid to Government or failing to take registration or transporting goods without cover of document. In such cases whether requirement of proving the *mens rea* should be there or not would be a debatable issue in future. In our view, following the judgement of *Sanjiv Fabrics (supra)* it can be argued that since the quantum of penalty is stringent (equivalent to tax/ITC involved) and these offences have been listed along with other offences where presence of *mens rea* is necessary to impose such heavy penalties, therefore existence of *mens rea* maybe a relevant factor to impose the penalty.

In case of Section 122(2), a distinction between offences where there is a requirement of *mens rea* is evident. A higher quantum of penalty has been prescribed in cases involving fraud, wilful-misstatement or suppression of facts to evade tax. As per this provision any registered person who supplies any goods or services on which tax has not been paid or short paid or erroneously refunded or input tax credit has been wrongly availed or utilised is liable to a penalty of ₹ 10,000 or 10% of tax due whichever is higher. However, in cases which involving fraud, wilful-misstatement or suppression of fact, the penalty prescribed is ₹ 10,000 or 100% of tax due, whichever is higher. Hence, it is evident that in situations not warranting existence of *mens rea*, penalty of 10% of tax dues can be imposed without any requirement of proving the intention to defraud the revenue, as these cases would fall under the category of "strict liability".

Section 122(3) provides for other penalties which may extend up to ₹ 25,000/- in ancillary circumstances. The requirement of *mens rea* can be said to be embedded in such discretionary power in levy of penalty as held in the case of *Bharjatiya Steel Industries (supra).*

Section 126 provides general principles related to imposition of penalty. Sub-clause (1) of thereof states that no officer shall impose any penalty for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence. But, this provision has been further watered down by provisions of sub-section (6) thereof which exclude the application of Section 126 in cases where the penalty specified under the CGST Act is either a fixed sum or expressed as a fixed percentage. Effectively, Section 126 is applicable only where discretion has been bestowed upon the officer regarding the quantum of penalty. Thus, the provision is like a toothless tiger which does not even have the power to growl.

Onus to prove existence of *mens rea* for Penal Provisions

Even though provisions of the Indian Evidence Act, 1872 may not be directly applicable for quasi-judicial proceedings but the principles enshrined therein are used in the said proceedings. Therefore, if the tax department is proposing to impose penalty which require existence of culpable mind, in that case, unless contrary is provided in the law, it is the responsibility of the proposer to establish that the act of accused was with intention to evade payment of tax. Section 101 of the Indian Evidence Act provides for the same.

***Mens rea* and Prosecution**

Prosecution is the conducting of legal proceedings against someone in respect of a criminal charge which is generally punishable with imprisonment. Under the CGST Act, 2017, Section 132 lists twelve offences under the Act which are punishable by imprisonment and a fine. The term

of imprisonment under the provision, depends on the amount involved in the offence, and the nature offence committed by the offender. As the imprisonment is a serious punishment affecting life and liberty of a person, existence of *mens rea* is a must for the offences made liable to prosecution. However, there are following two acts for which there is no specific mention of existence of *mens rea*:

(i) collection of any amount as tax but failure to pay the same to the Government beyond a period of three months from the date on which such payment becomes due [clause (d)]

(ii) failure to supply any information which is required to be supplied under the law [clause (k)]

In a situation where a person had collected GST but could not deposit it with the Government for compelling reasons such as a natural calamity leading to destruction of business or sudden insolvency of his major customer leading to a liquidity crisis, should that person be imprisoned because the law does not require existence of *mens rea* for such an offence. Our view is that in view of judicial pronouncements like in case of *M.C.T.M. Corpn. Pvt. Ltd (supra),* in any criminal proceedings existence of guilty mind would be necessary and it may be defence of accused to prove his innocence to avoid charges of prosecution. Even the guiding factors enumerated in *Sanjiv Fabrics (supra)* namely the object and scheme of the statute, and the nature of penalty will be determinative factor will lead to conclusion that *mens rea* may be required to be proved to inflict imprisonment to a person in such cases.

Onus to prove existence of *mens rea* in Prosecution cases

"Innocent until proven guilty" is the cornerstone of fairness in criminal jurisprudence. A fundamental principle of criminal jurisprudence is that an accused is presumed to be innocent and the burden lies on the prosecution to prove both, *mens rea* and *actus reus*, of the accused beyond reasonable doubt. The Law Commission of India in its 180th Report, on Article 20(3) of the Constitution of India and the Right to silence (May, 2002) has recognised presumption of innocence as one of the factors of the right of the accused to be silent, a derivative of Article 20(3).

Presumption of Culpable mental state under GST Law for Prosecution

The responsibility to prove a fact or facts is called burden of proof. The rules regarding allocation of burden of proof are laid down in Chapter VII of Indian Evidence Act, 1872. Section 101 thereof provides that *"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which lie asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."* In short, for criminal cases the burden to prove wrong doing lie on the person, normally the State who has launched the prosecution to seek punishment against the accused.

It is interesting to observe that Section 135 of the CGST Act, 2017 makes a significant departure from general law by providing that in any prosecution for an offence under the GST law, which requires a culpable mental state on part of the accused, the court shall presume the existence of such mental state but the onus would be on the accused to prove otherwise. The same does not hold true for offences punishable under the Indian Penal Code where *mens rea* is an essential ingredient. In case of *Govind Enterprises vs. State of U.P.*[8], the Hon'ble Allahabad High Court made a specific remark that offences punishable under the Indian Penal Code are qualitatively different from offences punishable under the U.P. GST Act, 2017 with reference to the standard of proof.

'Reverse Onus' Principle upheld by Apex Court

Section 135 is a *"reverse onus''* clause. It is analogous to Section 278E of the Income-tax

8. 2019 (27) G.S.T.L. 161 (All.)

Act, 1961, Section 138A of the Customs Act, 1962 and Section 9C of the Central Excise Act, 1944 and various other State VAT Acts. Extract of the same is given below for reference:

Section 135. Presumption of culpable mental state *In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

Explanation. – For the purposes of this section, –

(i) the expression "culpable mental state" includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;

(ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Reverse onus clauses, such as contained in Section 135 of the CGST Act replace the principle "Innocent until proven guilty" with "guilty until proven innocent" with regards to *mens rea*. Such reverse onus clause provides that the court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had no such mental state. It dilutes the burden of proof on the prosecution to prove only the *actus reus* while *mens rea* is presumed unless rebutted.

The Supreme Court upheld the constitutionality of reverse onus clauses in case of *Noor Aga vs. State of Punjab*[9] in reference the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act"). It was held that while Sections 35 and 54 of the NDPS Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused. A bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. Initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Further, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question.

The Supreme Court in various later decisions clarified the scope of reverse onus clauses. In *Dharampal Singh vs. State of Punjab*[10] and *Bhola Singh vs. State of Punjab*[11] it was held that the prosecution must prove initial facts. The prosecution is not required to prove that the accused knowingly committed the offence. In case of *Dharampal*, 65 kg. of opium was recovered from the car owned and driven by the accused. The prosecution was not required to prove that the accused knew that the car had the contraband. The presumption applied as soon as the prosecution proved the material was contraband, and that it was in the car owned and driven by the accused. It was now on the accused to rebut this presumption.

The following observations are important in the context of Section 135 (*supra*):

- The presumption on culpable mental state is wide in its scope as it includes presumption as to intention, motive, knowledge, belief as well as reason to believe.
- The standard of proof required to rebut the presumption is much higher i.e. 'beyond reasonable doubt' and not 'preponderance of probability'.
- The presumption on culpable state of mind extends only to cases of prosecution

9. (2008) 16 SCC 417
10. [(2010) 9 SCC 608]
11. [(2011) 11 SCC 653]

for offences and not to adjudication proceedings.

- Only 'courts' can presume the existence of culpable mental state.

The expression 'proof beyond reasonable doubt' in criminal law requires the prosecution to establish guilt and secure conviction of the accused by proving the charge 'beyond reasonable doubt'. In *Ramakant Rai vs. Madan Rai & Ors.*[12] referring to the expression 'reasonable doubt' in criminal law it was held as under:

"24. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than the truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."

The Supreme Court had not accepted the contention that before the presumption as to culpable mental state is attracted, prosecution must establish basic ingredients of the offence for which charge has been framed. It was held that the legislature having found it difficult to establish the necessary ingredients of evasion of duty or prohibitions and the economic offences having grown in proportion beyond the control, came forward with the presumption under Section 138A of the Customs Act, 1962[13].

However, the courts have held that in order to rebut the presumption of existence of mental state under Section 138A of the Customs Act, there need not be direct evidence, and the rebuttal can be gathered from the circumstances in the case[14]. Accordingly, the Madras High Court accepted that the presumption under section 138A was rebutted in case of a person accused of smuggling gold concealed in handles of briefcases basis his statement and other circumstances of the case.

Conclusion

While there is no room for dispute in provisions where mens rea is a pre-requisite for imposing penalty, the controversy as to the requirement of mens rea for imposing penalty under provisions where there is no specific mention of presence of guilty mind, is likely to invite attention of courts for years to come. It would also be interesting to see whether the courts, while deciding cases of prosecution where mens rea is not a requirement in the statute, relax the said principle if the accused shows good reasons for non-compliance. In such cases, courts are more likely, in our view to follow the course taken under the erstwhile Central Excise and Service Tax regime, wherein principles from the law of evidence were borrowed from and applied to indirect tax disputes. In any case, striking the right balance between requirements of the law and the circumstances of an assessee has more often than not, been a challenge for courts. In this article we have analysed various judicial pronouncements on these very issues. Let us wait and see how the judiciary decides such cases in the context of GST.

12. (2003) 12 SCC 395
13. *Devchand Kalyan Tandel vs. State of Gujarat & Anr. [(1996) 6 SCC 255]*
14. *Assistant Collector of Customs Madras vs. A. Narayana Pillai [1994 (71) E.L.T. 673 (Mad.)]*

Prosecution and Arrest Provisions in GST

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Introduction

The entire scheme of indirect taxes underwent a transformation upon introduction of GST with effect from 1-7-2017 with lofty objectives of allowing seamless credit mechanism in GST and to provide for a common national market for goods and services. However, the GST law has left much to be desired in so far as the provisions relating to arrest is concerned. Below is an analysis of legal provisions in GST relating to arrest and prosecution in light of judicial precedents and the Criminal Procedure Code.

Meaning of 'bailable' and 'cognizable'

Offences which can be prosecuted in GST are housed in Section 132 of the CGST Act. It provides for about 12 different offences and categorises them either as "non-cognizable and bailable" or "cognizable and non-bailable". The word "bailable offence" is defined in Section 2(a) of the Code of Criminal Procedure ('CrPC') as an offence which is made bailable under any law for the time being in force. Bailable offences are offences where bail is available as a matter of right. It does not mean that a person arrested for a non-bailable offence cannot be enlarged on bail at all. A person arrested for a non-bailable offence can also be freed on bail by approaching a court of sessions or the High Court. This aspect is dealt with later.

The word "cognizable offence" is defined in Section 2(c) of CrPC as an offence where a police officer may arrest without warrant. On a perusal of Part II of First Schedule to the CrPC, it can be seen that, generally, a cognizable offence would be an offence which is punishable with imprisonment of not less than three years. In case of *State of Himachal Pradesh vs. M. P. Gupta 2003 AIR SCW 6887*, drawing from Black's Law Dictionary, it was held that 'cognizance' means 'jurisdiction' or the "exercise of jurisdiction" or "power to try and determine causes". In common parlance, it means "taking the notice of". In *Om Prakash vs. UOI (2011) 14 SCC* 1, it was held that since offences under Central Excise and customs are non-cognizable, Central Excise and Customs Officer cannot arrest a person without warrant from magistrate. This led to changes in the law.

Any criminal proceeding is initiated by Magistrate by taking 'cognizance' of a case under section 190 of the Code of Criminal Procedure ('CrPC'). As per section 155 of CrPC, a police officer cannot investigate a non-cognizable case without the order of a Magistrate. On the other hand, a police officer can investigate cognizable case without order of Magistrate, as per CrPC.

Offences which can be prosecuted

Accordingly, Section 132(4) specifies that "notwithstanding anything contained in the Code of Criminal Procedure" ('CrPC'), the following offences would be treated as cognizable and non-bailable if the amount involved is more than ₹ 5 crore:

- Invoice not issued with intention to evade

- Invoice issued of higher amount to get excessive ITC
- Availed excessive ITC by issuing fake invoices
- Tax collected but not paid within 3 months

However, the above offences would be treated as non-cognizable and bailable if the amount involved is between ₹ 3 crore and ₹ 5 Crore, along with a whole host of other offences specified in that section. The term of imprisonment for the offences mentioned in section 132 vary from 6 months to 5 years.

The said Section further mandates previous sanction of the commissioner for commencement of any prosecution. Judicial magistrate of first class is the court competent to take cognizance of any offence punishable under the Act.

The powers of arrest is lodged in section 69 of the CGST Act. Section 69 deals differently with offences which are cognizable and non-bailable and offences which are non-cognizable and non-bailable. They are explained below in seriatim with reference to provisions of CrPC, wherever applicable.

Arrest in cases of cognizable and non-bailable offences

Firstly, it may be noted that the powers to arrest is conferred to the Commissioner (who may in turn authorize any officer of central tax) and not a police officer. In case of *State of Punjab vs. Barkat Ram AIR 1962 SC 276*, in the context of Section 25 of the Evidence Act[1], it was held that the word "police officer" cannot include persons on whom certain police powers are conferred. A tax officer is not primarily concerned with the detection and punishment of crime committed by a person, but is mainly interested prevention of evasion and recovery of tax. A tax officer would not be interested in the offender itself but would only be interested in safeguarding the revenues of the State. Therefore, it was observed that in order to enable a tax officer to discharge his duties efficiently, he be invested with some powers, which may have similarity with those of police officers. Affirming the view, in *Badaku Joti Savant vs. State of Mysore AIR 1966 SC 1746*[2], while holding that the excise officer can make enquiry even after arrest and statements received by the officer would not be held inadmissible evidence u/s. 25 of the Customs Act. It was also held that unless the officers have powers to lodge a report under section 173 of CrPC (a report for closure of investigation), they would not be regarded as "police officers". It appears to the authors that this position will necessarily have to be reviewed by the Supreme Court as the latest trend is to harass assessees by arresting rather than recovery of tax after doing assessments. In fact, some of the said officers behave worse than police officers.

Secondly, power to arrest is given only in respect of cognizable and non-bailable offences and the aforesaid four offences if the amount involved is between Rs. 3 crore and Rs. 5 Crore. Section 69 does not envisage power to arrest in respect of any other offences specified in Section 132.

Section 69 virtually contains no procedure to effect an arrest or procedures to be followed thereafter. It merely states that in cases of cognizable and non-bailable offences, the arrested persons must be informed of grounds of arrest and must be produced before a magistrate within 24 hours of arrest. This only gives out the period of detention and carries out the mandate of Article 22 of the Constitution. Moreover, unlike provisions relating to search and seizure contained in Section 67, the arrest provisions in respect of cognizable and non-bailable offences are not even made subject to provisions of CrPC. Even the

1. Section 25 of Indian Evidence Act deals with the validity of confessional statements made by the accused before the police officer.
2. It was held that Statements made before Excise Officers even after arrest are not hit by section 25 of Indian Evidence Act and these statements can be used as evidence against accused.

erstwhile Central Excise Act (*vide* Section 18) and Customs Act made arrest subject to provisions of CrPC. Further, the Central Board of Excise and Customs had also issued circulars to provide guidelines for arrest[3].

Such a bald provision governing arrest leaves much to be desired. Could the provisions of the CrPC be read into Section 69 so as to make the procedures for arrests in CrPC applicable to arrests in GST law? If yes, to what extent? If not, could the Commissioner assume unbridled powers to arrest without any safeguard to the assessee in absence any specific procedures for arrest? Would such unguided powers of the Commissioner impinge on the fundamental right of personal liberty? These are the questions that the lifeless and colourless section 69 would raise.

In *Maneka Gandhi vs. Union of India AIR 1978 SC 597*, construing Article 21 of the Constitution (which deals with the fundamental right to life and personal liberty) as the bedrock of all fundamental rights, it was held that the procedure adopted by the State must be just, fair and reasonable and not fanciful, arbitrary and oppressive. Another case which forbids investigating agencies from tresspassing into the privacy of individuals and following arbitrary and indiscriminate ways to invade the privacy of general public is *People's Union for Civil Liberties (PUCL) vs. Union of India AIR 1997 SC 568*.

In *Shreya Singhal vs. UOI (2015) 5 SCC 1,* drawing from the decision of the United States Supreme Court in *City of Chicago vs. Morales et al 527 US 41 (1999)*, it was held that legislation must establish minimum guidelines to govern law enforcement, for if not, a substantial amount of innocent conduct would also be brought within its net, leading to its unconstitutionality. Similarly, in case of *State of Madhya Pradesh vs. Baldeo Prasad [1961] 1 SCR 970*, while dealing with the constitutional validity of the Goonda Act it was held that where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent, it undoubtedly constitutes a serious infirmity which would inevitably take it out of the protection of Article 19(5)[4]. The result of this infirmity is that it has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a criminal.

As per section 69(1) of the CGST Act, to effect an arrest, it is sufficient for the commissioner to have a "reason to believe" that a person has committed the aforesaid offences or has re-committed any offence after a prior conviction. Several cases have interpreted the phrase "reason to believe". In case of *CIT vs. Kelvinator of India (2010) 320 ITR 561 (SC)*, the question was whether reassessment u/s. 147 of the Income-tax Act (incoming escaping assessment) could be done for mere "change in opinion" of the assessing officer. Answering the question in the negative, it was held that Section 147 of the said Act postulates that the assessing officer must have a "reason to believe" that income chargeable to tax has escaped assessment. In that context, it was held that reason to believe does not include reason to reopen unless he has tangible material to come to the conclusion that there was escapement of income from assessment.

In case of *Balwant Singh vs. R.D. Sharma [1969] 71 ITR 550 (Delhi)*, it was held that the existence of 'reason to believe' is subject only to a limited scrutiny and the Court cannot substitute its own opinion for that of the officer. If the grounds on which reason to believe is founded are non-existent or are irrelevant or are such on which no

3. Circular No. 171/6/2013-ST dated 17-9-2013 and Circular No. 38/2013-Customs dated 17-9-2013.
4. Reasonable restrictions on fundamental freedoms.

reasonable persons can come to that belief, the exercise of power would be bad and court can interfere. It is also open to the Court to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief. In case of *Rich Udyog Network Ltd vs. CCIT [2016] 386 ITR 136 (All)*, it was held that 'belief' must be based on information in possession of the assessing authority. It cannot be a mere pretence or a doubt or a suspicion.

The provisions of the CrPC go much beyond mere "reason to believe". Chapter V (Sections 41-60) of the CrPC deals with procedures for arrest. Section 41 deals with the arrest in cases of cognizable offences. Section 41A CrPC explains the procedure when arrest is not required. In case of *Arnesh Kumar vs. State of Bihar (2014) 8 SCC 273,* while dealing with section 498A of the Indian Penal Code (which deals with subject of wife to cruelty by husband) which is also a cognizable and non-bailable offence commented on exercise of power u/s. 41 and 41A CrPC. It was held:

> "A person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence. A police officer, before arrest in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fact, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of Clause (1) of Section 41 CrPC.
>
> Further, as per ssection 41A CrPC, where the arrest of a person is not required under section 41(1) Code of Criminal Procedure, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 CrPC has to be complied and shall be subject to the same scrutiny by the magistrate."

In *Arnesh Kumar's case (supra)*, taking note of unscrupulous enforcement of Section 41 CrPC, a set of directions were issued ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. One of the direction was that failure of the police to comply with Section 41 and 41A of the CrPC would render them liable for departmental action and contempt of court.

Similarly, while observing that the law of arrest is one of balancing individual rights, liberties and privileges on the one hand, and individual duties,

obligations and responsibilities on the other, in *Joginder Kumar vs. State of UP (1994) 4 SCC 260*, it was held that no arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. Arrest must be effected after a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and even as to the need to effect the arrest. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.

In the context of Section 41A CrPC, in case of *Rani Johar vs. State of MP (2016) 11 SCC 703*, emphasizing on liberty and dignity of an individual, it was held that the law obliged an accused to appear before police officer and it further mandated that, if such an accused who complied with terms of notice would not be arrested, unless for reasons to be recorded, police officer was of opinion that arrest was necessary. At this stage also, condition precedent for arrest as envisaged under section 41 of CrPC, has to be complied.

In case of *DK Basu vs. State of West Bengal (1997) 1 SCC 416* it was observed that apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, etc which have the power to detain a person and to interrogate in connection with the investigation and custodial death is equally possible in such cases also. In so observing, the Supreme Court issued a set of eleven guidelines as procedure for making an arrest. One such guideline is that a memo of arrest should be prepared which should be attested by at least one witness - a family member or a respected person of the locality. Memo should be countersigned by arrestee and shall contain date/time of arrest. This now finds statutory recognition *vide* section 41B CrPC. The memo of arrest should be forwarded to Magistrate of the area. Also, arrestee may be permitted to meet his lawyer during interrogation, but not throughout the interrogation [See Section 41D CrPC]. However, in case of *Poolpandi vs. Superintendent of Central Excise AIR 1992 SC 1795*, it was held that refusal to allow presence of a lawyer or a friend during interrogation would not violate Article 21 of the Constitution.

At this stage, useful reference may be made to the decision of the Delhi Court in *MakeMyTrip (India) Pvt Ltd vs. UOI (2016) 58 GST 397* wherein, it was held that the decision to arrest a person must not be taken on whimsical grounds; it must be based on "credible material". The Constitutional safeguards laid out in *DK Basu's case (supra)* in the context of the powers of police officers under the CrPC and of officers of central excise, customs and enforcement directorates, are applicable to the exercise of powers under the FA in equal measure. An officer whether of the Central Excise department or another agency like the DGCEI, authorized to exercise powers under the CE Act and/or the FA will have to be conscious of the constitutional limitations on the exercise of such power.

In *PV Ramana Reddy vs. UOI 2019-TIOL-873-HC-TELANGANA-GST*, an argument was made that arrest must not be made before investigation. It was argued that since the Commissioner making the arrest is not a police officer and cannot have custody of the arrested person after the magistrate remands him to judicial custody or enlarges him on bail. Therefore, it does not advance the cause of investigation or enquiry. However, this argument was turned down on the ground that pre-investigation arrest is not only made for further investigation but also for the reasons as indicated in Section 41 as seen above. Another argument was that if a notice u/s. 41A is issued to a person in respect of whom an arrest has been authorised u/s. 69, and such person is duly complying with the notice, then, arrest must not be made. Again, this argument was also turned down on two grounds: one, that power to summon u/s. 41A CrPC is already engrained in section 70 of the CGST Act (which deals with powers to summon, give evidence and produce documents); two, even otherwise, Section 41A(3) does not give absolute protection from arrest. The upside nonetheless is that the judgment recognizes

the fact that Section 41 and 41A of the CrPC would be applicable while making arrests in GST, though, we opine that the judgment should be reviewed.

The above view was also taken by the Rajasthan High Court in *Bharath Raj Punj vs. CCGST 2019-TIOL-678-HC-RAJ-GSTT*. The decision of the Telangana High Court was also maintained by the Supreme Court in 2019-TIOL-216-SC-GST. However, after noting differences between rulings of different High Courts, the Supreme Court has referred the matter to larger bench before which it is pending in *UOI vs. Sapna Jain 2019-TIOL-217-SC-GST*. It must be observed here that while dismissing the SLP against the judgment of the Telengana High Court, the Supreme Court also held that other courts should take note of this dismissal. This has led to unfortunate results as now no High Court will give bail as this observation would be treated as binding. In law, dismissal of SLP with reasons will also not be binding as the Supreme Court has merely refused to entertain the petition. See decision of the Supreme Court in *Kunhayammed vs. State of Kerala AIR 2000 SC 2587*.

Section 60A of CrPC says that no arrest can be made except in accordance with provisions of CrPC or any other law for the time being in force providing for arrest. As per Section 46 CrPC, the person making arrest shall actually touch or confine the body of person to be arrested, unless the person submits to the custody. If he resists arrest, all necessary means may be applied to effect the arrest. However, this does not give right to cause death of a person, unless the accused of the offence is punishable to death or with imprisonment for life. Arrest of a woman would be made by a lady constable.

As per section 50 of CrPC, person arrested should be informed full particulars of offence and his rights about bail. Further, Section 50A of the CrPC provides that information about his arrest shall be given to the friends, relatives and other persons as may be nominated by arrested persons. The right shall be informed to the arrested person as soon as he is brought to police station. Magistrate must satisfy himself that these provisions have been complied.

In line with Section 69(2) of the GST Act, Section 57 of CrPC provides that arrested person should be taken to Magistrate within 24 hours. However, as per Section 167, if investigation cannot be completed within 24 hours, but there are grounds for believing that the accusation or information is well founded, the magistrate may authorize detention of the accused in police custody for a maximum of 15 days in police custody in whole. In case of *CBI vs. Anupam Kulkarni 1992 (3) SCC 141*, the question was whether the Magistrate under section 167 CrPC can authorise the detention of the accused either to police custody or to judicial custody beyond a period of 15 days in the whole. Answering the question in the negative, it was held that after first 15 days, the remand can only be to judicial custody. This remand again, can extend only for a period 60 days thereafter, after which the accused person would be entitled to apply for bail, whether or not the investigation is complete within such time. Section 169 says that if it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall release the accused on furnishing a bond, with or without sureties, and direct that he appear before the magistrate if required.

In *Bhavain Impex Pvt Ltd vs. State of Gujarat 2010 (260) ELT 526 (Guj),* the question arose whether excise officers could arrest a person u/s. 13 of the Central Excise Act ('CEA') without a warrant or lodging of FIR or a complaint before a competent court. It was held that if person was to be arrested only after registration of a FIR or lodgment of a complaint, question of arrest by Central Excise authorities would not arise. Neither would question of magistrate issuing a warrant arise prior to lodging a complaint. Besides, once an FIR was registered or complaint was lodged under the provisions of CrPC, person against whom an accusation was made would be "an accused". However, Section 13 CEA contemplated

arrest of a person and not an 'accused'. Thus, Section 13 of the Act empowered Central Excise Officers to arrest person whom he had reason to believe to be liable to punishment under CEA without issuance of warrant and without registration of FIR or complaint before Magistrate.

Arrest in cases non-cognizable and bailable offences

Firstly, it is interesting to note that Section 69 does not envisage power to arrest in cases of non-cognizable and bailable offences. In fact, nowhere in the CGST Act can we locate the power to arrest in cases of non-cognizable and bailable offences. Yet, it goes on to comment on the bail provisions applicable to persons arrested in such cases.

However, unlike the cognizable and non-bailable cases, the arrest provisions comment only on procedure for bail and makes it subject to the provisions of CrPC. It stipulates that the person arrested must be admitted to bail or must be forwarded to the custody of the magistrate on default of bail. For the purposes of releasing a person on bail, the Deputy Commissioner or the Assistant Commissioner would have the same power as "officer in charge of the police station".

It was already seen earlier that to prosecute for a non-cognizable offence, a warrant must be obtained from the magistrate in terms of Section 155(2) CrPC. It was also seen in case of *Om Prakash (supra)* that arrest can be made by the revenue officers without warrant only if it is a cognizable offence. Now, even assuming the commissioner has power to arrest for non-cognizable offences, should he approach the magistrate to obtain a warrant? Or should a police officer approach the magistrate to obtain a warrant in absence of specific power for commissioner to make the arrest? Or would the "previous sanction" of the commissioner act as a warrant itself? These are the questions that are left unanswered in the GST law.

Can Arrest Precede Assessment?

In case of *Rajender Singh vs. UOI (2015) 51 GST 540 (P&H),* it was held, in the context of service tax law, that arrest cannot be made even before issuing show cause notice and adjudication. Again in the context of service tax law, The *Delhi High Court in MakeMyTrip (India) Pvt. Ltd. vs. UOI (2016) 58 GST 397*, it was held that before making arrest, department must adjudicate demand and also grant hearing to assessee as to materials collected. If payment was made before criminal court to avoid detention/arrest, such payment must be treated as made under coercion or involuntarily. Such amount must be refunded with interest. This case was later affirmed by the Supreme Court in (2019) 22 GSTL J59 (SC).

In case of *Sapna Jain vs. UOI 2019-TIOL-1473-HC-MUM-GST,* the Bombay High Court granted ad-interim relief from arrest by directing the revenue to desist from taking coercive steps. Similarly, even the Gujarat High Court in *Vimal Yashwantgiri Goswami vs. State of Gujarat in R/ Special Civil Application No. 13679 of 2019 (Order dated 7-8-2019),* relying on Makemytrip (supra), observed that Prosecution u/s. 132 of the CGST Act should normally be launched only after the adjudication is completed.

Similarly, in case of *Jayachandran Alloys vs. Superintendent of GST 2019-TIOL-1021-HC-MAD-GST*, it was held that the term 'commits' in Section 132 clarifies that the act of committal of the offence is to be fixed first before punishment is imposed. When recovery is made subject to determination in an assessment, the Revenue's argument that punishment for the offence alleged can be imposed even prior to such assessment, is clearly incorrect and amounts to putting the cart before the horse.

On the other hand, there are a series of cases where it was held that departmental adjudication and criminal proceedings are independent of each other and do not affect each other. In case of *Radheshyam Kejriwal vs. State of West Bengal (2011) 3 SCC 581*, in the context of Foreign Exchange Regulation Act, it was held that

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously; (ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution and (iii) Adjudication proceedings and criminal proceedings are independent in nature to each other.

Holding departmental proceedings in assessment as civil in nature, in *Maniklal Pokhraj Jain vs. Commissioner of Customs (Preventive), Bombay 1986 (26) ELT 689 (Bom),* it was held that criminal proceedings against the same person for the same offence can go on independent of each other. The same view was taken by the Madras High Court in case of *Sri Ambal Mills Ltd. vs. ACCE 1995 (76) ELT 517 (Mad HC).* As a corollary, in *P. Abdul Majeed vs. CCE (1995) 79 ELT 554 (Mad)* it was also held that departmental adjudication can continue even if a person is acquitted in criminal court. Even in the case of *P. V. Ramana Reddy (Supra)*, it was held that offences mentioned in Section 132 have no co-relation to and do not depend on any assessment and adjudication.

Therefore, this aspect must still be clarified by the Supreme Court in the appeal pending in *Sapna Jain (Supra)*. However, the authors would opine that arresting persons and lodging them in jail without even arriving at an assessment would be highly disproportionate and if such interpretation be placed on a law, the same deserves to be quashed as manifestly arbitrary given the dictum laid out in *Shayara Bano vs. UOI (2017) 9 SCC 1.*

Other remedies in cases of arrest

Compounding

Section 138 of the CGST Act contains provisions for compounding of offences. It is an arrangement whereby the person who may be liable for imprisonment can pay a prescribed amount (but only after having paid tax, interest and penalty involved). It may be invoked by the offender either before or after institution of prosecution but prior to conviction. After payment of such composition amount, prosecution would not be launched, or if it was launched, it would be withdrawn. However, in *P. V. Raman Reddy (supra),* it was held that even after compounding, arrest can be made.

Bail

Again here, it is important to note that Section 69 does not prescribe the remedy for applying for bail in cases of cognizable and non-bailable offences. As said earlier, arrest would lead to deprivation of liberty. Further, the adversarial trial system followed in India deems a person innocent until proven guilty. In case of *Sanjay Chandra vs. CBI (2012) 1 SCC 40* and many other cases, it was held that Bail is a rule and committal to jail is an exception. So, again, the principles and provisions of CrPC may be applicable.

A catena of cases[5] spells out relevant considerations to enlarge a person on bail in non-bailable cases:

- *prima facie* case (without exhaustive exploration on merit)
- severity of punishment in case of conviction
- nature and seriousness of offence
- character of the supporting evidence
- circumstances which are peculiar to accused
- frivolity in prosecution
- risk of non-appearance at the trial
- reasonable apprehension of witnesses being tampered with
- larger interest of public or State

5. *Jayendra Saraswathi Seamigal vs. State of TN AIR 2005 SC 716; State of Rajasthan vs. Balchand AIR 1977 SC 2447; Chaman Lal vs. State of UP 2004 AIR SCW 4705; State of Maharashtra vs. Sitaram Popat Vetal 2004 AIR SCW 4910; State of Delhi vs. Jaspal Singh AIR 1984 SC 1503; Ram Govind vs. Sudarshan Singh AIR 2002 SC 1475.*

However, granting or denial of bail and subsequent remanding to police or judicial custody u/s 167(2) is entirely a matter of judicial discretion[6].

Section 438 CrPC deals with anticipatory bail. If the applicant has a "reason to believe" that he may be arrested for non-bailable offence, he may approach a court of sessions or the High Court for anticipatory bail. In *Vaman Narain Ghiya vs. State of Rajasthan (2009) 2 SCC 281,* it was held that mere fear of arrest does not amount to "reason to believe". The case of *Gurbaksh Singh Sibbia vs. State of Punjab (1980) 2 SCC 565* describes anticipatory bail as a pre-arrest legal process which directs that if the person is thereafter arrested, he shall be released on bail. It is in anticipation of arrest. A direction under section 438 grants a conditional immunity from touch or confinement contemplated u/s 46 of Criminal Procedure Code. However, it does not give a person blanket protection from "arrest wherever for whichever offence". Nor does it give the court powers to enlarge a person on bail for unlimited period of time. In case of *HDFC Bank vs. JJ Mannan (2010) 1 SCC 679,* the Supreme Court held that anticipatory bail is meant for a limited period and cannot protect a person if charge sheet is filed after investigation.

In case of *P. V. Ramana Reddy (supra)*, it was held that since no FIR is registered before invoking Section 69(1) section 438 CrPC cannot be invoked to obtain anticipatory bail. Therefore, relying on the judgment of *Km Hema Mishra vs. State of Uttar Pradesh 2014 (4) SCC 453*, it was held that powers available with High Court under Article 226 can be converted into proceedings for anticipatory bail. However, it was cautioned that a writ of mandamus cannot be invoked by a person sought to be arrested u/s. 69(1) to compel statutory authorities not to arrest.

In *Adri Dharan Das vs. State of West Bengal (2005) 4 SCC 303*, it was held that powers to grant anticipatory bail are extra-ordinary and should be granted in exceptional cases. It should be for limited period. After grant of anticipatory bail, a person can be arrested but should be released on bail instead of sending him to jail. Anticipatory bail can be denied in exceptional circumstances if the court thinks it would take away the benefits of custodial interrogation. The case of *Jerath vs. Union Territory Chandigarh 1998 AIR SCW 1769* is an example for this. In *Narenderjit Singh vs. UOI (2001) 34 SCC 433*, it was held that anticipatory bail can be refused when appellant was involved in duping millions of people by floating fictitious and frivolous companies and when many warrants were pending in different courts. A similar view was taken in the case of *Enforcement Officer vs. Bher Chand Tikaji Bora 121 ELT 7 (SC)*, where it was observed that if a person is menace to the society, anticipatory bail can be denied. In the same way cancellation of anticipatory bail must also happen in exceptional circumstances such as if there is attempt to interfere with administration of justice or possibility to evade justice or possibility of absconding or such other cases[7].

Bail in Economic Offences

Economic offences are viewed seriously and bail is not as easy to obtain. In case of *YS Jagan Mohan Reddy vs. CBI AIR 2014 SC 1933*, it was held that economic offences constitute a class apart and need to be visited with a different approach in the matter of a bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing a serious threat to the financial health of the country. While granting bail, the Court has to keep in mind the nature of the accusations,

6. *Director of Enforcement vs. Deepak Mahajan (1994) 3 SCC 440; Director of Enforcement vs. P. V. Prabhakar Rao AIR 1997 SC 3868; Sankarlal Saraf vs. State of West Bengal 1993 (67) ELT 477 (Cal).*
7. *Dolat Ram vs. State of Haryana 1995(1) SCC 349*

the nature of evidence in support thereof the severity of the punishment which conviction will entail, the character of the accused, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.

In case of *Gautam Kandu vs. Directorate of Enforcement (2015) 16 SCCI 1,* it was observed that cases relating to money laundering is a serious threat to national economy and national interest. Schemes are prepared in a calculative manner with a deliberative design and motive of personal gain, regardless of the consequence to members of the society. Therefore, bail applications in such cases must be viewed strictly. A similar view was reiterated in *Rohit Tondon vs. Directorate of Enforcement (2018) 11 SCC 46.*

In case of *CBI vs. Anil Sharma (1997) 7 SCC 187*, recognising the advantages of effective interrogation, it was held that a pre-arrest bail would lead to elude such an advantage and would reduce interrogation to a mere ritual. A similar view was take in case of *Enforcement Officer vs. Bher Chand Tikaji Bora (1999) 5 SCC 720.*

Quashing

Section 482 CrPC deals with inherent powers of the High Court. Under this provision, an accused can challenge the maintainability of proceedings before an inferior court such as the criminal courts. The High Court may interfere and quash proceeding before a lower court to prevent abuse of process of court or to secure ends of justice[8]. In *State of Haryana vs. Bhajan Lal 1992 Supp (1) SCC 335,* it was observed that proceedings before a criminal court can be quashed if uncontroverted allegations are made or if they are absurd or improbable or if the allegations are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused. Further, where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, the proceedings may be quashed.

Conclusion

In view of the above, it can be said that the safeguards and procedures contained in CrPC must be read into the provisions of GST Act to save it from being unconstitutional. It should be noted that having a separate procedure for arrest under GST different from the CrPC would be manifestly arbitrary unless the same safeguards are built in. See ratio of decision of the Constitution Bench in *Meenakshi Mills Ltd vs. A. V. Visvanatha Sastri AIR 1955 SC 13.* Further, the safeguards laid out by the Supreme Court in Arnesh Kumar's case quoted *supra* will have to be noted. Perhaps the Supreme Court could give clarity on the matter in the case of *Sapna Jain (supra)* which is pending consideration before a larger bench.

8. *Inder Mohan Goswami vs. State of Uttaranchal (2007) 12 SCC 1*

The Unveiling GST Frauds - A Typology

Shailesh Sheth, *Advocate*

"Corruption, money laundering, and tax evasion are global problems, not just challenges for developing countries."

[Sri Mulyani Indrawati, Minister of Finance, Indonesia]

Introduction

India embraced GST on July 1, 2017 and with that, ambitiously embarked upon a fascinating journey of the most fundamental Indirect tax reform which is unprecedented in its scale and impact post-independence. GST is the current favoured name for 'Value Added Tax' (VAT) and therefore, the reader would find the use of both the expressions VAT & GST throughout this article treated synonymously.

VAT is the 'consumption tax' of choice of some 190 countries today. With the exception of United States (US), all countries that are members of the Organisation for Economic Co-operation and Development (OECD) have a VAT, including the partners of the US in the North American Free Trade Agreement (NAFTA) – Canada and Mexico.

In terms of revenue raised, VAT is, by a long distance, the most important indirect tax in the United Kingdom (UK) and in most other OECD countries. Since its introduction in France in 1954, it has proved to be an exceptionally successful form of taxation. VAT is called *'unquestionably the most successful innovation of the last half-century ….. perhaps the most economically efficient way in which countries can raise significant tax revenue'*. (Bird, 2010). It is also passionately argued that *'purely from a revenue point of view, VAT is probably the best tax ever invented'*. (Cnossen, 1990). It will not be an exaggeration to say that the rapid and seemingly irresistible rise of the VAT is probably the most important tax development of the latter half of the twentieth century, and certainly the most breath-taking.

The Rudiments of VAT/GST

International Tax Dialogue, 2005 defines 'VAT' as *"a broad based tax levied at multiple stages of production (and distribution) with – crucially – taxes on inputs credited against taxes on output. That is, while sellers are required to charge the tax on all their sales, they can also claim a credit for taxes that they have been charged on their inputs. The advantage is that revenue is secured by being collected throughout the process of production (unlike a retail sales tax) but without distorting production decisions (as turnover tax does)"*.

Thus, the defining characteristic of a VAT is that it is, in principle, a broad-based tax on all sales of goods or of services, whether to consumers or to other businesses. However, registered businesses are able to credit the VAT charged on their purchases ('Input VAT') against the VAT due on their sales ('Output VAT'). Any excess credit this creates ia refunded to the taxpayers. Here, two other important expressions, viz., 'zero rating' and 'exemption' need a brief mention.

"Zero rating" simply means that VAT is levied at a rate of zero: no tax is due on output, but the credit – which, with no output tax, becomes a refund – is still available for input VAT.

"Exemption" in contrast, means that no tax is due on output, but nor is a credit available for input VAT. Thus, the VAT 'sticks' on business purchases; the Australian term "Input-taxed" is more evocative.

Under the 'destination principle' – which is the international norm – commodities or services are taxed by the jurisdiction in which they are consumed. This is generally implemented under the VAT by zero rating exports and charging VAT on imports. While this implies that exporters will be eligible for due refunds, it does not amount to an export subsidy and is fully WTO – consistent; it is simply a device for removing any domestic VAT from exports. Levying VAT on imports simply puts them on the same basis as their domestically produced counterparts.

The VAT, as defined above, can be implemented in the following three main ways, viz:

a. Subtraction or ledger or Product Approach method (also known as Accounts method) under which each dealer is taxed on the difference between his purchases and sales.

b. Addition method under which tax is levied on an estimate of 'value added' calculated by summing and adjusting, as needed, the *'factor incomes'*. In nutshell, under this method, the tax is levied on the sum of wages and profits.

c. Invoice credit method under which the registered traders charge tax on their sales and issue corresponding invoices to their customers, who, if also registered, can use these invoices to establish a right to credit or refund against their own output VAT liability.

Except Japan that applies a 'subtraction/ledger method' of VAT, all the countries, including India, who have adopted VAT/GST, have applied 'invoice credit method' for the implementation of VAT. Interestingly, with respect to its consumption tax system, Japan has announced that beginning in 2023, it will use an invoicing method that's similar to that used in various European countries.

Self-enforcing feature of VAT/GST

The advocates of the VAT/GST suggest that the VAT is 'self-enforcing' in the sense that each trader has an incentive to ensure that its suppliers have themselves properly paid VAT, in order that they themselves can claim an appropriate credit. As VAT/GST is paid at each stage of production, in order to claim credit for the VAT/GST paid on its inputs against the VAT/GST received on its outputs, a taxpayer would need to show, if required, that the VAT/GST had been paid by its suppliers. *"One man's proof of purchases is evidence of another man's sales."* [National Economic Development Office, Value Added Tax (2nd Ed. 1971 HMSO, London)]. It is argued that there would be no incentive for two traders to fail to invoice a transaction between them, since the purchaser's liability for VAT would be increased by the amount the supplier had not been recorded as paying. With an indirect tax levied at only one stage of production, the whole of the tax is potentially at risk at that stage, whereas, with VAT, theoretically at least, it is only the tax added at that stage that is at risk. [*"VAT/GST: The UK Experience Revisited"* - by Simon James]. It is further suggested that there is an important sense in which the VAT is self-correcting, if not self-enforcing: If for some reason a supply to some registered trader escapes VAT, that missing VAT will be recovered at the next stage in the VAT charged by that trader on their own sales, since there will, in that case, be no credit to offset against their liability.

Enforcement, evasion and VAT/GST

As observed by Michael Keen and Stephen Smith (2007), *"The implementation of a VAT involves the same core elements as does any other self-assessed tax; the identification and registration of those required (or*

choosing) to pay the tax; collection and processing of amounts spontaneously remitted with periodical returns; audit to ensure accuracy of returns; and enforcement action on delinquent payers." Like any tax, VAT (or GST) is also vulnerable to evasion or fraud. At the heart of VAT/GST is the credit mechanism, with tax charged by a seller available to the buyer as a credit against his (buyer's) liability on his own sales and, if in excess of the output tax due, refunded to him (buyer), [Keen and Smith (2007)]. This credit and refund mechanism does offer unique opportunity for abuse and gives rise to several types of fraud characteristic of VAT/GST.

The critics often stress that the case for these 'self-enforcing' or 'self-policing' or 'self-correcting' features of the VAT cannot be overstated. It had been recognised that there was scope for evasion, in spite of these intrinsic features of the VAT. For instance, while traders have an incentive to ensure that their suppliers provide them with invoices that the authorities will accept as establishing a right to refund or credit, they have no incentive – unless specific requirements of this end are imposed – to ensure that tax has actually been paid. As Hemming and Kay (1981) stress, the notion that the VAT is self-enforcing is ultimately 'illusory'.

As noted by Richard M. Bird in his Paper *"Review of 'Principles and Practice of Value Added Taxation: Lessons for Developing Countries" (1993): "A VAT invoice is a check written on the Government."* Needless to say, in a country like India, it is a cakewalk for the tax evaders to encash such checks i.e., VAT invoice and encashing they have been and how! In fact, the credit and refund mechanism of the VAT/GST creates its own opportunities for fraud.

VAT/GST – Tax Evasion and Tax Avoidance

"The difference between tax avoidance and tax evasion is the thickness of a prison wall."

[Denis Healey]

To ensure that the desired amount of revenue is collected and that the burden of taxation lies squarely where it is intended, taxation legislation should be framed in precise terms and the opportunity for revenue leakage should be tapped as far as possible. Revenue leakage may arise from either "tax evasion" or "tax avoidance". The meaning of these quite different terms has become "blurred" over a period of time and it is therefore important to clearly distinguish their respective meanings at this early juncture.

In *Wilson vs. Chambers & Co Pty Ltd.,* a case involving customs duty, Starke J. indicated that evasion involves "the intentional avoidance of payment in circumstances indicating to the party that he is or may be under some obligation to pay duty." This case was subsequently referred to in the income tax case of *Barripp vs. C of T (NSW)*, where Williams J., after indicating that it was inadvisable to define what is meant by "evasion", stated that "where a taxpayer makes a profit, which he knows to be taxable income, and wilfully omits this profit from his income tax return, he would be guilty of evasion in the absence of some satisfactory explanation for the omission."

Tax evasion therefore involves the clear illegal act of non-payment of tax lawfully due. Typically, some purposeful non-disclosure or covert act hiding a liability is involved. Being illegal in nature, tax evasion is a policing matter and the traditional response to combat this practice has been by way of deterrent in the form of the imposition of penalties (either monetary or custodial sentence or both).

Tax avoidance, on the other hand, involves something less that tax evasion, but something which is still nevertheless perceived by community standards as unacceptable or improper. It involves the otherwise legal arrangement of a tax payer's affairs in such a way so as to circumvent the tax laws. Tax avoidance arrangements are often contrived and artificial and are designed to exploit defects and omissions in the drafting of the relevant legislation.

[Also see, *McDowell & Company Limited vs. The Commercial Tax Officer - 1986 AIR 649 SC; 1985 (154) ITR 148 SC*]

The readers may, however, note that the distinction between the 'tax evasion' and 'tax avoidance' is briefly discussed here only to emphasise that both cannot be put at par. The 'tax avoidance' or 'tax planning', so long as is within the framework of the law, cannot be looked at as if it is a 'tax evasion' and visited with the same punitive action which may be resorted to in case of 'tax evasion'. The tax authorities may frown upon such legitimatised 'tax avoidance' or 'tax planning' but the remedial action, if required, will lie elsewhere.

Frauds under VAT/GST

Evasion and fraud are important issues in the administration of VAT. Keeping up with what remains a vast paper trail of invoices is formidable task. Almost all the VAT-compliant countries are facing the huge problem of 'VAT gap', though the quantum may vary depending upon the design and structure of VAT and its effective implementation. 'VAT gap' is the difference between tax actually collected and the tax that would have been paid if all individuals and companies complied with, both the letter of the law and the Revenue Administration's interpretation of the intention of Parliament in drafting the law. India is no exception to this worldwide 'tax epidemic' that is being faced by the VAT-compliant countries. In fact, the quantum of tax involved in the cases of the GST frauds that have surfaced so far in India and the non-chalant manner in which the frauds are taking place coupled with the lower-than-expected revenue under GST regime is 'scary' considering that it is not even three years of the implementation of the new tax regime in the country!

VAT fraud comes in various guises, but the following main types can be distinguished, listed in their most likely order of importance.

- *Shadow economy fraud:* Genuine individuals and businesses with a turnover above the registration threshold deliberately do not register for the VAT. This phenomenon comprises a large number of individuals who render all kinds of services "VAT-free," often by using or buying taxable inputs from their own or employer's business. Examples of VAT-free services are plumbing, carpeting, painting, gardening, catering, hairdressing, car repairs, and various other services (sometimes rendered on a barter basis).
- *Suppression fraud*: Genuine businesses that understate their sales or falsely inflate their claims for VAT on purchases, including individuals who "consume through the business", that is withdraw goods and services from their own or their employer's business for personal consumption without being charged for them, while the business takes credit for the VAT on inputs.
- *Insolvency fraud*: Genuine businesses (operating in the domestic market only) purchase taxable goods, which they sell on (often at inflated prices), providing high tax credits to (related) purchasers, and subsequently declare itself insolvent without paying their VAT liabilities.
- *Carousel fraud*: Also called Missing Trader Intra-community (MITC) fraud (in the EU VAT parlance) in which fraudsters register for VAT, buy goods (generally zero rated) VAT-free from another member state, sell them on at VAT-inclusive prices and then disappear without paying the VAT due. Fundamentally, it is the break in the VAT chain created by the zero-rating of exports which allows this type of fraud to occur. It is particularly problematic for tax authorities because it involves not just reduced revenue, but also an actual payment out from the system – the revenue is negative.
- *Bogus traders*: Fraudsters register for VAT, make false claims for repayments (paid out by the VAT office!) and then abscond.

While not all of the VAT gap represents outright fraud (a significant part of it is reflected as innocent error or legal tax avoidance), the illegal evasion, undisputedly, is quite significant. What seems clear, however, is that shadow economy and suppression frauds are much more important than carousel fraud, though the latter gets so much attention. No doubt, the reason is that shadow economy and suppression fraud generally involve a large number of low-profile cases involving small amounts of GST/VAT. By contrast, insolvency and carousel fraud, although occurring much less frequently, often involve large amounts of GST/VAT, which catch the limelight and appeal to the imagination.

In general terms, evasion falls into two main categories:

- traders understanding taxable sales and/or overstating creditable inputs;
- traders disappearing without paying a VAT bill they owe.

The first category involves a range of different practices. These include working cash-in-hand and not recording sales that ought to be taxable, or failing to register for VAT despite being liable. Invoices for input purchases can be faked, or it is possible to claim that sales are zero rated (for example, by faking export invoices) when they should not be. Evaders can also exploit the different rates of VAT on different or at times, even on the same form of transactions, taking advantage of the difficulty in policing borderlines between different activities (for example, consumption versus business expenditure; exempt versus non-exempt activities; inputs from registered versus unregistered suppliers; taxable versus zero-rated inputs). Some of these problems are inherent to a VAT system, though many are concrete and expensive examples of the consequences of the complexity created by deviations from uniformity. The way VAT works does limit the scope for evasion because it is harder to understate sales when the buyer wants an invoice with which to reclaim input VAT ('Input Tax Credit' (ITC) in Indian GST parlance) and, correspondingly, it is harder to overstate inputs when one needs an invoice from the seller. Broadening the VAT base would further help, since reducing the number of boundaries would leave less scope for misclassification – reducing error and avoidance as well as evasion. It would also be harder to claim zero-rated sales if fewer products were zero rated. Other aspects of VAT policy – such as the choice of registration threshold, the speed with which payment is demanded and refunds are given, and the sheer level of resources devoted to the tax administration's enforcement activities – could also have an impact on evasion, though of course, there are also other considerations involved in each of these choices.

The second form of evasion mainly arises when individual traders have large net VAT liabilities. The fractional nature of VAT is designed precisely to deal with the problem: the VAT liability on a final consumption sale is divided across the supply chain so that no individual trader gains that much by disappearing. Of course, where a single trader genuinely creates significant value added, there is still a substantial incentive to disappear, but much less so than under a retail sales tax. And the very fact that the value added is genuine must reduce the incentive to sacrifice the long-term benefits of remaining active for short-term fraudulent gains.

Those traders with the biggest incentive to evade VAT in this way are those with large liabilities relative to their turnover. These will generally be firms that produce taxed outputs using untaxed inputs.

GST/VAT frauds – Remedial models

Given the susceptibility of VAT/GST to evasion and fraud, particularly the Input Tax Credit (ITC) related frauds, the legislators and tax administrators all over the world, have been constantly devising the 'ways and means' to check the tax evasion, promote tax compliance and in turn, enhance revenue collection.

Determining which regulatory enforcement strategy will be the most effective in gaining long-term voluntary compliance from taxpayers is a challenge for all tax authorities around the

world. A long-standing debate in the regulatory literature has been between those who think that individuals will comply with rules and regulations only when confronted with harsh sanctions and penalties, and those who believe that gentle persuasion and co-operation works in securing compliance. These two alternative approaches to enforcement have been termed the 'deterrence' and 'accommodative' models of regulation, respectively. Yet another model of regulation, amongst other varied models, that is being seriously discussed is the 'norms model' of regulation. [However, this aspect is not being discussed in detail here.]

Whilst VAT is in many ways a successful tax, the audit trail that is required to collect it accurately and effectively is complex. As we have seen, scope for fraud and evasion is significant, particularly in the context of inter-State trade, where a combination of factors like the lack of internal frontiers and a reliance on paper invoices have allowed significant frauds. There are no easy solutions. Reverse charging has been effective in the short run. Increased auditing has also helped. More fundamental changes have their own problems, creating different sets of problematic incentives and/or requiring additional bureaucracy to keep national GST/VAT revenues in line with current levels. Of the reform options, some form of uniform rating looks the most promising. But it would not be in any sense straightforward to implement.

It is possible that a longer-term solution does exist, though, based on a much more effective enforcement system using new technology. The current system remains still heavily reliant on paper invoices. It is very hard to follow the VAT payment trail through the supply chain. There are also significant delays between the point at which firms charge VAT to their customers and the point at which they remit the VAT to the authorities.

Conclusion

GST/VAT is an appealing way to raise revenue. In its purest form, it taxes only final consumption. Because it is collected at stages through the supply chain, scope for wholesale evasion, such as can exist with a retail sales tax where all the revenue is collected at the point of sale to the final consumer, is limited. But many difficulties remain which limit its effectiveness in practice. GST/VAT is complex to administer, and depends for its operation on careful auditing and enforcement. Evasion remains a problem. Rate differentiation and the use of exemptions create welfare-reducing distortions as well as adding to complexity.

It may be stated here that regulatory/administrative policies based only on enforcement may well be a reasonable starting point but not a good ending point for increasing tax compliance. Indeed, what is needed is a multifaceted policy approach that includes enforcement, but one that also emphasises such things as service, especially trust. People exhibit a remarkable diversity in their behaviour. There are individuals who always cheat and those who always comply; some who behave as if they maximise the expected utility of the tax evasion gamble while there are others who seem to overweight law probabilities. Then there are individuals who respond in different ways to changes in their tax burden, some who are at times co-operative and at other times free-riders, and many who seem to be guided by such things as social norms or moral sentiments. Any government approach toward tax compliance must address this "full house" of behaviours by devising a comparable **"full house"** of policies to combat tax evasion. **[Alm, 2013]**

Finally, a word of caution here! Frauds under GST should be ideally perceived as a 'normal loss' in production or losses that occur in an outlet due to shoplifting so long as they are within a reasonable limit. Any undue attention to these frauds will only result in adventurism through complex provisions, controls and restrictions in law which will defeat the very objective of GST and adversely affect the good compliant businesses.

"The two greatest priorities for my government are tackling tax evasion and corruption."

[Mario Monti]

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Preventive measures and use of Technology for unearthing GST frauds

Deepak Mata

Introduction

A large number of GST fraud cases involving fake invoices has been detected since the rollout of GST. More than ₹ 45,000/- crore cases have been booked since the launch of GST on July 2017. Warnings have also been issued. A lot of arrests have been made. Legal provisions for arrest have been challenged in courts. The belief that GST is a self-policy model and the incentives to evade taxes have gone due to uninterrupted input tax credit in the whole supply chain has somewhat gone for a toss. A Rule-Based Economy cannot be built overnight! A far-reaching change like GST is a painful and time-consuming process. It is true that a few unscrupulous persons still find or create loopholes or misuse the facilitation measures provided during the transition period and break the trust reposed in them by the government.

These taxpayers, while claiming fraudulent ITC, do have genuine transactions as well. They deal with a large number of genuine taxpayers who deal with them in good faith. However, once such taxpayers are red-flagged in the data analysis being done by the department, all their transactions come into the ambit of scrutiny resulting sometimes in perceived harassment to genuine taxpayers/consultants. A consultant/auditor is not supposed to do the job of enforcement. In hindsight, it is easy to pinpoint mistakes but unless it comes on record that a person was aware of the wrongdoing of the person and he facilitated the fraud by way of abetting in the offense committed, he should always be given a benefit of doubt. A large number of taxpayers, as well as consultants, become victims by being the part of the long chain in which the fraudulent ITC moves along the intermediate supplies, a part of which may be fake. The taxpayers/consultants, therefore, should be aware of various *modus operandi* being adopted and they need to take sufficient precautions in terms of KYC, etc., which a prudent person would have done or is supposed to do in normal circumstances.

The perpetrators of these frauds may have different motives which along with the methodologies employed need to be necessarily discussed before suggesting any measures for preventing, controlling and/or unearthing such frauds. The challenges concerning jurisdiction, manpower, and data with regard to investigations, the GST frauds need to be primarily constrained by way of putting sufficient preventive measures in place and systemic changes so as to encourage voluntary compliance by the taxpayers.

II Motive

The motives for such frauds appear to be fraudulent availment/encashment of Input Tax Credit (ITC) and also to defraud other authorities

by inflating turnovers, laundering of money, etc. Some of the motives along with the respective *modus operandi* are categorized below:

1. GST evasion on taxable output supplies
   - Availment of input tax credit using invoice or bill under which no goods or service has been received
   - Saving GST (Cash) by payment of tax liability using ITC
   - Clandestine Supply without Invoices and without payment of taxes
2. Convert excess/fraudulent ITC into cash
   - Issuance of any invoice or bill without supply of goods or services
   - Transfer of ITC to those who can utilise it to pay their liability
   - Shifting ITC from exempted supplies to taxable supplies
   - Encashment of fraudulent ITC by way of refund route - IGST Refund or unutilized ITC refunds - by way of issuance of invoices from supplier firm in favor of exporting firm without actual supply of goods or availment of ITC in exporting firms on the basis of invoices raised from supplier firms
3. Inflate Turnover for the purpose of
   - Higher Credit Limit/Overdraft from Banks
   - Obtain bank loans
   - Improve Valuations for IPO or Stake Sale
   - Obtain Contracts including Government Contracts
4. Booking fake purchases for IT benefits
   - Show reduced profit margins and higher expenses
   - Avoid payment of income-tax by reducing net profit
5. Cash Generation/Diversion of company funds
6. Trade-based money laundering

III Preventive Measures

1. ***Focus on Data Analytics and Use of technology:*** Access to Data and Data Analytics are the cornerstones of fraud/ detection and investigation. A lot of reports are being generated which indicate possible laxity in tax compliance. Some of the indicators are list below:
   1. Non-fillers of GSTR-1 and GSTR-3B
   2. *Non-filers of GSTR-3B have filed GSTR-1*: Such registered persons may be hoodwinking their buyers who will see the ITC flow to their respective GSTR-2A and assuring themselves that the supplier has paid tax and that they are eligible for ITC. However, suppliers have not actually paid the same. These persons should be dealt with immediately by way of best judgment assessment and/or cancellation of registration. These types of cases are easiest to be identified resulting in immediate action by the Government.
   3. *Filing e-way bill but not filing GSTR-3B:* Usually, such persons do not have any supply of their own. They supply goods belonging to other registered persons who want to supply without issuing invoices and without paying taxes. For them, these are off-balance-

sheet supplies and are not shown in their books of account. These persons simply facilitate their actions on a commission basis and are by nature fly-by-night operators who have no intention to pay any tax and are ready to vanish the moment they are caught. With the introduction of the new EWB blocking provision, these can be controlled a bit.

4. Payment largely through ITC: Such persons may try to receive ITC through fake invoices or may supply part of their supplies in cash without an invoice. Sometimes, the supplies shown in the invoice are undervalued and the undeclared value is collected in cash. This practice is being adopted on a large basis.

5. *Difference between ITC taken in GSTR-3B and the ITC reflected in GSTR-2A:* In general, the ITC taken in GSTR-3B should always be less than or equal to the ITC reflected in the GSTR-2A. The difference needs to be further probed so as to identify possible causes of excess ITC availment. Once the integration of the Customs portal with the GSTN portal is done, this type of taxpayer would be easy to be identified by the department.

6. *Sales to the actual user without invoice and bill raised to the fake person*: The manufacturers/wholesalers may show a part of their sales as B2C sales which may have been made to their other buyers in specific sectors for cash without invoices. For instance, the packaging material may have been sold to the gutkha unit in cash without an invoice. Such goods have to be sold to someone to align books of account with the reduced inventory.

7. *Imports made as per ICES data but no GSTR-3B filed:* Such importers may have undervalued the imports and may have sold the goods later in cash so as to avoid paying GST. Once again integration of the ICES portal with the GSTN portal would definitely help the department in identifying such cases immediately.

8. *Substantial purchases as per GSTR-2A but no GSTR-3B filed:* This could be a signal of cash sales. Here some genuine taxpayers may also be a victim of such frauds. They are not involved in the transaction, but their GSTIN is used by the supplier to show sales to them. The genuine taxpayer doesn't avail ITC even sometimes.

9. *Purchases by composition taxpayers in cash:* Composition taxpayers may buy without GST paid invoice so as to not disclose their actual turnover and avoid paying tax. Since no ITC is available on purchases of goods by them, there is an incentive to buy without GST paid invoice. As compared to any other relief in GST, the composition scheme is being misused on a large scale.

2. ***Early identification of fraudsters:*** Many such operators have a tendency to operate through impersonation in the name of small dummy persons who have no real assets making it virtually impossible to recover any amounts from them if a case is detected at a later stage. Such shell companies are being used to issue e-Way bills without paying GST, transfer non-existent input tax credit, file GSTR-1 to

fool the buyers by way of letting the buyer see the input tax credit in his GSTR-2A but not paying the tax, etc. These companies are fly-by-night operators and are ready to vanish the moment they are caught with minimal chances of recovery. The government can't wait for the financial year to be over before conducting audit like processes. Such companies usually have little records to show. The genuine taxpayers should be aware of such suppliers and should randomly check the return filing status of their suppliers in addition to managing their own business. If such action is not done, the genuine taxpayer is definitely going to lose already availed ITC from such fraudsters.

2.1 The existing companies can be dealt with by way of normal adjudication, audits, and judicial process. However, the fly-by-night operators have to be nipped in the bud at the earliest. This can either be done at the time of registration itself in some cases where wrong information is submitted at the time of registration. However, this may not be possible in all cases due to low entry barriers for registration It may not be possible to reject the registration solely on the basis of doubts. Such persons and their activities need to be monitored and tracked so as to cancel their registrations and/or take other actions as per law, as soon as their nefarious activities are noticed. Once registration is cancelled, the re-entry barriers should be kept higher for such persons so that the system is not reused again by them. With the introduction of Aadhaar based verification, let us hope that fraudulent and fly by night suppliers can be traced later on also.

2.2 Early identification of such persons is necessary in order to stop them from continuing their nefarious activities and control potential damage by them. Immediate action under sections 62, 63 and 64 of the CGST Act, 2019 in the form of Best Judgment Assessment/Cancellation of registration/summary assessment should be taken wherever possible. Action under sections 62/63/64 does not debar subsequent action under sections 73/74 of the CGST Act if required later.

2.3 How to identify such potential fraudsters? Early identification can be done by identification of the indications/characteristics pointing towards such persons, continuous monitoring of suspected registered persons through data analysis. An indicative list of such risk parameters in the form of SOPs has been prepared and is being used for such identifications. IP address verification can be a very effective tool for identifying the linkages, real beneficiary/kingpin and preparing the fraud tree so as to identify the *modus operandi* and catch the real culprits. Assessing these persons through best judgment assessment and/or cancellation of registration, wherever required make a continuation of such activities difficult and a costly affair in terms of costs as well as risk. Technology too can help here.

3. ***Creation of Offence Database to record offences/offenders:*** The offence database will be an input to the risk profiling module to identify the re-entry of earlier entities who have come to adverse notice and identify taxpayers who need to be monitored/audited/inspected for possible compliance verification. Recently GSTN portal has enabled functionality on the dashboard of taxpayers to file online complaints against fraudulent persons. This would facilitate detection at an early stage and to prepare/maintain a database of such persons.

3.1 Access to independent databases for address verification (Google Maps), Vehicle Registration (RTO), Income Tax (PAN/ Returns), e-Way bill module, company affairs (MCA) can help identify such potential tax avoiders. Some Artificial Intelligence tools may also be used for this purpose.

3.2 GSTN has opened its Frauds Analytics Cell and is passing on information/inputs to the States/Centre. DG, ARM has also initiated its data analysis and forwards its reports to commissionerates. The respective commissionerates also analyse their respective data. All this is showing good results and many such *modus operandi* are being busted. The CBIC ADVAIT project is also likely to be a principal driver in the future for data analysis and in identifying the potential/possible fraudsters.

4. Systemic/Policy Changes

Changes like the introduction of new returns; invoice matching, auto-population of crucial data; real-time linkage between e-Way Bill system and GST; integration of Customs portal with GSTN; change in audit norms can mitigate fake invoice frauds in the long run. Some of these are being discussed below:

4.1 ***Robust Reporting System to generate real-time tax alerts***

4.2 ***Precautions in re-registration:*** A person whose registration application is rejected or a person whose registration is cancelled may apply again for registration. A Circular No. 95/14/2019-GST dated 28th March 2019 has been issued to not allow such registration and such persons should be asked to file for revocation of their registrations. Not applying for revocation of cancellation of registration along with the continuance of the conditions specified in clauses (b) and (c) of section 29(2) of the CGST Act shall be deemed to be a "deficiency" within the meaning of rule 9(2) of the CGST Rules and the proper officer should analyse the reasons for not doing so and reject the registration application in such cases.

4.3 ***Real-time connect between e-Way Bill system and GST Portal:*** There are registered persons issuing e-way bills and not filing any returns. They are usually dummy persons having no supplies of their own. They only facilitate other suppliers making supply without issuing any invoices and without payment of GST. Such persons need to be caught as early as possible. Any detection at the time of year-end audits is meaningless in such cases from a recovery point of view. Blocking of e-way bill issue facility for non-filers which is scheduled to be started w.e.f. 21st November, 2019 is likely to help a bit especially in respect of goods being supplied without invoice or being impersonated under different GSTINs which have no intention to pay and are being used only to conceal the fact of non-issue of invoice, camouflage the e-Way Bill and escape departmental interdiction while checking e-Way Bills.

Interdiction or interception of any consignment for the purpose of verifying the e-Way Bill or otherwise, if preceded with some analysis of the profile of the supplier/recipient/commodity can better help in quality interventions. The officers intercepting the vehicles should have real-time information about the credentials of the suppliers so that their decision-making process can be improved. The e-Way Bill data is important as it gives the audit trail to prove fake invoices case. Interception teams ought to be provided with handhelds and other devices so that they can access data from the Zonal Data Centers.

4.4 ***Strengthen EWB:*** E-Way Bills can be employed to check evasion happening at the first point of sale in B2B transactions. RFID may be made mandatory for Transporters etc., along with GPS enabled vehicles, especially for select sensitive commodities.

E-way bill interdictions based on real-time verifications and analysing the taxpayer's details will result in an increased success rate.

4.5 ***Risk Profiling and Scrutiny of Registration Data:*** As the registration process has a low entry barrier, scrutiny/verification and subsequent monitoring of registered taxpayers through risk profiling and verification for early identification of fraudsters indulging in fake invoices is critical. This would include maintenance of offence database of those figuring in frauds to prevent re-entry in the system. There is a need for an **independent risk profiling module** to parse registration data having access to third party databases like vehicle registration, Aadhaar, PAN, addresses, etc. The module will flag risk indicators against registered taxpayers based on risk rules which can be verified by jurisdictional divisions/ranges.

Post cancellation profiling of such persons based on Aadhaar/PAN etc., so that re-registration by such persons is dealt with differently than normal registration. Reapplying for registration if cancelled once should be flagged and officers granting such registration should be alerted. There should be no deemed registration in such cases. Physical verification should be a must for such cases. If this is done, it would discourage fraudulent taxpayers to a large extent.

4.6 ***Thematic audit:*** The theme-based audit experimented in Customs in the last few years has produced wonderful results. The same can be done in GST as well. This will be focused on themes across jurisdictions and taxpayers. This requires to be modelled at a little higher level with co-ordination between multiple jurisdictions. Industry data points and various financial ratios can be compared. However, it is possible now due to centralised single GST portal and availability of data at one point of source. This, however, has, issues of confidentiality of data and business secrets. Moreover, pinpointed intelligence/efforts are required to conduct such an audit.

5. ***Linkages between GST and Customs*** Due to the immediate refund of IGST from Customs, sometimes undue ITC is transferred to exporters, who take its refund. Thus, ITC is converted into cash on an immediate basis. In such cases, fraud is done in GST and the same is extended from GST to Customs. It may so happen that the refund of IGST is dependent on the ITC was taken by the supplier making supplies to the exporter and transferring the ITC taken wrongly. In such cases, if ITC taken is denied, the refund of IGST can also be denied as a direct corollary. Similarly, on the import side, the IGST and compensation cess paid on import of goods are available as credit further down the supply chain. The importer takes such taxes paid as credit subject to the exclusions contained in section 17(5) of the CGST Act, 2017. The linkage between the ICES, SEZs IT systems, courier, posts and GST portal may help in the matching of the taxes paid and the credit is taken. Further sharing of the information of such cases by GST with Customs and *vice versa* can help in a seamless flow of data.

Auto authentication at least up to the last 4-5 backward supply invoices before transmitting data to Customs for IGST refunds can help to some extent. Invoice

level matching for ITC which is likely to be introduced in the new return mechanism w.e.f 1st January, 2020 may help in stoppage of gross ITC frauds. Post audit of IGST refund can also help.

6. ***Multi-agency and Inter-department coordination:*** GST frauds have usually been spread across states. The inter-State nature of these frauds make it imperative for State as well as Centre to collaborate or share the inputs so as to have a real impact.

An SOP/protocol on Enforcement and/or Co-ordination amongst CGST & SGST departments and GSTN is required for ensuring co-ordination, sharing of information. This is all the more important in view of across the board cross empowerment of State and Central tax officers. Further, these cases have a multi-agency and multi-jurisdictional impact. A nodal officer should be designated in CGST and SGST in each State for co-ordination/information sharing for the purpose of enforcement functions. Nodal Officers should be appointed in GSTN as well as DG, ARM/DG, System for seeking data and sharing information, preferably on a real-time basis.

The department that initiates enforcement action against a taxpayer need to file an information report with details of the case within a specified time limit with the nodal officer of both administrations. The normal collection of intelligence, visits, etc., should not be considered as the initiation of a case.

7. Use of third party information for verifying tax compliance

There are various studies[1] that suggest that detection probability with third party reporting increases to close to one as against near to zero for self-reported incomes. The evasion rate is zero for third-party reported income, and significant for self-reported income. Taxes have been divided into two types

- Traditional taxes that rely on self-reported information
- Modern taxes that rely on third-party information

7.1 Third Party information can be effectively used not only for verifying tax compliance but also for helping the taxpayer in tax compliance as well. GSTR-2/2A was in this direction wherein the returns were auto-populated based on data fed by the suppliers. However, the same was shelved. However, the new returns being introduced are supposed to attempt the matching of invoices. Section 150 of the CGST Act provides the legal framework for collecting third party information. However, further rules/regulations are yet to be issued.

7.2 The Ministry of Corporate Affairs (MCA) regularly identifies a list of defaulter companies, defaulter directors (DIN) which can be effectively used as red flags to identify possible GST fraud cases also. These names should be mapped and flagged by GSTN and further analysis should be done at the DGGI level. With the addition of Rule 25A in Company rules relating to Active Company Tagging Identities & Verification (ACTIVE) which has come into effect from 25-2-2019, it is expected that fake/shell companies may get identified at an early stage so that necessary remedial measures can be taken in time.

8. Electronic-invoicing though still under wraps can be very useful in reducing the compliance complexity by way of obviating

1. *http://darp.lse.ac.uk/pdf/EC426/EC426_19.pdf*

the need for returns and fresh data entry thereby simplifying things for the taxpayers and reducing transcription errors.

As on date, no standard has been defined for the e-invoice. GSTN, in partnership with the Institute of Chartered Accountants of India (ICAI), has drafted an e-invoice standard, which also takes into account the requirement under tax laws and has features, which are required for international trade.

E-invoicing is likely to be optional in the beginning. However, once it stabilises, and with sufficient incentives, it can help in proper reporting by the taxpayers and help in compliance verification in a very meaningful manner.

9. Action to be taken against the offenders

9.1 ***Provisional Blocking of ITC:*** Provisionally blocking of ITC of such persons including their beneficiaries so as to not allow the person to get away with undue credit. ITC needs to be blocked from Electronic Credit Ledger in respect of the following situations.

- Registered taxpayers are found to be bogus/fake as a result of any investigations
- Registered taxpayers are found to be non-functional
- Registered taxpayers are found to have claimed excess credit through TRAN-1/II (To the extent of excess credit claimed)
- Registered taxpayers are found to be not entitled to ITC (To the extent of inadmissible credit)

9.2 Provisional attachment of bank accounts/ properties with banks as well as debtors: Provisions for provisional attachment of property including the bank accounts are contained in section 83 of the CGST Act, 2017 read with rule 159 of the CGST Rules, 2019. These provisions should invariably be invoked in such cases albeit with due caution and in rare circumstances so as not to unnecessarily affect the cash flows.

9.3 If there are *prima facie* reasons showing criminal involvement of directors in effecting GST evasion, then Section 89 of the CGST Act 2017 can be invoked read with Section 83 of CGST Act 2017, bank accounts/properties of even directors may be liable for attachment.

10. Conclusion

Incentivising the consumer to demand proper receipt and upload invoice on app-based tools, pay through banking channels so as to create a proper trail of the transactions can create an environment to nudge the taxpayer to voluntarily assess and pay GST. Cressey's Fraud Triangle revolves around three factors namely Opportunity, Incentives/Pressures, and Attitudes/Rationalisation. The reduction of opportunities appears to be the best way forward in GST. This can be done through invoice matching, identifying the potential fraudsters and monitoring them, building more robust systems based on risk profiling and better use of provisions under GST related to assessments. Strengthening of Centre/State level enforcement agencies like DGGI, State investigation units, etc., focus on fraud data analytics, empowering Divisions/Ranges and other measures will not only help combat this fraud but also any other kinds of GST frauds.

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Detention of Vehicles and Seizure of Goods under The Goods and Services Tax Regime

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I. INTRODUCTION

1. As we move towards liberalized and simplified taxation system, more faith is reposed on the taxpayers. At the same time, the government seeks to introduce checks and balances in the taxation laws to secure the Government revenue and ensure tax compliance.

2. In this pursuit, the Central Goods and Services Tax Act, 2017 (**'CGST Act'**) and the Central Goods and Services Tax Rules, 2017 (**'CGST Rules'**) prescribed thereunder have also stipulated checks and balances to ensure compliance. One such measure is relating to seizure of goods and detention of vehicles where any person transports any goods or stores any goods while they are in transit in contravention of the CGST Act and the CGST Rules.

3. This article deals with the statutory provisions with respect to seizure of goods and detention of vehicles which are used for transport of offending goods. This article also discusses the rights and remedies available to the affected persons in cases of seizure of goods and detention of vehicles along with the available jurisprudence since the commencement of the Goods and Services Tax (**'GST'**) regime with respect to these provisions.

II. SCHEME OF STATUTORY PROVISIONS AND PROCEDURES

4. The purpose of detention of vehicles and seizure of goods is to protect the interests of Revenue, provide a deterrent to tax evasion and establish a level-playing field for compliant taxpayers. The provisions relating to detention of vehicles and seizure of goods are stipulated in Section 67 and Section 129 of the CGST Act read with Rules 139 to 141 of the CGST Rules. These statutory provisions lay down the basis for seizure of goods and detention of vehicles in case of any prescribed contraventions by the taxpayers as well as the transporters. Section 67(2) of the CGST Act empowers the proper officer to carry out search and seize goods if he has reasons to believe that any goods are secreted at any place which are liable for confiscation and which shall be useful or relevant in his opinion to any proceedings under the CGST Act. Further, Section 129(1) of the CGST Act provides for seizure of goods and detention of conveyances used as a means of transport for carrying the said goods where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of the CGST Act or the CGST Rules.

5. In this regard, the procedure is prescribed under Rules 139 to 142 of the CGST Rules. Rule 139 of the CGST Rules stipulates that where any goods are liable for seizure under Section 67 (2) of the CGST Act, the concerned officer shall pass an order of seizure in FORM GST INS-02. Where it is not practicable to seize any such goods, the concerned officer may serve an order of prohibition on the owner or the custodian of the goods in FORM GST INS-03 in terms of which the said owner/custodian shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer. Rule 140 provides for release of the seized goods on execution of a bond and furnishing of a security in the form of a bank guarantee and Rule 141 provides for the procedure for release of the seized goods which are perishable or hazardous in nature.

6. Rule 142 of the CGST Rules provides for issuance of notice and order for demand of amounts payable with respect to detention of vehicle and seizure of goods. The said rule provides that the proper officer shall, along with issuing a notice under Section 129, also issue a summary of the same in FORM GST DRC-01. Rule 142(5) of the CGST Rules provides that a summary of the order issued under Section 129 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax, and the same shall be treated as the notice for recovery. It further provides that when the person concerned makes payment of the amount for release of goods, as provided under Section 129(1), he shall intimate the proper officer of said payment in FORM GST DRC-03 and the proper officer shall issue an order in FORM GST DRC-05 concluding the proceedings in respect of the said notice.

7. In this regard, circulars issued by the Government of India, namely, Circular No. 41/15/2018-GST dated 13-4-2018, Circular No. 49/23/2018-GST dated 21-6-2018 and Circular No. 64/38/2018-GST dated 14-9-2018, clarify the procedure for interception of conveyances for inspection of goods in movement and detention, seizure and release and confiscation of such goods and conveyances.

III. RIGHTS AND REMEDIES AVAILABLE TO THE ASSESSEE

8. The statutory provisions under the CGST Act and the CGST Rules provide for a robust mechanism of rights and remedies to ensure that the affected persons have adequate protection against arbitrary action by the authorities as well as provisions for challenging such actions in appellate proceedings.

Principles of natural justice

9. It is a well-settled principle in law that any judicial or quasi-judicial proceedings must adhere to the principles of natural justice which include, *inter alia*, granting an opportunity of being heard and passing of a reasoned and speaking order. Accordingly, the statutory provisions incorporate various provisions keeping in line with the principles of natural justice, as mentioned below:

i. Section 67(7) of the CGST Act provides that in case a notice is not issued with respect to the seized goods within 6 months, extendable up to a further period of 6 months, of the seizure, such goods shall be returned to the person from whose possession they were seized.

ii. Section 129(3) of the CGST Act provides that the proper officer detaining or seizing goods or conveyances shall issue a notice to the concerned person specifying the tax and penalty payable and only thereafter, pass an order under Section 129(1) of the CGST Act.

iii. Section 129(4) of the CGST Act provides that no tax, interest or penalty shall be determined under Section 129(3) without giving the person concerned an opportunity of being heard.

iv. The proviso to Section 129(1) provides that goods or conveyances shall not be detained or seized without serving an order of detention or seizure on the person transporting the goods.

10. These provisions mandate that due process and principles of natural justice are followed in cases of detention and seizure of goods and conveyances. In this regard, reference may be made to the judgment of the Madras High Court in the case of *G. Murugan vs. Government of India, 2019-VIL-95-MAD*. In this case, an order detaining the goods as well as the conveyance was passed by the concerned authority without providing the details of the statutory provisions which the petitioner had contravened. In this regard, the Madras High Court observed that it is incumbent upon the statutory authority to have made the mention of the contravention in the impugned order. Accordingly, it was held that despite provisions for challenging the impugned order under Section 107 of the CGST Act, the detention order is liable to be quashed as the impugned order was incomplete and wholly non-speaking.

Provisional release of seized goods

11. Section 67(6) of the CGST Act provides that goods seized under Section 67(2) of the CGST Act shall be released on a provisional basis upon execution of a bond and furnishing of a security, as may be prescribed, or on payment of applicable tax, interest and penalty payable, as the case may be. This provision provides for an interim relief while the seizure proceedings are pending final adjudication and indicates a pragmatic approach adopted to secure the interests of businesses.

Provisions relating to release of seized goods and detained vehicles

12. As mentioned above, Section 129 of the CGST Act provides for seizure of goods and detention of conveyances used as a means of transport for carrying the said goods. As per Section 129, such seized goods or detained conveyances can be released as follows:

Sr. No.	***Description***	***Methods for release of goods/conveyances***
1.	Where the owner of the goods comes forward for payment of tax and penalty	*In case of non-exempted goods* Payment of applicable tax and penalty equal to 100% of the tax payable on such goods. *Illustration* If taxable goods valued at ₹ 1,00,000/- (tax rate 12%) are transported without documents and subject to detention, the amount payable would be equal to a tax ₹ 12,000/- and a penalty of ₹ 12,000/-. *In case of exempted goods* Payment of an amount equal to 2% of the value of goods or ₹ 25,000/-, whichever is less.

Sr. No.	*Description*	*Methods for release of goods/conveyances*
		Illustration If exempt goods valued at ₹ 1,00,000/- (tax rate 12%) are transported without documents and subject to detention, the penalty the amount payable would be ₹ 2000/- i.e. 2% of value of goods. OR Furnishing a security equivalent to the aforesaid amount payable, in prescribed form and manner.
2.	Where the owner of the goods does not come forward for payment of tax and penalty	*In case of non-exempted goods* Payment of applicable tax and penalty equal to 50% of the value of the goods reduced by the tax amount paid thereon. *Illustration* If taxable goods valued at ₹ 1,00,000/- (tax rate 12%) are being transported without documents and subject to detention, the amount payable would be equal to tax of ₹ 12,000/- and penalty ₹ 38,000/- [i.e. 50% of value of goods less tax amount (₹ 50,000/- minus ₹ 12,000/-)]. *In case of exempted goods* Payment of an amount equal to 5% of the value of goods or ₹ 25,000/-, whichever is less. *Illustration* If exempt goods valued at ₹ 1,00,000/- (tax rate 12%) are being transported without documents and subject to detention, the amount payable would be ₹ 5,000/- i.e., 5% of the value of goods. OR Furnishing a security equivalent to the amount payable as aforesaid, in prescribed form and manner.

13. Once one of the aforesaid methods are followed, all proceedings in respect of the notice issued for detention or seizure of goods or conveyances shall be deemed to be concluded in terms of Section 129(5) of the CGST Act. It may be noted that if the person transporting such goods or the owner of the goods fails to pay the amount of tax and penalty mentioned above within 14 days of detention or seizure, further proceedings shall be initiated in accordance with the provisions of Section 130 of the CGST Act (Confiscation of goods or conveyances and levy of penalty).

Provisions relating to appeal against seizure and detention orders

Appeal before the Appellate Authority

14. If the concerned person is aggrieved by an order of detention and/or seizure passed under Section 129 of the CGST Act, the same can be challenged in appellate proceedings under the CGST Act.

Appeal before the Appellate Tribunal

15. If any person is aggrieved by an order passed under Section 107 of the CGST Act or the corresponding State Government/ Union Territory legislation, such person

may appeal to the Appellate Tribunal against such order under Section 112 of the CGST Act.

Appeal before the High Court and Supreme Court

16. In terms of Section 117(1) of the CGST Act, any person aggrieved by any order passed by the State Bench or Area Benches of the Appellate Tribunal may file an appeal to the High Court and the High Court may admit such appeal, if it is satisfied that the case involves a substantial question of law. Further, under Section 118(1) of the CGST Act, an appeal shall lie to the Supreme Court from:

i. any order passed by the National Bench or Regional Benches of the Appellate Tribunal; or

ii. any judgment or order passed by the High Court in an appeal made under Section 117 in any case which, on its own motion or on an application made by or on behalf of the party aggrieved, immediately after passing of the judgment or order, the High Court certifies to be a fit one for appeal to the Supreme Court.

17. With respect to the provisions relating to appeals, it is pertinent to point out that certain disputes arose on the appealability of orders relating to detention and seizure in the context of Section 121 of the CGST Act which enumerates non-appealable orders. In this regard, the Allahabad High Court in the case of *RK Overseas vs. Union of India, 2018-VIL-79-ALH* has held that the order of seizure of goods in transit or storage passed under Section 129 (1) of the CGST Act is not appealable and, therefore, a writ petition is maintainable against it, subject to limitations of judicial review. However, in *Gati-Kintetsu Express Pvt. Ltd. vs. Assistant Commissioner, 2018-VIL-260-CAL*, the Calcutta High Court did not concur with the view expressed in RK Overseas (Supra) and held that a statutory remedy of appeal is available against the seizure order under the CGST Act.

18. It will be interesting to look at certain judicial precedents under the pre-GST era with regard to orders passed for provisional release of detained or seized goods. Recently, the Bombay High Court in the case of *S. S. Offshore Pvt. Ltd. - 2018 (361) ELT 51 (Bom),* relying on the tests laid down by the Supreme Court came to a conclusion that order of provisional release is an appellable order. The High Court justified its decision, holding that the nature of the power conferred under Section 110 read with Section 110A of the Customs Act is to deprive a owner of the goods the use of his property till the final adjudication of the proposed confiscation or allowing the provisional release of the goods subject to certain conditions to safeguard the interest of the Revenue till the final decision is taken. It is undisputed that the exercise of power which is conferred under Section 110A of the Act would have civil consequences. The power when exercised could lead to either the State being left without security by the time the adjudication order is passed or the conditions for provisional release could be so onerous that it would be impossible for the importer to comply with them and use the goods till adjudication is over. The person vested with the power to allow provisional release of the seized goods is the adjudicating authority under the Act. The Act itself deals with import of goods into the country. All of the above, would suggest that the order/decision given for provisional release would be in the nature of quasi judicial decision/order. The Court therefore concluded that such order will be an appellable order. The above tests will squarely apply to any seizure or release order under the GST law and hence the ratio this judgement will also apply in the GST regime.

Rectification of errors apparent on the face of record

19. With respect to any errors apparent on the face of record in a decision or order or notice by any authority, the same may be rectified within a period of 3 months (subject to a maximum period of 6 months) from the date of issue of such decision or order under Section 161 of the CGST Act. However, the extended period of 6 months shall not apply in such cases where the rectification is purely in the nature of correction of a clerical or arithmetical error, arising from any accidental slip or omission. It may be noted that where such rectification adversely affects any person, the principles of natural justice shall be followed by the authority carrying out such rectification.

Writ Remedies

20. Besides the statutory remedies available under the CGST Act and the CGST Rules, the aggrieved person may also evaluate exercising constitutional remedies by invoking writ jurisdiction of the High Court, depending on the facts and grievance in each case. Since the commencement of the GST regime, various writ petitions have been filed across the country against the detention and seizure orders. While the relevant statutory provisions have incorporated sufficient safeguards, the authorities implementing the said provisions often resort to arbitrary and coercive measures. This has led to a plethora of writ petitions filed across the country by the aggrieved persons and in many cases, the High Court have been inclined to grant reliefs to such cases. However, it must be remembered that a writ remedy is strictly at the discretion of the High Court and is subject to the test of judicial review. A challenge on merits of the case would seldom be entertained in a Writ remedy. Certain issues with respect to detention and seizure orders under the GST regime for which writ remedies were sought are discussed below.

Technical difficulties

21. In the case of *Rajavat Steels vs. State of UP, 2018-VIL-452-ALH,* a seizure notice was issued on the ground that the truck number in the invoice, e-way bill and weigh slip was incorrectly mentioned as U.P.-78-DN 7983 instead of U.P.-78-DN 7938. In this regard, the Allahabad High Court appreciated that the said incident had happened due to mistake or human error and expressed their dissatisfaction with the conduct of the authorities. The Allahabad High Court specifically noted that this was a clear cut case of harassment of the petitioner and, accordingly, allowed release of the goods and the vehicle on furnishing of an indemnity bond.

22. One may not paint the entire revenue administration with the same brush of arbitrariness as in fact the GST administration is cognizant of possibility of such technical errors and necessary instructions are periodically issued to safeguard the interests of the businesses. In this regard, reference may also be made to Circular No. 64/38/2018-GST dated 14-9-2018 which provided that in case a consignment of goods is accompanied with an invoice or any other specified document and also an e-Way bill, proceedings under section 129 of the CGST Act may not be initiated, inter alia, in the following situations:

i. Spelling mistakes in the name of the consignor or the consignee but the GSTIN, wherever applicable, is correct.

ii. Error in the pin-code but the address of the consignor and the consignee mentioned is correct, subject to the condition that the error in the PIN code should not have the effect of increasing the validity period of the e-way bill.

iii. Error in the address of the consignee to the extent that the locality and

other details of the consignee are correct.

iv. Error in one or two digits of the document number mentioned in the e-Way bill.

v. Error in 4 or 6 digit level of HSN where the first 2 digits of HSN are correct and the rate of tax mentioned is correct.

vi. Error in one or two digits/characters of the vehicle number.

Irreparable loss or disproportionate action

23. In certain cases, the High Courts have been inclined to give relief where the actions taken by the authorities may result in irreparable loss or the said actions are disproportionate and unreasonable. In *RK Motors vs. State Tax Officer, 2019-VIL-44-MAD,* the Madras High Court considered a case where even though the goods in dispute were covered by appropriate documents and the due tax was paid, detention and seizure orders were passed by the concerned authorities on the ground that the goods in the vehicle were not offloaded at the destined location and were instead moved to a different location on account of incorrect instructions received by the driver. The High Court took into account the facts mentioned above and noted that the only question which ought to have been considered is whether there was any attempt of evasion. Considering that the tax in respect of the goods had already been remitted and the transportation of such goods was duly covered by appropriate documents, it was held by the High Court that the detention and seizure orders suffered from the vice of gross unreasonableness and disproportionality. It was further noted by the High Court that when a power is conferred on a statutory authority, it should be exercised in a reasonable manner. Accordingly, the High Court quashed the impugned detention and seizure orders on payment of a nominal fine.

Release of goods/conveyance on payment of furnishing adequate security

24. There have also been various proceedings where despite depositing amounts with the authorities, the goods and conveyances which have been detained and seized have not been released. For instance, in *Sanjay Trading Company vs. State of Gujarat, SCA No. 13207 of 2019,* the vehicle as well as the goods came to be seized on the ground that the goods were not accompanied by e-Way bill and certain other discrepancies. In this case, the Gujarat High Court noted that the petitioner had deposited an amount towards tax liability and penalty and, accordingly, passed an interim order directing the authorities to release the vehicle as well as the goods. Similar orders have been passed by the Gujarat High Court in the case of *Jai Jawan Jai Kisan Suppliers vs. State of Gujarat, 2019-VIL-325-GUJ* and by the Kerala High Court in *Stove Kraft Pvt. Ltd. vs. Assistant State Tax Officer, 2019-VIL-61-Ker.*

Jurisdictional Issues

25. In certain cases, the aggrieved persons have also raised a challenge with respect to jurisdiction of the authorities to initiate proceedings. In *Advantage India Logistics Pvt. Ltd. vs. Union of India & Others, 2018 (9) TMI 1417,* the plea of the Petitioner was that in absence of any notification under Section 4 of Integrated Goods and Services Tax Act, 2017 ('IGST Act'), the state authority was not competent to issue show cause notice. In this case, the Madhya Pradesh High Court held that the officers appointed under the relevant State legislation were authorized to be proper officers for the purposes of the IGST Act as well.

Cases where writ petitions have not been entertained

26. It may be noted that in certain cases, the High Courts have not been inclined to consider the issues raised on merits and have relegated such petitions back to the concerned assessing authority. In the case of *Raghavendra Traders vs. Government of Karnataka, 2018-VIL-171-KAR*, the Karnataka High Court considered a case where the main dispute was relating to the valuation of goods carried in the vehicle. In this regard, the High Court noted that the dispute was factual in nature and, accordingly, relegated the petitioner to the Appellate Authority without expressing any opinion on the merits of the case. Similarly, in the case of *Gati-Kintetsu (Supra),* the Calcutta High Court refused to entertain a writ petition against a seizure order on the ground that a statutory alternative remedy of appeal under Section 107 of the CGST Act is available.

27. In this regard, emphasis may also be placed on the recent judgment of the Supreme Court in the case of *Union of India vs. Palak Designer Diamond Jewellery, 2019-TIOL-350-SC-GST.* In this case, the petitioner filed a Special Leave Petition against the order of the Gujarat High Court in *Palak Designer Diamond Jewellery vs. Union of India, 2019-TIOL-430-HC-AHM-GST* wherein the High Court allowed provisional release of the seized goods under Section 67 (6) of the CGST Act upon execution of a bond and furnishing of a bank guarantee. However, the Supreme Court has subsequently granted an interim stay on operation of the said order of the Gujarat High Court.

28. In view of this, it is our view that before initiating writ proceedings against seizure and detention orders, assessees must evaluate their facts independently and examine if their individual case falls within the ambit of the settled principles of judicial review.

IV. CONCLUSION

29. Admittedly, introduction of GST is a major shift from the erstwhile multi-layered, multi-jurisdictional tax system to a consolidated 'One Nation-One Tax' system. There will be certain implementational challenges while embracing this new tax system for both – tax administration as well as businesses. What is important is that both the stake holders in the GST eco system, endeavour to perform their roles judiciously and no one seeks to take undue advantage of any other. In the field of search, seizure and detention, one of the links in the chain is an illiterate or semi-literate transporter's lobby. There are bound to be certain errors in the compliance. What is required for the authorities is to identify and seek rectification of those errors judiciously for some of them may be genuinely unintentional. This approach will make the implementation of the GST system smooth and painless. At this juncture, it will not be out of place to quote from a recent judgment by the Kerala High Court in *Sheen Golden Jewels (I) P. Ltd. vs. State Tax Officer, 2019 (23) GSTL 4:*

"A nascent enactment in a nebulous field of taxation will have many teething troubles. GST is no exception. In its path to perfection, GST has much dust to settle-legislatively and judicially. These are the days of confusion and cacophony: many views, many interpretations, and many jurisprudential mumblings."

30. The ideal way forward will be to adopt a pragmatic approach wherein the genuine and *bona fide* issues faced by the taxpayers and transporters who are affected by the seizure and detention proceedings are appreciated and resolved amicably and liberally at the same time create sufficient deterrence for the erring tax evaders. This will result in ease of business, provide equity and level playing field for the tax compliant businesses and will provide for efficient use of the resources of the tax administration.

Recovery Mechanism - Provisions and Procedure

Bharat Raichandani,
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What the Government gives, it must take first

Introduction

The power to tax is power to destroy. Such is the effect of recovery of taxes. As is well known, death and taxes are certain, the two, however, should not be related. At least death does not get worse, every time the Government meets.

The primary goal of tax administration is to secure revenue for development. Compliance to tax obligations and recovery of tax arrears is the primary step towards creation of revenue yield, efficiency and fairness in any tax system. Recovery proceedings, in my view, would draw its genesis from Article 265 of the Constitution of India, which states that "no tax shall be levied or collected except by authority of law". While such a provision places a duty upon a tax payer to pay taxes as levied under law, on the other hand, it provides the Government with the power to levy and collect tax within the confines of the Constitution. It is in absence of conformity to provisions of law pertaining to payment of tax that recovery mechanisms come into play.

Erstwhile recovery mechanism

We have a system of taxation by confession. With levy, there has to be a power to recover. Tax assessment today is, largely, based on self-assessment. The tax payer has to assess himself to tax dues. Should such dues not be paid, within the prescribed time, recovery provisions would become operative. Section 11 of the Central Excise Act, 1944 permits an officer empowered by Central Board of Excise & Customs (CBEC) to recover any amount payable by an assessee by attachment or sale of excisable goods. In cases where such an assessee fails to make the payment, the officer can prepare a certificate and send it to the collector i.e., the district in which the defaulting assessee resides or carry on his business. If the assessee disposes off his trade or business, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all excisable goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by such officer. Likewise, Section 87 of the Finance Act, 1994 provides for recovery of any amount due to the Government. Section 33 of the Maharashtra Value Added Tax Act, 2002 provided for recovery invoking garnishee proceedings. Section 34 thereof provided for special power for recovery of tax arrears as arrears of land revenue.

GST regime

Even under GST era, similar provision exists. Like there was a need for a change over the tried and tested formula. Section 79 of the Central Goods and Services Tax Act, 2017 ("the Act") provides for recovery of GST. The form/manner in which tax is to be recovered is:

i. Deduction of the tax amount by a proper officer/specified officer from any amount owed by a person towards the defaulting assessee;

ii. By selling of goods belonging to an assessee by process of auction, including e-auction;

iii. Issuance of a notice in writing to a third person who owes money to the defaulting assessee or holds money for such defaulting assessee, to pay to the Government the tax amount;

iv. Detention of movable or immovable property of a defaulting assessee until the tax amount payable is paid;

v. Issuance of a certificate to a collector in a district where the defaulting assessee resides, to recover the tax amount in the form of arrears of land revenue; or

vi. Application to a Magistrate for recovery of the tax amount from a defaulting assessee by a proper officer. The Magistrate can proceed to recover the tax amount in a manner as if a fine has been imposed by him on the defaulting assessee.

The provision provides for the above modes of recovery. The section uses "namely". It is well settled that the word "namely" is exhaustive and not illustrative. "Namely" is "that is to say"[1]. It means "to wit"; "videlicet". Namely means "by name"[2]. Thus, there cannot be any other mode/ method of recovery which can be resorted to by the Revenue. If they do, it would be illegal.

Any or all methods can be adopted for recovery. The modes are not exclusive. They are not sequential. They are optional.

It would be apposite to state, the underlying test, which flows is that the above stated provisions would apply in cases of admitted and/or undisputed tax liability. The provision authorises recovery of dues payable to the government. Thus, what is not "*due*" and "*payable*" to the Government, cannot be enforced by recovery. A self assessed liability declared in the return would be subject matter of recovery, if not paid. There is no requirement of issuance of a show cause notice, in law, proposing any such action to be taken. Per contra, if tax liability is under challenge and/or dispute, the recovery provisions, encapsulated above, cannot be invoked.

Attachment of Bank Accounts

The most impressive and oft-repeated mode of recovery has been attachment of bank accounts. The seizure of the bank accounts results in paralyzing the day-to day operations, loss of business and loss of market reputation for the assessee. However, bank accounts cannot be attached/freezed, unless there is an admittedly tax liability which is due and payable to the Government. In *Lawons's* case[3], the Bombay High Court held that unless a competent authority adjudicates the proceedings by an appropriate order, no dues can be said to be crystallized and adjudicated. Merely on issuance of show cause cum demand notice, the bank account could not have frozen and/or attached. This view has been reiterated in several other cases[4].

Recently, the Revenue sought to distinguish the said view and argued that, during the course of investigation, a statement has been recorded under section 14 of the Central Excise Act read with section 83 of the Finance Act, and in the said binding statement, the liability has been accepted and admitted. Therefore, according to the Revenue, recovery, by way of attachment of bank accounts, was justified. This contention came to be negated in *M. P. Enterprises* Case[5] holding that a statement does not amount to admission. At the stage of adjudication, the assessee would

1. Concise Oxford Dictionary.
2. Chamber's Twentieth Century Dictionary.
3. *Lawson Tours and Travels (India) Pvt. Ltd. vs. Deputy Director, DGCEI, Zonal Unit, Mumbai 2015 (317) ELT 248 (Bom).*
4. *ICICI Bank Limited vs. Union of India - 2015 (38) STR 907 (Bom); Cleartrip India Pvt Ltd vs. Union of India 2016 (42) STR 948 (Bom) and Quality Fabricators & Erectors vs. The Deputy Director, DGCEI Zonal Unit, Mumbai 2015-TIOL-2710-HC-MUM-ST.*
5. *M. P. Enterprises vs. Union of India (Writ Petition No. 10085 of 2018)* (Order and Judgment dated 18-9-2018).

have an opportunity to explain the meaning and significance of the alleged admission.

In a case where the bank accounts of the assessee's sister/group companies were attached, the revenue argued that the said companies should challenge the said recovery notice and the assessee has no locus. This connection was rejected in *Sampark Marketing* Case[6], holding that it was for the dues of the assessee that the bank accounts were attached and hence, the assessee had locus to challenge the same. In fact, the revenue had no authority to attach the bank accounts of the sister companies.

Garnishee Proceedings

Another powerful tool is attaching the debtors. The procedure of recovering arrears of tax from a third party draws its origin from the Civil Procedure Code, 1908. Termed as "garnishment", the concept was introduced in the Civil Procedure Code, 1908 (by way of provisions contained in Rule 46A to 46L of Order XXI). Under garnishee proceedings, a garnishee is a person who is liable to pay a debt to a judgment debtor or to deliver any movable property to him. A garnishee order is passed by an executing court, directing or ordering a garnishee/third party not to pay money to judgment debtor. It is an order of the court to attach money or goods belonging to the judgment debtor in the hands of a third person. Garnishee orders may be made by the court to holders of funds, i.e. a third party that no payments have to be made until the court authorises them. Such an order is served upon a garnishee requiring him not to pay or deliver the money or property of the debtor (defendant) to him and/or requiring him to appear in the court and answer to the suit of the plaintiff to the extent of the liability to defendant. The purpose of the Order is to protect the interest of the decree holder. Under Rule 46A, a notice is to be issued to a garnishee before a garnishee order is issued against him. In case such a notice is not issued to a garnishee and an opportunity of hearing is not given, then any garnishee order passed against such a person shall be rendered as null and void.

Garnishee proceedings were incorporated under the erstwhile indirect tax legislations in the form of section 11 of the Central Excise Act, 1944, section 142(1)(d) of the Customs Act, 1962 and section 87(b) of the Finance Act, 1994. *Vide* Circular dated 28-2-2015[7], the CBEC clarified that when an assessee pays the money to the Government after issuance of a garnishee notice to a garnishee/third party, in such cases, the garnishee notice has to be either withdrawn or amended. Accordingly, the officers are empowered to add, amend, vary or rescind any garnishee notices.

However, in departure to the erstwhile central tax statutes, section 78 of the Act allows an assessee to request for payment of amount in arrears in the form of monthly instalments. Under the erstwhile regime, the same was regulated by circulars issued by the CBEC. *Vide* circular dated 18-3-1991[8], assessee was allowed to pay amount in arrears in the form of 12 monthly instalments. There was also a debate on the amount of interest payable on such instalments. *Vide* Circular dated 11-4-1994 and 2-5-1996[10], it was clarified that rate of interest on such instalments would be at the rate of 20% per annum.

Recovery Proceedings against Directors and Purchasers

In cases where the Revenue is not in a position to recover from the company (assessee), it proceeds to recover the same from the bank accounts/ property of the Directors. Whether such recovery is permissible in law? I think not.

6. Writ Petition No. 2195 of 2018 (Order and Judgment dated 24-10-2018).
7. Circular No. 996/3/2015-CX dated 28-2-2015.
8. Circular F. No. 289/10/91-CX.9 dated 18-3-1991.
9. Circular No. 32/1994-CX dated 11-4-1994.
10. Circular No. 208/42/96-CX dated 2-5-1996.

In *Vandana's* Case[11], the petitioner was appointed as the director of the company after her father's demise. Before his demise, the petitioner was transferred a property situated in Chembur by way of gift. The department issued notice to the petitioner, demanding recovery of excise dues payable during the tenure of her father by way of attachment of the property gifted to her in as much as the same was in the name of her father. The Bombay High Court held that duty and penalty are arrears of the company. It was the company that was the person engaged in manufacture of goods and registered as manufacturer under section 6 of the Central Excise Act, 1944. Accordingly, the obligation to pay the excise duty was on the company and not on the individual directors. There are no statutory provisions which allow recovery of excise dues from directors of a company. Hence, issuance of notice to the former director and his daughter for recovery of arrears is without jurisdiction. Similar view has been taken by the Punjab and Haryana High Court in *Krishan Kumar's* case[12], wherein it was held that directors are not personally liable for liability of a company.

Similarly, the Revenue seeks to recover arrears of sick companies from its purchasers. The issue about the liability of new purchaser/buyer to discharge outstanding dues of predecessors has been a subject matter of dispute. It has been observed in *Alpha Silicon's* Case[13] that arrears can be recovered from such buyers only if there is a transfer of goodwill of business along with transfer of assets. The position was reiterated by the Andhra Pradesh High Court in *Adinarayan's* Case[14]. However, these are essentially matters of fact.

Provisional Attachment

Section 83 of the Act provides for provisional attachment of property, including bank account, belonging to a taxable person. During pendency of proceedings under section 62 (*assessment of non-filers of returns*) or section 63 (*assessment of unregistered persons*) or section 64 (*summary assessment in certain cases*) or section 67 (*power of inspection, search and seizure*) or section 73 (demand of tax not paid/erroneously refunded/ short-paid for reasons other than fraud or wilful misstatement) or section 74 (*demand of tax not paid/erroneously refunded/short-paid for reasons of fraud or wilful misstatement*), the Commissioner can provisionally attach the property of an assessee, including bank account to safeguard the interest of the Revenue.

Recently, the Gujarat High Court, under the GST regime, in Ankit Lokesh Gupta Case[15], held that section 83 cannot be invoked in case of investigation pending under section 71(1) of the Act and hence, it was without authority of law. Though the Revenue withdrew the attachment notice, the High Court imposed cost of ₹ 10,000/- on the Revenue for such illegal action.

It is important to note that there should be sufficient justification to hold a view that the provisional attachment of property is necessary to protect the interests of revenue. The remedy of attachment being, by its very nature, extraordinary, has to be resorted to in the utmost circumspection and with maximum care and caution. The grounds on which the tax officer entertains the reasonable belief that the assessee would dispose of, or remove, the property and the sources of his information, if any, should be clearly stated while seeking the approval. It may also be noted that appropriate disciplinary action shall be initiated against the officers who may be found to exercise the powers of provisional attachment of property frivolously and without sound reasons[16].

In fact, the following types of offences committed by a supplier alone should be considered for

11. *Vandana Bidyut Chatterjee vs. Union of India reported at 2012-TIOL-1212-HC-MUM-CX.*
12. *Krishan Kumar vs. UOI & Ors reported at 2015-TIOL-2765-HC-P&H-CX.*
13. *Alpha Silicons vs. Assistant Commissioner of Sales Tax (Recovery), Gulbarga reported at (77 STC 68) (Kar.).*
14. *V. Adinarayan & Others vs. Andhra Bank & Others reported at (142 STC 469) (A.P.).*
15. *Ankit Lokesh Gupta vs. State of Gujarat (Special Civil Application No.16632 of 2019) (Order and Judgment dated 01.10.2019).*
16. Recommendation of the Standing Committee on Finance (Fourteenth Lok Sabha) in its 27th Report.

provisional attachment of property: (a) supply of goods or services or both without the cover of an invoice or any other document, as prescribed, and without payment of tax; (b) supply of goods or services or both without declaring the correct value for payment of tax, where a portion of value, in excess of invoice price, is received by him or on his behalf but not accounted for in the books of account; (c) Taking of input tax credit without the receipt of goods or services specified in the document based on which the said credit has been taken; (d) Taking of input tax credit on invoices or other documents which a person has reasons to believe as not genuine; (e) Issue of invoice or any other document, without providing or to be providing a taxable supply. In other words, cases of outright tax evasion should be dealt with under such a provision.

Arrest

A person who commits any of the offences under section 132 which includes evasion of liability, supply of goods and services without issuance of an invoice, avails input tax credit without issuance of an invoice, collects tax and fails to pay to the Government etc., such a person shall be arrested under section 69 of the Act. Similar provisions existed under section 91 of the Finance Act for proceedings against a defaulting assessee. Such proceedings are initiated against a defaulting assessee to recover service tax and excise dues. However, arrest of a person for recovery of money is nothing less than a draconian initiative. Such orders of detention and arrest should be made by the department only if an assessee is seriously involved in obstruction or delay of the amount due to the Government. Without affording any chance to an assessee to represent his case, no arrest can be made solely for the purpose of recovery of arrears/dues.

This exposition of law was rendered by the Delhi High Court in *MakeMyTrip* Case[17] and *E-Biz* Case[18]. It was held that payment of service tax during bail proceedings of arrested person, while in judicial custody and that too without show cause notice is under coercion and duress. The same cannot be considered as voluntary. Loss of liberty and reputation is bound to compel even most rational person to succumb to extreme pressure. Ergo, the amount collected from detained assessee by the DGCEI was ordered to be returned to assessee.

Due to such high-handed action on part of the officers time and again, the Board issued guidelines[19] regarding arrests of alleged defaulting assessee. Balancing the interest of both sides; prevent any impingement on the personal liberty of an assessee and carrying out proper investigation into the facts of the case are some of the striking tests laid down. To this end, the Government has laid down monetary limits for invocation of such provisions.

First Charge

The concept of "first charge" is yet another debatable area marred by litigation and statutory amendments. "First Charge" is defined as a charge which shall have priority over all others. The concept of first charge finds its roots in the common law doctrine of "government debts to have priority". This common law doctrine is enshrined in the Constitution of India under Article 372(1). Tax enactments have been constructed in a manner so as to provide primacy to debts owed to the Government.

In **Dena Bank's** Case[20], the Supreme Court held that statutory dues will have priority over the dues of a secured creditor, if there is a specific provision in that particular statute. In *Central Bank's* case[21], the Supreme Court held that

17. *Makemytrip (India) Pvt. Ltd. vs. Union of India (2016) 44 STR 481 (Delhi).*
18. *E-bizcom Pvt. Ltd. vs. Union of India (2016) 44 STR 526 (Delhi).*
19. Circular No. 201/11/2016-Service Tax dated 30-9-2016
20. *Dena Bank vs. Bhikabhai Prabhudas Parekh & Co. (2000) 5 SCC 694.*
21. *Central Bank of India vs. State of Kerala & Ors MANU/SC/0306/2009.*

state dues will have priority on the basis of the existence of statutory first charge in a particular tax enactment. Pursuant to the same, all major tax enactments have been amended to provide for a specific "first charge" clause, providing priority to government dues over any other. However, the question that remains to be answered is who will be first amongst equals.

This common law doctrine finds place under Section 82 of the Act. It creates first charge in favour of the Government for payment of any tax, interest or penalty which an assessee is liable to pay. Section 82 opens with a *"non-obstante* clause". However, it gives precedence to the Insolvency and Bankruptcy Code 2016 (IBC, 2016) for creation of first charge. Therefore, section 82 of the Act has to be read with/in conjunction with section 53 of IBC, 2016 to understand creation of first charge on "government debts/dues".

Section 53 of IBC, 2016 provides for a waterfall mechanism for the order of distribution of proceeds from the sale of liquidation assets among the stakeholders in liquidation proceedings of a corporate person. By virtue of the notwithstanding provision of section 53, the waterfall mechanism under the Code is to have overriding effect over any other Central or State statutes that are in force. Under the earlier liquidation regime, Government dues were given a high priority among all the outstanding dues whereas under the Code priority for the payment of Government dues is shifted to the bottom. The order of priority under IBC, 2016 is as under-

(a) The insolvency resolution process costs and the liquidation costs paid in full;

(b) The following debts which shall rank equally:

(i) workmen's dues for the period of 24 months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) Wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date;

(d) Financial debts owed to unsecured creditors;

(e) The following dues shall rank equally between and among the following:

(i) government dues; and

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) Any remaining debts and dues;

(g) Preference shareholders, if any; and

(h) Equity shareholders or partners, as the case may be.

Even under the erstwhile service tax regime, first charge was created upon Government dues, irrespective of anything contained in Central and State laws. However, the same was subject to order of priority of dues as provided under Section 529A of the Companies Act, 2013, Recovery of Debts Due to Banks and the Financial Institutions Act, 1993 and Securitisation and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002.

Conclusion

Recovery provisions are mandatory. It is the need of the hour. For it creates fear psychosis. However, there is a fine line. But, one must draw the line. It is to be decided, in the facts of each case, which side of the line would one fall. Either way, there is only one right side. Your right side is not mine.

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Role of Professionals – Precautions to be taken and Obligations under CA Act

CA C. N. Vaze

The Chamber of Tax Consultants deserves compliments for conceiving a special issue of its Journal, dedicated to the theme of **'GST Frauds, offences, Penalties and Prosecutions'.** I felt honoured that I was asked to contribute on the topic – **'Role of Professionals – Precautions to be taken and obligations under CA Act'.**

I honestly believe that this topic calls for serious introspection on the part of all of us, or for that matter all those who are concerned with the implementation of GST. This requires a lot of courage and conviction on our part to speak the truth and follow it into practice. It comes only out of ethical behaviour. It is well said, "If you salute yourself, you don't have to salute anyone; but if you pollute yourself, you may have to salute everybody". The role of professionals is nothing but to learn to salute the profession and command respect from others.

We are in *Kaliyug*. All professionals are taken for a ride. By all professionals, I mean, not only CAs or tax professionals; but even doctors, lawyers, architects and others. There are many people having vested interests in compelling the professionals to bend and compromise on principles. There are often 'tempting rewards' for such compromises. It is true that the whole system is responsible for this pathetic state of affairs. There is a complete lack of credibility. Duty conscious people have become a rare species. It does not mean that the majority of the professionals lack duty consciousness. It is true that the circumstances do not permit them to perform their duty truthfully.

Thus, the mere absence of dishonesty or ill-motive is not enough. The real question is whether we have the willingness and courage to bring honesty into practice, in a positive sense! Are we in a position to stand erect, assert ourselves and put our foot down on non-sensical things? Have we lost our spine? Unless we wake up and regain our strength, we have no future. Our very survival is at stake. This role of a professional has to manifest itself in many forms and dimensions. In this article, I attempt to discuss a few of them in the succeeding paragraphs.

1. The starting point

How do we project ourselves as professionals? The fundamental principles of any profession; and of CAs in particular are:-

- Integrity - Honesty
- Objectivity - Impartiality

- Professional competence - Updated knowledge and skills; with training
- Confidentiality - Secrecy
- Professional behaviour - Compliance

If we lack even one of these, our respectability becomes questionable.

2. Threats

The Code of Ethics for CAs cautions us on the following types of threats in our day-to-day practice.

- Self-interest threat - Independence
- Self-review threat - Conflict of interest
- Advocacy threat - Taking a particular stand and then act to be 'objective'
- Familiarity threat - Relationship may make us compromise
- Intimidation threat - This could be actual or perceived

3. Safeguards

Our CA Code of Ethics then describes the safeguards created by the profession, legislation or regulation. These include –

- Education, training, and experience for entry into the profession.
- Continuing professional education and development
- Professional standards
- Professional or regulatory monitoring and disciplinary procedures
- External review by a legally empowered third party

We need to seriously ponder over each of these points. That is introspection. If we follow it in a letter as well as in spirit, we can perform wonders.

4. Are we ourselves corrupt?

Very startling question! We blame the authorities for being corrupt. We equate corruption with bribery. But is bribery the only form of corruption? Corruption could be even of thoughts and attitudes. Our role is that of financial police. If we accept fees without discharging our attest function or even advisory function truthfully and without doing justice to what is expected of us, is it not 'corruption'?

5. Need to be agile and alert

We should learn to be proactive and not reactive. Thus,

- When a new law or regulation is proposed, we should give priority to study the pros and cons of the content. By our experience, we should be able to point out the flaws or lacunae that eventually lead to serious hardship for ourselves.
- Even our actual work should be planned in a pro-active manner and executed in an organised way. That is professionalism.
- It is necessary and worthwhile to educate the clients, their staff; and also train our articled students and assistants. A conscious effort in this regard is essential.
- Timely and effective communication. – This is of utmost importance. Most

of the problems arise due to the lack of or gaps in communication.

- Maintaining a record of work. The work should not only be done, but it should be seen that it is done. And, the faintest of ink is stronger than the strongest of memories.

In all our work, the careful maintenance of working papers is a must. Many professionals miserably fail in this aspect.

Actually, the concept of Peer Review is meant to facilitate this. Unfortunately, we professionals do not take it in proper spirit and try to 'manage' it. It is painful that even CPE hours are sought to be 'managed' by many.

Well-directed efforts – This also calls for time-management. There are often wasteful efforts that have no direction. Even if we slog burning late candles, we do not get comfort and confidence that everything is proper. We get swayed in the flow and cannot steer ourselves to the destination.

6. Reasons for today's plight

It was said in old scriptures that in *kaliyug*, the strength lies in unity. That is precisely where we professionals lack. We assemble only for academic discussions and debates, but never think of any collective action. We lack unity and are keen to grab work, not necessarily in a transparent and fair manner. We never make our voices heard. That is why our representations are not perhaps received respectfully in the Government circles.

7. Bloodhound, and not watchdog – Professional skepticism

A few years ago, Chartered Accountants had a shelter under the maxim 'Auditor is a watchdog and not a bloodhound'. This observation of the High Court is no longer a strong shield to protect us from the allegation of negligence. Now, an auditor is expected to be a bloodhound only.

Therefore, henceforth, we should proceed with professional skepticism in every task. Doing anything in 'good faith' may prove disastrous.

8. Procedural precautions

Until now, we discussed the precautions in respect of attitude and methodology of working. There are certain procedural precautions also advisable. Under GST, services by a tax professional can either be in the nature of advisory/consultancy services or compliance services. Besides, a few professionals like Chartered Accountants/Cost Accountants are also permitted to undertake Statutory Audit under the GST Act.

Needless to say that, when it comes to tax advisory services, a professional must draw a line between, advice resulting in tax planning which falls well within the four corners of the law and practices that are suggestive of tax evasions. The latter should be avoided at any cost.

As regards, providing audit services, one needs to ensure that, generally accepted auditing practices prevailing in India are adhered to in letter and in spirit and audit methodology and processes are adequately documented.

- Firstly, one should ensure whether one's appointment is made properly. One should insist on a regular appointment letter. It is in the interest of the professional himself. The scope of work and remuneration should be

clearly specified. If the appointment is for the first time, then one should check whether there was any previous auditor who has carried out the work. Ideally, it should be stated in the appointment letter itself. If there was any previous auditor for GST or for any indirect tax for that matter, it would be mandatory to communicate with him in writing. One has also to ensure that the previous auditor's undisputed audit fees have been paid.

- Besides, if one fails to communicate and/or if undisputed audit fees are unpaid, one is liable to be held guilty of professional misconduct.
- Wherever possible, cognizance of third party information may be taken while carrying out audit procedures. The Management Representation Letter may be used as a shield only to safeguard Auditor's interest in limited areas and should not be treated as a tool to replace an achievable/ indispensable audit exercise.
- The role of auditor under GST is not only to carry out the audits of Books of Account maintained under GST (i.e., Inward Supply Register, Outward Supply Register, Stock Register, etc.) but also to prepare a Reconciliation Statement reconciling the GST turnover with income/ receipts as per financial statements. Although CBIC Circulars clarify that, GST auditor is not expected to go beyond books of account, the said Reconciliation Statement (GSTR-9C), should be prepared in the "true and correct" manner. Hence, items contained in the financial statements not having GST exposure need to be properly disclosed by the auditor in his reconciliation statement along with reasons therefor.
- In addition to the same, the GST auditor needs to be more vigilant while auditing the turnover which is not recognized as income in the books of accounts (e.g.: turnover relating to "deemed supplies" without considerations).

As regards compliance services, the following precautions need to be taken:

- Proper KYC of the client to ensure that clients are genuine.
- Scope of work should be properly defined. (e.g.: A person responsible for filing GST returns for his clients as a part of his professional service should ensure that letter of engagement makes it clear that his services involve filing of data provided by the client after limited scrutiny and is not responsible for auditing or checking the genuineness of such transactions).
- Although information for the returns is necessarily compiled and vetted in Tax professionals' office, it is a healthy practice, to file the return from the client's place.
- Care should be taken that necessary validation details required for filing of GST returns (such as the mobile number and email address etc) provided by the tax consultants to GST Authorities/GSTIN are those of the respective clients and not of the consultant.
- The use of digital signatures should be properly monitored.

- Any payment made by the client towards payment of taxes should be deposited in a separate bank A/c maintained for client deposits. Adequate correspondence for receipt of such payment should be maintained.

9. Obligations under the Chartered Accountants Act

The CA Act prescribes many conditions for the conduct of the CA profession. The Council of the Institute of Chartered Accountants of India (ICAI) has been empowered to prescribe guidance notes, accounting and auditing standards and other guidelines to regulate the conduct of its members. All these pronouncements are binding on the CAs. So also, opinions expressed by the Expert Advisory Committee (EAC) and Ethical Standards Board (ESB) are also to be honoured by the CAs.

Section 22 of the CA Act defines professional misconduct as any act or omission provided in any of the Schedules, and it also covers 'other misconduct'.

The misconduct can take place not only in the assignments relating to audit and certification; but also in advisory function.

A few important clauses in schedules to the CA Act are:-

Part IV of First Schedule

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he—

(1) is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months;

(2) in the opinion of the Council, brings disrepute to the profession or the Institute as a result of his action whether or not related to his professional work.

Part I of Second Schedule –

A chartered accountant in practice shall be deemed to be guilty of professional misconduct, if he—

(1) discloses information acquired in the course of his professional engagement to any person other than his client so engaging him, without the consent of his client or otherwise than as required by any law for the time being in force;

(2) certifies or submits in his name, or in the name of his firm, a report of an examination of financial statements unless the examination of such statements and the related records has been made by him or by a partner or an employee in his firm or by another chartered accountant in practice;

(3) expresses his opinion on financial statements of any business or enterprise in which he, his firm, or a partner in his firm has a substantial interest;

(4) fails to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary in making such financial statement where he is concerned with that financial statement in a professional capacity;

(5) fails to report a material misstatement known to him to appear in a financial statement with which he is concerned in a professional capacity;

(6) does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;

(7) fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion;

(8) fails to invite attention to any material departure from the generally accepted procedure of audit applicable to the circumstances;

Part II Second Schedule –

(1) contravenes any of the provisions of this Act or the regulations made thereunder or any guidelines issued by the Council;

Part III Second Schedule

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term exceeding six months.

Readers are also advised to note certain FAQs published by the ICAI in respect of GST Audit and certification. A few selected ones have been reproduced below:

Q6. Whether a member can send a presentation/ write-up on GST and include services provided in the same?

A. He can send a presentation on GST/write-up on GST only to existing clients, and to a proposed client if an inquiry was received from the proposed client with regard to the same.

Q.8 Whether a member can share GST updates on modes like mass mail/social media?

A. A member can share GST updates, mentioning himself as "CA" with an individual name, provided the communication is limited to providing updates. Mention of Firm name is not allowed.

Q9. Whether a member can publish testimonials/ appreciation letters received by him with regard to GST Training assignments?

A. Such testimonials are allowed to be mentioned on the CA Firm website, but not on social media like Facebook, Linkedin, etc.

Q11. Whether it is permissible for a member to put a Notice for GST Registration/Return preparation along with mention of his name/name of CA Firm? Whether he can mention fees/charges for providing such services?

A. GST services are part of professional services provided by a chartered accountant, and accordingly, its advertisement has to be in terms with the ICAI Advertisement Guidelines, 2008 only. He cannot mention the fees/charges, as it is not allowed in the Advertisement Guidelines.

I hope, the contents of this article will awaken the fellow-members to bring into practice the ICAI motto –

"Ya esa suptesu jagarti kamam kamam Puruso nirmimanah |

Tadeva sukram tad brahma tadev amrtamucyate |

Tasminlokah sritah sarve tadu natyeti Kascan | etad vai tat |

(He who is awake when the world around is asleep!)

Conclusion

Needless to state that any audit or certification work is an onerous task. There are many users of the statements certified by us. Under GST one has to certify the statements as 'True and correct', and not 'True and fair'. Correctness has to be a hundred per cent! Hence, eternal vigilance and professional skepticism are required. One simply cannot afford to take it lightly. Clients also need to be educated about their duties and the consequences of the errors. Further, it is also our duty to properly train our articled trainees and assistants to perform the task carefully and seriously.

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DIRECT TAXES

Supreme Court

Keshav B. Bhujle,
Advocate

1 ***Principal CIT vs. Ballarpur Industries Ltd.***
(2019) 413 ITR 447 (SC): [2019] 104 taxmann.com 394 (SC): dated 22-4-2019.

Appellate Tribunal – Tribunal being last Court of appeal on facts, its finding on question of fact is of significance, thus, where Tribunal did not correctly appreciate as to what Assessing Officer and Commissioner (Appeals) held and what was their reasoning which led to their conclusion that claim could not be considered as revenue expenditure, matter was to be remanded back for adjudication afresh (A.Y. 1993-4)

For the A.Y. 1993-94, the assessee had claimed a deduction of ₹ 3.25 crore as business expenditure. The Assessing Officer disallowed the claim holding that the payment cannot be considered as revenue expenditure. The Commissioner (Appeals) confirmed the addition. The Appellate Tribunal directed the Assessing Officer to allow the claim. The Bombay High Court dismissed the appeal filed by the Department.

On appeal by the Revenue, the Supreme Court remanded the matter back to the Tribunal and held as under:

"i) The Tribunal had recorded a finding that the Assessing Officer did not dispute the fact that the expenditure related to the business of the assessee, that the Commissioner (Appeals) reversed the findings of the Assessing Officer but that a perusal of the Commissioner (Appeals)'s order showed that he was of the view that the expenditure could not be considered as business expenditure and that the Commissioner (Appeals) was of the view that the expenditure in question was not a capital expenditure but of a revenue nature.

ii) This observation of the Tribunal, on what the Assessing Officer and the Commissioner (Appeals) held, was inconsistent in the light of the finding of the Assessing Officer. In other words, the Tribunal did not correctly appreciate what the Assessing Officer and the Commissioner (Appeals) held and what was their reasoning which led to their respective conclusion. The Tribunal proceeded to examine the case and eventually reversed the order of the Commissioner (Appeals). The High Court did not notice the observations of the Tribunal and upheld the order of the Tribunal.

iii) The matter deserved to be remanded to the Tribunal for deciding the appeal filed by the assessee afresh on the merits because the Tribunal being the last court of appeal on the facts, its findings on questions of fact

are of significance. The aggrieved party would not be prejudiced as it would have a right of appeal to the High Court and then to the Supreme Court against any adverse order.

iv) We allow the appeal, set aside the orders of the High Court and the Tribunal and remand the appeal to the Tribunal for its decision afresh on the merits in accordance with law uninfluenced by any observations made in the impugned order, the order of the Tribunal and in this order. Needless to observe, the parties will be entitled to raise all contentions in appeal before the Tribunal."

2 ***Principal CIT vs. Maruti Suzuki India Ltd.***
[2019] 416 ITR 613 (SC): [2019] 107 taxmann.com 375 (SC): dated 25-7-2019

Assessment – Validity of notice and proceedings – Effect of amalgamation of companies – Amalgamating company ceases to exist – No assessment proceedings can be initiated or order passed against it thereafter (A.Y. 2012-13)

For the A. Y. 2012-13, the assessee(S) filed its return of income on 28-11-2012. On 29-1-2013, a scheme for amalgamation of S and M was approved by the High Court w.e.f. 1-4-2012. On 2-4-2013, M intimated the Assessing Officer of the amalgamation. Notice u/s. 143(2) of the Income-tax Act, 1961 was issued to S the amalgamating company on 26-9-2013, followed by a notice u/s. 142(1). The final assessment order was passed on 31-10-2016 in the name of S (amalgamated with M) making an addition of ₹ 78.97 crores. Before the Tribunal the assessee raised the objection that the assessment proceedings were continued in the name of the non-existent or merged entity S and that the final assessment order which was also issued in the name of a non-existent entity, would be invalid. The Tribunal set aside the final assessment order on the ground that it was void *ab initio*, having been passed in the name of a non-existent entity.

The decision of the Tribunal was affirmed by the Delhi High Court.

The Supreme Court dismissed the appeal filed by the Department and held as under:

"i) The income sought to be subjected to the charge of tax for the A.Y. 2012-13 was the income of the erstwhile entity (S) prior to amalgamation. The consequence of the scheme of amalgamation approved u/s. 394 of the Companies Act, 1956 was that the amalgamating company ceased to exist. It could not thereafter be regarded as a person u/s. 2(31) of the Act against which assessment proceedings could be initiated or an order of assessment be passed.

ii) Notice u/s. 143(2) was issued on 26-9-2013 to the amalgamating company, S, which was followed by a notice to it u/s. 142(1). Prior to the date on which the jurisdictional notice u/s. 143(2) was issued, the scheme of amalgamation had been approved on 29-1-2013 by the High Court under the Companies Act, 1956 w.e.f. 1-4-2012. The Assessing Officer had assumed jurisdiction to make an assessment in pursuance of the notice u/s. 143(2). The notice was issued in the name of the amalgamating company in spite of the fact that on 2-4-2013, the amalgamated company M had addressed a communication to the Assessing Officer intimating the fact of amalgamation. On these facts, the initiation of assessment proceedings against an entity which had ceased to exist was void *ab initio*.

iii) The notice u/s. 143(2) under which jurisdiction was assumed by the Assessing Officer was issued to a non-existent company. The assessment order was issued against the amalgamating company. This was a substantive illegality and not a procedural violation of the nature adverted to section 292B.

iv) Despite the fact that the Assessing officer was informed of the amalgamating

company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principal that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the amalgamated company in the circumstances could not operate as an estoppel against law. The appeal is dismissed."

3 ***Prashanti Medical Services and Research Foundation vs. UOI***

(2019) 416 ITR 485 (SC): [2019] 107 taxmann.com 382 (SC): dated 25-7-2019

Special deduction u/s. 35AC of ITA 1961 – Article 142 of Constitution of India – Donations to notified projects and schemes – Notification granting approval to project of assessee-trust for three financial years – Deduction discontinued and benefit to donors not available for third financial year – No estoppel against Legislature – Provisions of section 35AC(7) valid (A.Y. 2018-19)

The petitioner appellant, a charitable trust, set up a heart hospital in Ahmedabad, and filed an application u/s. 35AC of the Income-tax Act, 1961 to the National Committee for Promotion of Social and Economic Welfare for grant of approval to its hospital project to enable donors to claim deduction from their total income of donation made to the trust for construction of the approved hospital project. A notification was issued by the Government on 7-12-2015 approving 28 projects as "eligible projects" u/s. 35AC of the Act. The name of the petitioner trust appeared at serial No. 10 in the notification and the period of approval was stated to be for three financial years commencing with the F.Y. 2015-16 i.e., 2015-16, 2016-17 and 2017-18. The trust received donations during the F.Ys. 2015-16 and 2016-17 and the donors claimed and were allowed deduction u/s. 35AC. The benefit of deduction was, however, discontinued from the A.Y. 2018-19 by insertion of sub-section (7) in section 35AC of the Act by Finance Act, 2016 w.e.f. 1-4-2017.

The petitioner Trust filed a writ petition challenging the constitutional validity of sub-section (7) of section 35AC of the Act on the ground, *inert alia*, that once the committee had granted approval to the trust's hospital project for a period of three financial years, it could not be withdrawn on the strength of insertion of sub-section (7) in section 35AC of the Act, that sub-section (7) of section 35AC was prospective in nature and had no application to projects approved by the Committee prior to insertion of sub-section (7), i.e., 1-4-2017, and that donors should be held entitled to avail of the full benefit for the three financial years in terms of the notification dated 7-12-2015. The Gujarat High Court dismissed the writ petition.

On appeal to the Supreme Court, the petitioner, *inter alia*, contended that the Court may invoke powers under article 142 of the Constitution of India and allow he trust to receive donations even for the third financial year in terms of the notification dated 7-12-2015. The Supreme Court dismissed the appeal and held as under:

"i) The plea of promissory estoppel is not available to an assessee against the exercise of legislative power. No vested right accrues to an assessee in the matter of grant of any tax concession to him. In a taxing statute, a plea based on equity or hardship is not legally sustainable. The validity of any provision especially a taxing provision cannot be struck down on such reasonings.

ii) 28 projects were approved by the Committee by notification dated 7-12-2015 but none of them had come forward to question the Constitutional validity of sub-section (7) except the trust. The real aggrieved parties, which should be felt aggrieved by insertion of sub-section (7) in section 35AC of the Act, were the donors who despite paying the donation to the assessee were not allowed to claim

deduction of the amount from their total income during the F.Y. 2017-18. None of the donors claimed to have paid amounts to any eligible projects had come forward complaining that despite their donating the amount to the trust for their project, they were denied the benefit of deduction of such amount from their total income by virtue of sub-section (7) of section 35AC of the Act during the F.Y. 2017-18.

iii) Sub-section (7) was prospective in operation and the donors were rightly allowed to claim deduction of the amount paid by them to eligible projects from their total income during two financial years, namely, 2015-16 and 2016-17. Neither the trust nor the donors had any right to set up a plea of promissory estoppel against the exercise of legislative power such as the one exercised while inserting sub-section (7) of section 35AC of the Act, especially when this sub-section was made applicable uniformly to all alike prospectively.

iv) Once the action was held in accordance with law and especially in tax matters, the question of invoking powers under Article 142 of the Constitution of India to allow the trust to receive donations even for the third financial year in terms of the notification dated 7-12-2015 did not arise. The donors were admittedly allowed to claim deduction of the amount paid by them to the trust u/s. 35AC during the two financial years 2015-16 and 2016-17. The matter had to rest there."

4 *Special Leave Petitions*

4.1 Business expenditure

4.1.1 Commission paid to Iraqi Government agency for purchase of oil

Supreme Court dismissed the Department's special leave petition against the judgment of the Bombay High Court whereby the High Court refused to admit the appeal on the question whether the Tribunal was right in allowing commission or surcharge paid to State Oil Marketing Organization, an Iraqi Government agency for payment of oil which the Assessing Officer had disallowed on the ground that it was illegal commission.

CIT vs. Reliance Industries Ltd.; (2019) 416 ITR 124 (st): dated 19-7-2019.

4.1.2 Specified Business – Hotels – Date of certificate

Supreme Court dismissed the Department's special leave petition against the judgment of the Madras High Court whereby the High Court held that the reasons assigned by the Tribunal for grant of deduction to the assessee u/s. 35AD(5)(aa) of the Income-tax Act, 1961 were just and proper and the clause (aa) of section 35AD(5) did not mandate that the date of the certificate was to be with effect from a particular date.

CIT vs. Ceebros Hotels Pvt. Ltd.; (2019) 416 ITR 124 (st): dated 5-8-2019.

4.2 Capital gains

4.2.1 Charge of tax – Transfer of Development Rights whether chargeable in absence of cost of acquisition

Supreme Court dismissed the Department's special leave petition against the judgment of the Bombay High Court whereby the High Court held that the Tribunal was right in holding that in absence of the cost of acquisition of the development rights, they could not be taxed as capital gains.

Principal CIT vs. Manohar H. Kakwani.; (2019) 416 ITR 125 (st): Dated 02/08/2019.

4.2.2 Long-term or short-term capital gains – Date of acquisition – Date of allotment of flat by builder

Supreme Court dismissed the Department's special leave petition against the judgment of the Bombay High Court whereby the

High Court held that the assessee had acquired the property in question on 31-12-2004, the date on which the allotment letter was issued by the builder.

Principal CIT vs. Vembu Vaidyanathan; (2019) 416 ITR 125 (st): dated 19-7-2019.

4.3 Charitable purpose – Benefit to be denied only to income applied directly or indirectly for benefit of prohibited persons

Supreme Court granted special leave to the Department to appeal against the judgment of the Karnataka High Court whereby the High Court held that the Tribunal was correct in law in holding that the denial of benefit u/s. 11 of the Income-tax Act, 1961 was to be restricted to that income of the trust which was applied directly or indirectly for the benefit of the prohibited persons.

CIT (Exemption) vs. Audyogik Shikshan Mandal.; (2019) 416 ITR 127 (st): dated 26-7-2019.

4.4 Exemption – Contribution received by an investor protection fund from a recognised stock exchange

Supreme Court dismissed the Department's special leave petition against the judgment of the Bombay High Court whereby the High Court held that the Tribunal was right in allowing the exemption u/s. 10(23EA) of the Income-tax Act, 1961 though the claim was not made by the assessee in the return of income but at the appellate stage.

DIT (Exemption) vs. National Stock Exchange Investor Protection Fund Trust; (2019) 416 ITR 129 (st): dated 26-7-2019.

4.5 Income – Accrual of income – Payments received for prepaid cards

Supreme Court dismissed the Department's special leave petition against the judgment of the Delhi High Court whereby the High Court held that appropriation of the payments made on account of prepaid cards by subscribers as advance was contingent upon the assessee performing its obligation and rendering services to the prepaid customers and the amount received on the sale of prepaid cards to the extent of unutilized talk time did not accrue as income in the year of sale, and that in the case of prepaid cards that lapsed, the unutilized amount had to be treated as income or receipt of the assessee on the date when the card had lapsed.

Principal CIT vs. Systema Shyam Teleservices Ltd.; (2019) 416 ITR 129 (st): Dated 12/07/2019:

4.6 Industrial undertaking

4.6.1 Component of price for sale of electricity fixed on basis of tax liability whether part of transfer price of coal and sale price of electricity

Supreme Court granted special leave to the Department to appeal against the judgment of the Madras High Court whereby the High Court held in favour of the assessee on the question whether the components of price for sale of electricity fixed on the basis of tax liability should be taken as part of the transfer price of coal and sale price of electricity in computing the relief u/s. 80-IA and 80-IB of the Income-tax Act, 1961.

ACIT vs. Neyveli Lignite Corporation Ltd.; (2019) 416 ITR 131 (st): dated 6-5-2019.

4.6.2 Special deduction – Computation – Sale price of electricity

Supreme Court granted special leave to the Department to appeal against the judgment of the Madras High Court whereby the High Court held in favour of the assessee on the question whether the components of price for sale of electricity fixed on the basis of tax liability should be taken as part of the transfer price of lignite and sale price of electricity in computing the

relief u/s. 80-IA and 80-IB of the Income-tax Act, 1961, that since the so called tax reimbursement was nothing but a component of price, the relief in respect of all units had to be taken into account for the purpose of deduction u/s. 80-IA, and that the reimbursement shall be computed in matter of granting the relief u/s. 80-IA.

ACIT vs. Neyveli Lignite Corporation Ltd.; (2019) 416 ITR 131 (st): dated 21-7-2014.

4.6.3 Special deduction – Computation – Sale price of electricity

Supreme Court granted special leave to the Department to appeal against the judgment of the Madras High Court whereby the High Court held that the Tribunal was not right in holding that the components of price for sale of electricity fixed on the basis of tax liability should not be taken as part of sale price of electricity in computing relief u/s. 80-IA of the Income-tax Act, 1961.

ACIT vs. Neyveli Lignite Corporation Ltd.; (2019) 416 ITR 131 (st): dated 12-7-2019.

4.7 International transactions – Determination of Arm's Length Price – Applying transactional net margin method to corroborate analysis made under comparable uncontrolled price method

Supreme Court granted special leave to the assessee to appeal against the judgment of the Delhi High Court whereby the High Court upheld the view of the Tribunal that once the comparable uncontrolled price method for determination of the Arm's Length Price of international transactions had been accepted as the most appropriate method there was no question of applying the transactional net margin method to corroborate the analysis made under comparable uncontrolled price method.

Cargill Foods India P. Ltd. vs. ACIT; (2019) 416 ITR 132 (st): dated 29-7-2019.

4.8 Settlement of cases – Settlement Commission – Order based on material other than report of Commissioner

Supreme Court dismissed the Department's special leave petition against the judgment of the Gujarat High Court whereby the High Court held that the Settlement Commission was not justified in permitting the Principal Commissioner to supplement the report submitted by the Commissioner by way of oral submissions which were beyond the contents of the report and that the order passed by the Settlement Commission being in breach of the provisions of section 245D(2C) of the Income-tax Act, 1961, the Settlement Commission had placed reliance upon material other than the report, its order could not be sustained.

Principal CIT vs. Akshar Associates; (2019) 416 ITR 137 (st): dated 19-7-2019.

4.9 Valuation of stocks: Depreciation on valuation of investment portfolio allowable as stock-in-trade of bank

4.9.1 Supreme Court granted special leave to the Department to appeal against the judgment of the Karnataka High Court whereby the High Court, following 356 ITR 549 answered in favour of the assessee the question whether on valuation of the investment portfolio depreciation is allowable treating the investments held by the assessee bank as stock-in-trade.

CIT vs. Karnataka Bank Ltd.; (2019) 416 ITR 81 (st); dated 2-7-2019.

4.9.2 Supreme Court dismissed the Department's special leave petition against the judgment of the Karnataka High Court whereby the High Court answered in favour of the assessee the question whether on valuation of the investment portfolio depreciation is allowable treating the investments held by the assessee bank as stock-in-trade.

CIT vs. Corporation Bank; (2019) 416 ITR 82 (st): dated 2-7-2019.

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DIRECT TAXES

High Court

Paras S. Savla, Jitendra Singh, Nishit Gandhi, *Advocates*

1 ***C. K. Abdul Azeez vs. CIT, Calicut***
ITA No. 19 of 2019, Kerala High Court, Order dated 5th September, 2019

Power of survey u/s. 133A – Statement recorded on Oath – Whether such statement has evidentiary value and an addition can be made simply on the basis of such statement – Held : No – However addition confirmed on the basis of corroborating evidence

A search under Section 132 of the Act was conducted at the residential premises of Mr. Sainul Abdheen, one of the Directors of the company by name 'Parathode Granites Private Limited' (hereinafter referred to as 'the company'). During the search, an agreement executed by the assessee, who was the Managing Director of the company, for purchase of land having an extent of 28.75 acres, was found and seized. This document revealed that the assessee had given 90 lakh rupees as an advance for purchase of the property. Thereafter, survey proceedings under Section 133A of the Act were conducted at the premises of the company. During the survey proceedings, the assessee gave a statement on oath on 11-3-2011 that he had given an amount of 95 lakh rupees as advance for purchase of the property. Subsequently, assessee sent a letter dated 4-3-2013 to the department, stating that he had executed the agreement in the capacity as the Managing Director of the company, that the amount of 95 lakh rupees was invested out of the funds of the company, that he had not made any personal investment in the deal and also that the deal was subsequently cancelled by the company. The AO did not accept the explanation given by the assessee regarding the nature and source of the amount. He found that the books of accounts of the company did not reveal that the amount of 95 lakh rupees was invested by the company in such a deal. Therefore, the aforesaid amount was brought to tax by the AO as unexplained investment u/s. 69. On appeal the CIT(A) agreed with the AO and dismissed the appeal. The Tribunal also confirmed the findings made by the AO and CIT(A). The arguments before the High Court were threefold:

a) The agreement for the purchase of property was executed by the assessee in his capacity as the Managing Director of the company and the investment was made out of the funds of the company. The assessee had not made any personal investment.

b) No assessment could have been made based solely on the sworn statement given by the assessee before the income tax authority during the survey proceedings.

c) The income tax authority has no power to examine on oath any person during the survey proceedings, and such a statement made on oath by the assessee has got no evidentiary value.

The Court observed that the question regarding the evidentiary value of the statement was never raised by the assessee before the assessing officer or the CIT(A) or even before the Tribunal. No such question of law was even raised in the memorandum of appeal filed before the Court also. However, in view of the submissions made by the learned counsel for assessee, the Court considered the following substantial questions of law:

1) Has the income tax authority got power to examine on oath any person during survey proceedings under Section 133A of the Act?

2) Is it correct proposition of law that a statement made on oath by the assessee before the income tax authority during the survey proceedings under Section 133A of the Act has no evidentiary value at all?

3) Is it permissible under law to make an assessment of tax solely on the basis of the statement made on oath by an assessee before the income tax authority during the survey proceedings under Section 133A of the Act?

The Court was placed in a peculiar situation. It observed that in *Paul Mathews and Sons vs. Commissioner of Income Tax : (2003) 263 ITR 101 (Ker.),* the Division Bench had categorically held that, whatever statement is recorded under Section 133A of the Act, it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement. At the same time another Division Bench of the Court in *Commissioner of Income Tax vs. Hotel Samrat : (2010) 323 ITR 353 (Ker.),* stated that the view taken in *Paul Mathews (supra)* does not lay down the correct law. However, the issue was not referred to a Full Bench as it was not necessary to do so in that case. Thereafter another Division Bench of the same Court considered the issue in *Travancore Diagnostics (P) Limited vs. Assistant Commissioner of Income Tax: 2016 (5) KHC 580 : 2016 (4) KLT 350* wherein the Division Bench clarified the dictum laid down in *Paul Mathews (supra)*. The Court observed that section 133A(3)(iii) of the Act empowers the income tax authority to record the statement of a person including an assessee. Section 133A of the Act, unlike Section 132(4) of the Act, does not specifically empower the income tax authority to examine a person on oath. The Court concluded that there can be no quarrel with this proposition laid down in *Paul Mathews (supra)*. However, Section 133A of the Act does not also prohibit the income tax authority to administer an oath to a person. As in the case of an accused in criminal proceedings, there is no specific prohibition as contained in Section 4(2) of the Oaths Act, 1969 against administering oath to an assessee in the proceedings under Section 133A of the Act. The status of an assessee in the proceedings under Section 133A of the Act cannot be equated to the status of an accused in a criminal case. Therefore, merely by reason of the fact that the income tax authority has administered oath to an assessee and recorded his sworn statement during the survey proceedings under Section 133A of the Act, it cannot be found that such statement has no evidentiary value at all and that it cannot be used in any manner against the assessee in any proceedings under the Act. The Court observed that the statement on oath made by an assessee to the income tax authority during the survey proceedings under Section 133A of the Act is not conclusive. The assessee can explain or withdraw the admission, if any, made by him in such statement. Assessment of tax cannot be made solely on the basis of such sworn statement made by the assessee under Section 133A(3)(iii) of the Act. At the same time, such statement can be used to corroborate other materials before the assessing authority, including the contents of any document. The Court thus held that the dictum laid down in *Paul Mathews (supra)* and *Hotel Samrat (supra)* and *Travancore Diagnostics (supra)* can be harmonised in this manner without any conflict. Thus, the substantial questions of law raised as items (1) and (3) were answered in favour of the assessee and against the revenue. However, the substantial question of law raised as item No. (2) was answered in favour of the revenue and against the assessee. The Court further held that the burden is on the assessee to prove or explain the source of the money or investment. In other words, a discretion has been conferred on the Income tax Officer under Section 69 of the Act to treat the source of investment as the income of the assessee if the explanation offered by the assessee

is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case. The Court observed that in the instant case, there was no dispute with regard to the fact that the assessee had paid 95 lakh rupees as advance for purchasing a property. The books of account of the company did not reveal any such transaction or investment made by the company. Therefore, the assessing officer was not satisfied with the explanation given by the assessee. The assessee was none other than the Managing Director of the company and he could have easily produced records or materials to show that the amount was actually invested by the company and not by him in his personal capacity. The Court held that in the absence of any such materials produced, the assessing officer was justified in rejecting the explanation given by the assessee and in bringing the amount to tax as unexplained investment. The Court held that addition was not solely based on the sworn statement of the assessee. The basis of the assessment was the agreement executed by the assessee for purchase of property and also the circumstance that he failed to establish his plea regarding the investment made. The sworn statement of the assessee only corroborated those materials. The fact that the assessing authority gave emphasis to the sworn statement of the assessee while passing the order of assessment did not change this factual situation. Further the factual findings made by the Tribunal do not suffer from any such error or illegality or perversity. Hence the addition was confirmed by the Court and the appeal was dismissed.

2 ***PCIT vs. Dinesh Chandra Jain***

ITA Nos. 276 and 277 of 2015, 197 to 200 of 2015, Allahabad High Court, Order dated 26th August, 2019

Penalty u/s. 271(1)(c) – Gift received by minor son – No concealment of income or furnishing of inaccurate particulars of income – penalty deleted

Search and seizure was conducted on the business premises of the persons related to Begum Gutkha Group on 9-12-2003. During the course of search and seizure, various books of account and other documents were found and seized. In response to notice u/s. 153-A of the Act, the assessee filed a letter on 23-2-2007 stating that his original return filed may be treated as return required under Section 153-A of the Act. The assessee had filed return declaring income of ₹ 1,63,65,386/- on 31-10-2000 for assessment year 2000-01. The assessment was completed u/s. 153-A/143(3) on 8-11-2007 at an income of ₹ 3,27,87,990/- as against return income of ₹ 1,63,65,386/-. The AO had made an addition of ₹ 1,64,22,604/- by treating the exempted gifts received by the assessee' s minor son of ₹ 1,52,20,000/- as his income from other sources. The assessment order was confirmed by the CIT(A) and the Tribunal. No further appeal was filed by the assessee against the said Tribunal order. Thereafter penalty u/s. 271(1)(c) of ₹ 75,76,441/- was imposed. CIT(A) partly allowed the appeal reducing penalty at 100% instead of 150%. On further appeal, the Tribunal allowed the appeal. On appeal by the Revenue, the High Court observed that the assessee had disclosed the fact of gift in his return for the relevant assessment year, but it was after the assessment proceedings that the Assessing Officer who did not accept the creditworthiness of the donor as well as the genuineness of transaction made an addition of ₹ 1,52,00,000/- as income from other sources. The said addition was sustained by the CIT (A) and the Tribunal. As from the reading of Section 271(1)(c), it is clear that that the said provisions contemplate for levy of penalty where two conditions are satisfied, that the assessee has concealed particulars of his income or has furnished inaccurate particulars of such income thus, concealment of income and furnishing of inaccurate particulars of income are two basic ingredients for the initiation of proceedings for penalty under the relevant section. The explanation further provides, where any such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner to be false or such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such

person as a result thereof was for the purpose of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed. The Court held that burden of proof in penalty proceedings varies from that in the case of assessment proceedings and any finding in assessment proceeding that a particular receipt is income cannot automatically be adopted, though finding in assessment proceeding constitutes good evidence in the penalty proceedings. In penalty proceedings the authorities must consider the matter afresh as the question has to be considered from a different angle. The Court held that the argument of the Revenue that assessee failed to prove the identity of the creditors, their creditworthiness and the genuineness of transaction and the same being confirmed by the Tribunal in the quantum proceedings, cannot be reopened now and looked upon in the penalty proceedings, could not be accepted, as penalty cannot be levelled solely on the basis of reason given in the original assessment order. As in the penalty proceedings, case is examined afresh for limited purpose for determining whether the assessee has furnished inaccurate particulars of income or has concealed the income so as to make him liable for penalty under Section 271(1)(c) of the Act. The Court observed that the Assessing Officer did not record any finding as to incorrect, erroneous or false return of income filed by the assessee which could lead to the fact that assessee has furnished inaccurate particulars of income and make him liable for penalty under Section 271(1)(c) of the Act. The Assessing Officer had only doubted the genuineness of the gifts on ground of human probabilities and had also doubted the creditworthiness of donors and genuineness of transaction. The Tribunal, on the other hand, had recorded finding regarding the identity of creditors, their creditworthiness and genuineness of the transactions which were before the Assessing Officer but he had not properly appreciated the same and discarded and doubted the genuineness of gifts on ground of human probabilities, though they were tax payers and the amounts gifted had been disclosed in their tax return for relevant year. The Court thus held that it was not a case of either concealment of income or of furnishing inaccurate particulars as neither the assessing authority nor first appellate authority recorded any finding to such effect that details furnished by the assessee to be incorrect, erroneous or false. The Court thus held that no penalty could be imposed u/s. 271(1)(c) of the Act as Revenue has failed to establish that assessee has concealed income or furnished inaccurate particulars. The Departmental appeal was dismissed.

3 ***CIT vs. M/s. Oberon Edifices & Estates (P) Ltd.***

ITA No. 163 of 2016, Kerala High Court, Order dated 5th September, 2019

Business expenditure u/s. 37 – Future expenses towards construction of the building which was sold during the year allowable

The assessee was a company engaged in the business of construction and sale of residential and commercial building complexes. During the assessment year 2009-10, the assessee sold a portion of the mall building constructed by it. The construction of the building was not completed at that time. In the revised return of income filed on 6-4-2011, deduction of the expenses incurred during the financial years 2009-10 and 2010-11 for completing the construction of the building was claimed by the assessee. The assessing authority disallowed the aforesaid deduction claimed and completed the assessment. On appeal, the CIT(A) allowed the appeal. The Tribunal confirmed the CIT(A) order. On further appeal, High Court observed that the dispute raised by the revenue was with regard to the deduction claimed by the assessee in respect of the expenses incurred in future, that is, after the sale of the building, during the subsequent financial years. The Court observed that Section 37 of the Income-tax Act, 1961 is a residuary section for allowability of business expenditure. The Court held that the expression "profits and gains" has to be understood in its commercial sense and there can be no computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipts is deducted therefrom – whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future date. The profit of a trade or business is the surplus by which the receipts from

the trade or business exceed the expenditure necessary for the purpose of earning those receipts. It is the meaning of the word "profits" in relation to any trade or business. Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise. The Court held that 'Expenditure' is not necessarily confined to the money which has been actually paid out. It covers a liability which has accrued or which has been incurred although it may have to be discharged at a future date. However, a contingent liability which may have to be discharged in future cannot be considered as expenditure. It also covers a liability which the assessee has incurred *in praesenti* although it is payable in future. The Court held that in order to claim deduction of business expenditure, it is not necessary that the amount has been actually paid or expended during the relevant accounting year itself. It is sufficient that the liability for payment had incurred or accrued during the relevant accounting year. The actual payment of amount or discharge of liability may occur in future. What is crucial is the accrual of liability for payment or expenditure during the relevant accounting year. But, a contingent liability that may arise in future, cannot be treated as expenditure. The Court observed that in the instant case, the revenue had no case that the sale deed executed in respect of the building did not provide that the assessee was liable to complete the construction of the building. The Tribunal was right in confirming the finding of the appellate authority that the expenditure incurred by the assessee company during the financial years subsequent to the sale of the building, is eligible for deduction in computation of taxable income. The department appeal was thus dismissed.

4 ***NRK Thangamani vs. JCIT***

Tax Case Nos. 1431 & 1432 of 2007, Hon'ble Madras High Court, Order dated 5th September, 2019

Penalty u/s. 271D for violation of section 269SS

The assessee was engaged in the business of liquor where at the time of bids being given for obtaining liquor license at the nick of time, the assessee had to deposit the bid amount by way of demand draft. Since the award of contract in such cases in favour of the assessee was uncertain, the assessee could not keep such demand drafts ready. The assessee, therefore, obtained cash loans from his friends and immediately utilised the same for drawing of demand draft and procuring liquor contracts. Considering the same the AO levied penalty u/s. 271D for violation of section 269SS of the Act by the assessee. This business was conducted in earlier years as well and in fact the JCIT had dropped similar penalty in the earlier year i.e., AY 1999-2000. However, for the AY 2000-01 though the Tribunal noted the said fact of dropping of penalty for the preceding year viz. AY 1999-2000, but, still imposed penalty for the AY 2000-01 by observing that the assessee cannot be permitted to take undue advantage of the liberal view of the Department taken for the AY 1999-2000. On further appeal, the High Court held that the Tribunal could have taken a liberal view of the matter and since the imposition of penalty depends upon the facts and circumstances of each case and if the assessee can put forth a reasonable cause for accepting the deposits in cash then, such circumstances can be considered by the Assessing Authority to waive or reduce the penalty in question. The High Court considering the fact that in similar circumstances and for the same assessee, the Assessing Authority himself entirely waived off the penalty for the preceding AY 1999-2000, held that the Tribunal, fell in error in upholding the imposition of penalty by just observing that the assessee ought not to have repeated such a mistake and ought to have done the transaction only through Bank which method, in fact, was adopted on 31-8-2001 on which date, the Bank Account was opened by the assessee and therefore, it is only for this Assessment Year 2000-01 which stood out. The High Court thus took a lenient view in favour of the assessee and allowed the appeal in favour of the assessee on the ground that for the preceding Assessment Year *viz*., 1999-2000, on the same set of facts and circumstances, the Assessing Authority himself dropped the penalty proceedings in question.

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INTERNATIONAL TAXATION CONFERENCE 2019

JOINT CONFERENCE BETWEEN
FOUNDATION FOR INTERNATIONAL TAXATION, INDIA
&
INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION, AMSTERDAM
IN CO-OPERATION WITH THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PARIS
DECEMBER 5-7, 2019, ITC MARATHA HOTEL, MUMBAI
(Provisional : September 1, 2019)

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Our 24th Annual Conference in 2019 is making a major shift in our focus from Base Erosion and Profit Shifting (BEPS) to a wider topic dealing with Use of Computers and Digitalisation of the Global Economy. The theme of our conference is **ADDRESSING THE GLOBAL TAX CHALLENGES ARISING FROM DIGITALISATION.** Our keynote topic remains **AN OVERVIEW OF AND LIKELY NEW ISSUES UNDER THE OECD AGENDA ON DIGITAL ECONOMY (ACTION ONE).**

As in previous year, our first speaker is **Murray Clayson**, the Current Worldwide President of the International Fiscal Association, with **Porus Kaka**, our Past President, as the Session Chairman. Our Keynote Speaker in this session is **Pascal Saint-Amans**, Director of the OECD's Center for Tax Policy, based in Paris. He heads the BEPS Project and reports regularly to the G20 Finance Ministers on its progress. He plans to submit their draft proposals on Taxation of Digital Economy to G20 Committee for their review in November this year. Our December Conference is perfectly timed for the announcement of their recommendation on the subject. We plan to invite several global experts from his OECD team in Paris and around the world as speakers to support him.

Our other eminent speakers this year include **Robert Danon**, Professor at Lausanne University in Switzerland - **Mike Williams** from the UK Treasury in the United Kingdom - **Sol Picciotto**, Emeritus Professor from Lancaster University, United Kingdom - **Jeffrey Owens**, Professor & Director, Global Tax Policy Center at Vienna University - **Akhilesh Ranjan**, Member, Central Board of Direct Taxes, India.

As last year, the conference will be held jointly with **IBFD**, Amsterdam, and in co-operation with **OECD**, Paris. IBFD is the sister organization of **International Fiscal Association**. It was set up as its publications, research and training arm in 1938. It is the largest institution of its kind in this field. **Foundation for International Taxation** is also a charity and today runs one of the leading conferences annually on international taxation in India.

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DIRECT TAXES

Tribunal

Neelam Jadhav, Neha Paranjpe & Tanmay Phadke, *Advocates*

Reported Decisions

1 ***Shree Laxmi Estate (P.) Ltd. vs. Income Tax Officer, Ward – 15(3)(3), Mumbai***

(ITA 798/Mum/2018) [Assessment Year: 2014-15] Order dated 5-7-2019

[2019] 108 taxmann.com 195 (Mumbai – Tribunal)

Section 43CA – If the assessee being a developer entered into an agreement to sell flats and office premises that were under construction, the provisions of Section 43CA would not apply as there is no transfer of any land or building or both in favour of the assessee in the year under consideration.

Facts

The assessee is a Private Limited Company and engaged in the business of development and construction. The assessee is following a project completion method. During the year under consideration, the assessee has carried out the construction of a commercial project named as 'Orchid Plaza' and the same was completed in the subsequent year i.e. A.Y. 2015-16. The case of the assessee was selected for the scrutiny assessment. During the course of assessment proceedings, the AO after referring to the Index II of the various properties noticed that the Appellant had sold 14 properties during the relevant year and there are certain discrepancies between agreement value and stamp duty value of the said properties. The AO further, noticed that out of 14 properties, 7 properties were allotted to the buyers prior to 31-3-2013 and 7 properties were allotted during the year under consideration. The AO asked the assessee to explain the difference between agreement value and stamp duty value. Pursuant to the said query, the assessee explained that it has been following a project completion method consistently. The said project was completed in the A.Y. 2015-16 in which the entire sales of all the 14 properties were offered to tax. The assessee further submitted that out of 14 properties, 7 properties were allotted prior to 31-3-2013 however; the registration of the same was done in the relevant year. The assessee, further, submitted that the registration authority charged the stamp duty value based on the village/area which is different from the area in which properties are situated. The sale values

of the properties are based on the market conditions whereas the stamp duty value is standard without considering different aspects. Thus, the value mentioned in the agreement is correct as the buyers were not ready to pay over and above what is stated/decided in the agreement. However, the AO was not persuaded with the submissions of the assessee and made the addition of ₹ 3,41,41,270/- with regard to all the 14 properties. On appeal, the CIT(A) confirmed the action of the AO. Being aggrieved, the assessee has preferred an appeal before the ITAT. After hearing both the sides, the ITAT held as under:

Held

The ITAT observed that the assessee has not reported any sales during the year under consideration as the assessee is following a project completion method. The project was completed in the A.Y. 2015-16 and the sales have been reported as turnover in the A.Y. 2015-16 by declaring the agreement value as full value of consideration. It is not in dispute that the assessee has not sold any land or building or both in respect of any of the units during the year under consideration. The ITAT observed that the assessee has only registered the agreements during this year in which it is clearly stated that the properties which proposed to be transferred by the assessee to the respective buyers are still under construction. Thus, the said registered agreements pertained to the 'property under construction' and not the property *per se*. It was further, observed that the provisions of section 43CA are applicable only when there is a transfer of land or building or both. In the said case, the transfer of the properties has not taken place pursuant to the registration of agreements with the stamp duty valuation authorities. With respect to the allotment of properties made prior to 31-3-2013, it was observed that the assessee and the prospective buyers of flats have specifically agreed that till the time the agreement of sale is executed and registered, no right is being created in favour of the flat buyers. The allotment letter is just a confirmation of booking subject to the execution of the agreement which is to be drafted at a later point in time. The said allotment letter also specified that the relevant office premises have been allotted to the flat buyers with rights reserved with the assessee to amend a building plan as it may deem fit. Accordingly, the flat buyers are bound to accept unconditionally and confirm that any kind of increase or decrease in the area of the said office or shift in the position of the said office, if arises, due to amendment in the plan etc. and in case of variation of the area, the values of the offices shall be proportionately adjusted. All these documentary evidences clearly prove that the assessee had not completed the construction of the office during the relevant year. Only the rights were created in favour of the flat buyers pursuant to registration of agreements with the stamp duty valuation authorities. Hence, what the assessee has transferred pursuant to registration of the agreement is only the rights in the flat/office which is under construction and not the property *per se*. Hence, Hon'ble ITAT concluded that there was no transfer of any land or building or both by the assessee in favour of the flat buyers pursuant to registration of the agreement in the year under appeal. The ITAT held that the provisions of section 43CA of the Act cannot be applied to the facts of the present case. While coming to this conclusion, the ITAT relied on the decision of Ahmedabad Tribunal in the case of *ITO vs. Yasin Mosa Godil [2012] 20 taxmann.com 424/52 SOT 344* and the decision of Jaipur Tribunal in the case of *Mrs. Rekha Agarwal vs. ITO [2017] 79 taxmann.com 290 (Jaipur)*.

On the aforesaid observation, the ITAT held in favour of the Assessee and against the Revenue.

2 ***Oxcia Enterprises Pvt. Ltd. vs. Dy. CIT***
(ITA NO:291/JODH/2018) [Assessment Year: 2016-17], order dated 6-5-2019
[2019] 109 taxmann.com 19 (Jodhpur - Trib.)

Section 194IA r.w.s 201 – No TDS shall be deductible as per section 194IA of the Act, if the sale consideration on transfer of the immovable property is less than ₹ 50 lakh

Facts

The assessee is a private limited company and purchased a residential property on 28-5-2015 for the total consideration of ₹ 60,12,000/-. The said property was owned by Shri Anant Ram Kumavat and Smt. Seema Kumavat jointly. However, the sale of the same was executed by Shri Vijay Kumavat, who was the power of attorney holder of the said joint owners. The Assessee Company deducted the TDS at the rate of 1% of the sale consideration by quoting the PAN of Shri Vijay Kumavat (POA). During the course of assessment proceedings, the AO (TDS) opined that TDS should have been deducted in the name of actual owners and not in the name of power of attorney holder of the joint owners. Further, the AO (TDS) held that the assessee is in default in not mentioning the PAN of the actual owners. Thus, the AO (TDS) was of the view that the provisions of section 260AA of the Act are applicable in the present case and the tax has to be deducted at source at the rate of 20% of the purchase consideration of ₹ 60,12,000/-. The AO (TDS) accordingly raised the demand amounting to ₹ 12,02,400/- u/s. 201(1) and also levied the interest amounting to ₹ 2,28,456/- u/s. 201(1A). On appeal, the assessee did not find any success before the CIT (A). The assessee being aggrieved by the appellate order preferred the appeal before ITAT.

Held

The ITAT after considering the submissions and contentions of both the parties held the property was purchased by the assessee as per the sale deed dated 28-5-2015 from Shri Vijay Kumawat, a Power of Attorney holder (POA) of the joint owners of the said property named as Shri Anant Ram Kumawat and Smt. Seema Kumawat. The assessee has deducted 1% TDS on the sale consideration and deposited the same in the Government treasury with interest. The sale consideration has been paid by cheque through the bank account of Shri Vijay Kumawat. The ITAT held that the only issue involved in the present appeal is that whether the assessee is correct in deducting the TDS u/s. 194IA at the rate of 1% of the sale consideration without mentioning the PAN details of the actual owners of the property. ITAT observed that the TDS has been deducted in the hands of the power of attorney holder, Shri Vijay Kumavat who is the son/brother of the joint owners respectively. ITAT further, appreciated the argument raised by the assessee that the said property was owned by the joint owners and the total sale consideration paid for the purchase of the same was amounting to ₹ 60,12,000/-. Thus, each owner is entitled to receive a sum of ₹ 30,06,000/-. Further, the reliance was placed on the provisions of sub-section (2) of section 194-IA and observed that the assessee's case falls under the exception provided under sub-section (2) of section 194-IA of the Act. As per sub-section (2) of section 194-IA, no deduction of TDS shall be at the rate of 1% if the consideration for the transfer of an immovable property is less than fifty lakh

rupees. Thus, the ITAT held that the provisions of section 194IA are not applicable in the present case. ITAT therefore, directed the AO (TDS) to delete the addition made under section 194IA as well as the demand raised u/s. 201(1) and the interest levied u/s. 201(1A) of the Act. ITAT allowed the appeal of the assessee.

Unreported Decisions

3 *Kanakara Rajendra Prasad Reddy vs. JCIT*

[ITA 1962/Bang/2017] (Assessment Year: 2013-14), Order dated 2-8-2019

Section 271E and 275(1)(c) – If an assessment order mentions about violation of provisions of Section 269T, initiation of penalty proceedings gets triggered on the date of an assessment order and not the date on which JCIT issues a show cause notice for penalty proceedings u/s. 271E

Facts

The assessee is an individual and engaged in the business of civil construction for Government and private parties. The case of the assessee was selected for the scrutiny assessment. During the course of assessment proceedings, the AO noticed that the assessee had repaid a loan of ₹ 10,00,000/- received from Mr. K. M. Kotresh in cash and thereby, violated the provisions of section 269T of the Act. The AO also observed that as per Section 271E, if the assessee violates provisions of Section 269T, he shall be liable to pay by way of a penalty a sum equal to amount of loan. Further, the assessment order was passed on 24-3-2016 by the AO [i.e. Asst. Commissioner of Income Tax, Circle-3(2)(1), Bangalore] wherein it was mentioned that the penalty u/s. 271E for repayment of a loan given in cash in violation of the provisions of section 269T will be attracted. Thereafter, the AO *vide* letter dated 9-8-2016 intimated the JCIT, range 3(2), Bangalore regarding a default of the assessee u/s. 269T. Thereafter, the JCIT issued a show cause notice dated 10-8-2016 u/s. 271E to the Assessee before imposing a penalty. The JCIT, therefore, imposed a penalty on the Assessee vide order dated 27-1-2017 u/s. 271E. Being aggrieved, an appeal was preferred before the CIT(A). The Assessee contended that the penalty order passed u/s. 271E is barred by limitation in view of the provisions of section 275(1)(c) of the Act. Thus, the same is bad in law and may be quashed. The CIT(A) without appreciating the submission of the assessee confirmed the penalty levied by the A.O. u/s. 271E. Being aggrieved, an appeal was preferred before the ITAT. After hearing both the parties, the ITAT held as under:

Held

The ITAT held that there is no dispute that a period of limitation is required to be examined in the light of provisions of Section 275(1)(c) of the Act. As per first condition laid down in the provisions of Section 275(1)(c), no order imposing a penalty u/s. 271E of the Act shall be passed after the expiry of the financial year in which proceedings, in the course of which action for the imposition of penalty have been initiated, are completed. The second condition laid down in the provisions of section 275(1)(c) is that no order imposing penalty u/s. 271E of the Act shall be passed after expiry of the six months from the end of the month in which penalty proceedings are initiated and whichever period expires later will have to apply. In the present case, the quantum proceedings were completed on 24-3-2016 and the penalty proceedings were initiated on the same date in the assessment order. As far as the first

condition of section 275(1)(c) is concerned, the financial year ends on 31-3-2016. Further, as per the second condition, a period of six months from the end of the month in which penalty proceedings are initiated ends on 30-9-2016. Going by these dates, the penalty order could not have been passed after 30-9-2016. The ITAT further held that the initiation of penalty proceedings did not trigger on the completion of the appellate quantum proceedings. Relying on the decision of the Rajasthan High Court in the case of *CIT vs. Hissaria Bros. (2007) 291 ITR 244 (Raj)*, the ITAT observed that transactions carried out in violation of section 269SS and 269T are not related to assessment proceeding. The same are independent of the assessments. Therefore, the completion of appellate proceedings arising out of the assessment proceedings or the other proceedings during which penalty proceedings u/s. 271E may have been initiated has no relevance. If penalty and assessment proceedings were dependent, the entire exercise of inserting a provisions of section 275(1)(c) on the statute would be futile. Further, the ITAT expressed its disagreement with the conclusion of the CIT(A) that in the assessment order dated 24-3-2016, the AO had not initiated penalty proceedings u/s. 271E and has merely made an observation that there is a default attracting a penalty u/s. 271E of the Act. The ITAT relied on the decision of the Delhi High Court in the case of *JKD Capital and Finlease Ltd. [*2015] 378 ITR 614 (Delhi) and observed that the AO when notices the default u/s. 269T of the Act in the assessment order, he has to be conscious of the time limit laid down in Section 275(1)(c) of the Act. The revenue cannot take the plea that the date of initiation of proceedings u/s. 271E is the date on which the proposal to levy the penalty is conveyed by the AO to the officer who is competent to impose penalty u/s. 271E. Therefore, it is futile to contend that the date of initiation of proceedings is the date on which the JCIT receives intimation from the AO or the date on which the JCIT issues show cause notice to the assessee u/s. 271E. The AO having initiated the penalty proceedings on 24-3-2016, the penalty order could have been passed till 30-9-2016. However, the penalty order was passed on 27-1-2017 which is barred by limitation as per section 271(1)(c). Therefore, the ITAT held that the penalty order passed u/s. 271E of the Act is bad in law. The issue was decided in favour of the assessee and against the Revenue.

4 ***Emdee Digitronics Pvt. Ltd. vs. PCIT***
[ITA 361/KOL/2019] (Assessment Year: 2014-15), Order dated 28-6-2019

Section 37(1) r.w.s 263 – An assessment order cannot be set aside u/s. 263 of the Act merely on the fact that the assessee has agreed for a disallowance of an expenditure which is otherwise allowable u/s. 37(1) of the Act

Facts

The Assessee is a private limited company and had filed his return of income on 26.09.2014 for the assessment year 2014-15. The said return was subsequently selected for the scrutiny assessment and the assessment order was passed u/s 143(3) of the Act. Later on, the PCIT after perusing records observed that there was a delay on the part of the assessee to deposit payments of VAT, service tax and TDS which has resulted in the interest liability of ₹ 3,45,633/-. According to the PCIT, the said interest is penal in nature and thereby, should not be entitled for a deduction u/s. 37(1) of the Act. However, the said interest was allowed as deduction in the scrutiny assessment proceeding which in view of the PCIT rendered the said

assessment order erroneous and prejudicial to the interest of the Revenue. Thus, the Assessee was served with a show cause notice giving it an opportunity as to why a remedial action u/s. 263 of the Act should not be invoked in the present facts. Pursuant to the same, the Assessee filed a letter with the PCIT and accepted that the said interest expense was not allowable u/s. 37(1) of the Act. It was further admitted that the assessment order contains an error and the assessment order is liable to be set aside u/s. 263 of the Act. Accordingly, the PCIT set aside the assessment order against which the assessee, being aggrieved, preferred an appeal before the ITAT. It was contended that the interest on the delayed payments of service tax, VAT and TDS was an allowable expenditure u/s. 37(1) of the Act being compensatory in nature and the view taken by the AO being one of the possible views does not render the assessment order erroneous and prejudicial to the interest of Revenue. On the other hand, the D.R. primarily relied on the order of PCIT and justified the action of the PCIT. After hearing both the sides, the ITAT held as under.

Held

The ITAT perused the records and contentions of both the sides. It observed that the PCIT revised the assessment order u/s. 263 on the sole ground is that the assessee has himself confessed and accepted that the said interest is not deductable u/s. 37(1) of the Act. The ITAT noted that there is no estoppel against the law and what is not otherwise taxable does not become taxable merely on the fact that the assessee had admitted it. The ITAT noted that the chargeability is not dependent on the admission of or waiver by the assessee but the same needs to be strictly construed as per the charging section. The ITAT observed that the interest under consideration is an allowable deduction and the same cannot be disallowed just because the assessee has agreed for the same. It was observed that the AO adopted one of the possible views ruling out the revision of the assessment order u/s. 263 of the Act. On the above mentioned observations, the ITAT quashed the order passed by the PCIT u/s. 263 of the Act and held in favour of the assessee.

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This life is short, the vanities of the world are transient, but they alone live who live for others, the rest are more dead than alive.

– Swami Vivekananda

Happiness is when what you think, what you say, and what you do are in harmony.

– Mahatma Gandhi

INTERNATIONAL TAXATION

Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala

A. HIGH COURT

1 *PCIT vs. M/s. Visteon Engineering Centre (India) Pvt. Ltd.*

[TS-863-HC-2019] (Bom.) – ITA 1336 of 2017

Transfer pricing adjustment cannot be done at the entity level and has to be done only in respect of international transactions of the assessee with its Associated Enterprises (AE)

Facts

i) The assessee was primarily engaged in the business of designing and developing products in CAD/CAM of auto parts.

ii) The AO pursuant to the directions of the learned DRP computed the transfer pricing adjustment on the entity level income of the Appellant instead of computing the transfer pricing adjustment on international transactions pertaining to provision of Engineering Design Services to its Associated Enterprises (AEs) only. Further, the assessee had included Genesys International Corporation Ltd. in the list of comparables for benchmarking which was also included by TPO.

iii) The Tribunal allowed assessee's appeal and held that transfer pricing adjustment is to be confined to the component of international transactions with the AEs alone and should not be made in relation to non-AE transactions. It also allowed ground of the assessee for exclusion of Genesys International Corporation Ltd. as it was not functionally comparable to the assessee.

iv) Aggrieved, the Revenue filed an appeal before the High Court.

Decision

i) The Court noted that transfer pricing adjustment cannot be done at the entity level and has to be done only in respect of international transactions of the assessee with its AEs. It further noted that the Tribunal had allowed the assessee's appeal on this issue by placing reliance upon the decision of its Co-ordinate Bench in the case of *M/s. Sandvik Asia Pvt. Ltd. vs. ACIT* dated 27th September, 2013 and Court had dismissed the Revenue's appeal against the same.

ii) Further, the Court observed that the only contention of Revenue for inclusion of Genesys International Corporation Ltd. was that it was included by assessee itself and he would be bound by its selection and could not now urge to the contrary. The Court noted that this issue was no longer *res integra*, as in the case of *CIT vs. Tata*

Power Solar Systems Ltd [2019] 77 taxmann.com 326 it had held that the assessee's submission in arriving at the ALP is not final, it is for the TPO to examine and find out the companies listed as comparables which are, in fact comparable.

iii) Accordingly, it dismissed Revenue's appeal as no substantial question of law arose.

2 ***PCIT vs. M/s. Visteon Engineering Centre (India) Pvt. Ltd.***
[TS-862-HC-2019(Del)] - ITA 411 of 2017

Cosmic Global Ltd was held to be not comparable to an ITES service provider

Facts

i) The assessee was engaged in the business of designing and developing products in CAD/CAM of auto parts and also customer support servicing and techno marketing services to its associate enterprises.

ii) The assessee had selected 9 Comparables in its TP Study report and arrived at a margin of 18.91%. The TPO rejected all comparables selected by assessee and selected 5 new comparables thereby arriving at a margin of 32.87%. DRP rejected the objection raised by the assessee for exclusion of the comparables. Thus final assessment order was passed by AO in conformity with the order ofTPO.

iii) The Tribunal allowed assessee's appeal and excluded Cosmic Global Ltd.

iv) Aggrieved, the Revenue filed an appeal before the High Court.

Decision

i) The Court noted that Cosmic Global Ltd. was engaged in providing BPO services while the assessee was engaged in provision of Information Technology Enabled (ITES) Services. Also, Cosmic Global Ltd. had out-sourced the services unlike the assessee who used its own engineers to provide services. Thus, it was functionally dissimilar to the business of the assessee and was rightly excluded by the Tribunal.

ii) Accordingly, it dismissed Revenue's appeal as no substantial question of law arose.

B. TRIBUNAL DECISIONS

3 ***Outotec (Finland) Oy vs. DCIT***
[TS-311-ITAT-2019 (Kol)]
Assessment Year: 2015-16

India-Finland DTAA – Article 12 – Taxability of Income from testing and other services – Held: Taxable as FTS under the India-Finland DTAA; Taxability of Income from sale of Designs and Drawings – Held: Not Taxable either as Royalty or FTS under the Treaty

Facts

i) The assessee, a Finland based entity, is a worldwide leader in providing innovative and environmentally sound solutions for a wide range of customers in metal processing industries.

ii) During the Assessment Year (AY) 2015-16, the assessee earned four types of revenue, i.e., technical services, royalty income, design and drawings, testing and other services. The assessee offered to tax income from the rendition of technical services and income from royalty (licence fees) but did not offer to tax income received from the sale of designs and drawings and income from testing and other services.

iii) The assessee contended that income from the sale of designs and drawings was a business income and since the assessee did not have Permanent Establishment (PE) in India, the business profit was not taxable in India.

iv) On the issue of income from rendering of testing and other services, the assessee

relied on Article 12(5) of the tax treaty and as the services had been rendered outside India, it claimed that the same was not taxable in India.

v) The Assessing Officer (AO) held that income earned from the sale of designs and drawings was taxable in India as the same was in nature of royalty under the tax treaty and under the Income-tax Act, 1961 (the Act).

vi) On the issue of taxability of income from rendering of testing and other services, the AO held that the same is taxable as royalty/FTS, both under the Act as well as under the tax treaty.

vii) The Dispute Resolution Panel (DRP) upheld the order of the AO.

Decision

On Appeal, the Tribunal held partly in favour of the assessee as under:

A) Re: Taxability of income from the sale of design and drawings

i) On a perusal of agreements for sale of drawings and designs, it indicates that the designs and drawings in question were not embedded in the plant and machinery. They were separate items which were sold by the assessee. The fact that these were sold outside India was not disputed. The Tribunal relied on various cases [*Outotec Gmbh vs. DCIT [2015] 172 ITJ 337 (Kol), Outotec Gmbh vs. DCIT (ITA No. 160 & 193/Kol/2016*) wherein it was held that income earned from the sale of designs and drawings was treated as business income and it was not liable to tax in India under the Act as well as under the tax treaty.

ii) The sale was made outside India, and the consideration was also received outside India in foreign currency. Accordingly, it has been held that income from the sale of designs and drawings cannot be classified either as royalty or as FTS. The income had to be considered as business income, and as the assessee did not have PE in India, it cannot be brought to tax in India.

B) Re: Taxability of income from testing and other services

i) It is an undisputed fact that testing and other services were rendered outside the country, i.e., in Finland. On a perusal of Article 12(5) of the tax treaty, it indicates that the royalties or FTS shall be deemed to arise in a state where the payer is located. In cases where the right of property, for which royalty was paid is used within a state or a case where the FTS relate to services were performed within a state, then the income shall be deemed to arise in the state in which the right of property is used or the state in which the services were performed.

ii) The assessee contended that the technical services of testing were performed outside the country, i.e., in Finland and hence cannot be taxed in India in view of the exception carved out to Article 12(5) of the tax treaty. The exception in question was when the fee is paid for technical services which are performed within a state, then the income therefrom is deemed to accrue or arise within the state in which the services were performed.

iii) The Tribunal observed that this clause does not apply as the payment in question was made for the test results which were used within the state i.e. India. It may be true that the process of testing may have been conducted outside India. However, the payment

in question was not for the process but was for the results of testing which were used in India. Accordingly, it has been held that income from testing and other services is taxable as FTS in India under the tax treaty.

Note:

The India-Finland Tax Treaty has been amended with effect from 1 April 2011, where the concept of 'make available' has been removed. Further the new tax treaty contains the most favoured nation (MFN) clause where it is provided that if after the India-Finland Tax Treaty has entered into force, any Tax Treaty between India and OECD country provides for an exemption from tax or a lower rate with respect to dividend, interest, royalty or FTS, the same will apply to India-Finland tax treaty. It is important to note that the MFN clause is subject to a notification to be issued by the Indian competent authorities and it only deals with the benefit of exemption from tax or lower tax rate.

4 *Spencer Stuart International BV vs. DCIT*

[TS-333-ITAT-2019 (Mum)]
Assessment Year: 2015-16

India-Netherlands DTAA – Article 12 – Taxability of Fees for executive search – Held: Not taxable as FTS or royalty under the India-Netherlands Tax Treaty

Facts

i) The assessee, a non-resident company, had a wholly owned subsidiary in India. The assessee is engaged in the business of executive search services as well as providing Spencer Stuart Technology software and related services to its group concerns worldwide and third party franchisees.

ii) The assessee had two streams of income from India, namely, licence fee and executive search fee. The assessee entered into a 'licence agreement' with its subsidiary in terms of which subsidiary had been granted licence to use trademark, trade name, logos and the right to use the software owned by the assessee and certain other support services. In terms of the agreement, the assessee was entitled to receive a licence fee which was offered as royalty under the Act as well as under the tax treaty.

iii) The assessee had also entered into a service agreement in terms of which the subsidiary agreed to provide, on principal-to-principal basis, support services to each other in relation to executive search assignments.

iv) In terms of the said arrangement, the assessee received consideration which was treated as business income. The assessee claimed that the said income was not taxable as FTS under Article 12(5) of the tax treaty since the said services neither 'made available' any technical knowledge, experience, skill, know-how or process nor did it constitute development and transfer of a technical plan or technical design. The assessee contended that income by way of executive search services were not for services which were ancillary or subsidiary to the property rights for which licence fees was paid.

v) There was no dispute about the taxability of licence fee received by the assessee. However, with respect to executive search fee, the Assessing Officer (AO) observed that it was to be treated as FTS in terms of *Explanation 2* to Section 9(1)(vi) of the Income-tax Act (the Act). Further, such fee was for services which are ancillary and for the application or enjoyment of the right, property or information for which the 'licence agreement' was entered into and, therefore, though it was in terms of a separate 'service agreement' yet it constituted FTS in terms of Article 12(5)(a) of the tax treaty.

vi) The AO held that the amount of the executive search fee received by the assessee was in the nature of FTS under Article 12(5)(a) as well as under Article 12(5)(b) of the tax treaty. Alternatively, the AO held that it was to be treated as royalty under Article 12(4) of the tax treaty read with clause (iv) of *Explanation 2* to Section 9(1)(vi) of the Act. The Dispute Resolution Panel (DRP) upheld the order of the AO.

Decision

On appeal, the Tribunal held in assessee's favour as under:

i) The Tribunal relied on the assessee's own case of earlier year where it was held that:

   (a) The licence agreement which resulted in earning of royalty income (which has been offered to tax) and the service agreement (which resulted in earning executive search fee) were separate and distinct agreements constituting different sources of income.

   (b) The principal business of the Indian subsidiary was to carry out or execute the mandate of executive searches and thus the executive search fee generating activities cannot be treated as ancillary or subsidiary to the licence agreement.

   (c) The licence fee payable in terms of the licence agreement was a percentage of search fee, which was earned by the Indian subsidiary from the execution of executive search mandate during a particular year. Thus, the executive search fee was not taxable as FTS in terms of Article 12(5)(a) or (b) of the tax treaty.

ii) The Tribunal, on reference to the Advance Pricing Agreement (APA) entered into by the subsidiary, observed that the 'licence agreement' and the 'service agreement' between the assessee and the subsidiary are separate and distinct of each other. Further, in the context of the arm's length price (ALP) of the transactions, the APA makes a distinction between the payment of licence fee and executive search fee. There was a complete dichotomy between the nature and characterisation of transactions accepted in the APA in the context of Indian subsidiary *vis-à-vis* the tax authority in the present case. Ostensibly, it does not need any more emphasis that the nature and characterisation of the amount in the present case has to correspond to what has been accepted by the tax authorities in the case of the payer of the same.

iii) If the tax department was to contend that the executive search fee was nothing but licence fee, then even in the APA proceedings, the tax authority should have recharacterised such executive search fee as 'licence fee' to tax it as royalty under the APA. The Tribunal observed that considering the executive search fee as 'royalty' would make the APA redundant. Therefore, the executive search fee cannot be treated as FTS under Article 12(5)(a) as well as 12(5)(b) of the Tax Treaty. Further, it cannot be taxed as royalty under Article 12(4) of the Tax Treaty read with clause (iv) of *Explanation 2* to Section 9(1)(vi) of the Act.

Cases referred to and relied upon:

i) *Spencer Stuart International BV vs. ACIT [2018] 94 taxmann.com 380 (Mum)*

ii) *Ranbaxy Laboratories Ltd. vs. ACIT [2016] 68 taxmann.com 322 (Del)*

iii) *PCIT vs. Ameriprise India Pvt. Ltd. (ITA 206/2016)*

iv) *AXA Technologies Shared Services Pvt. Ltd. vs. DCIT [2016] 76 taxmann.com 102 (Bang)*

v) *Warburg Pincus India Pvt. Ltd. vs. ACIT [2017] 78 taxmann.com 273 (Mum)*

vi) *3i India Private Limited vs. DCIT (ITA No. 581/Mum/2015)*

5 *Gemological Institute of America vs. ACIT*

[TS-356-ITAT-2019(Mum)]
Assessment Year: 2010-11

India-USA DTAA – Article 5 – Subsidiary as a PE – Held: On facts, Indian subsidiary of a U.S. company does not constitute a PE in India under the India-U.S. tax treaty

Facts

i) The assessee, a non-resident company (a company incorporated in the U.S.), is engaged in the business of diamond grading and preparation diamond dossiers.

ii) Prior to the setting up of the subsidiary, the assessee entered into a contract with a third party 'consolidator'. Under the consolidator arrangement, the consolidator co-ordinated the collection of diamonds from India, and the assessee graded the diamonds and issued grading reports. It was agreed between the parties to the consolidator arrangement that the cost to the consumers would be divided in the ratio of 90:10 (90 for the assessee and 10 for the consolidator). This arrangement existed even after formation of subsidiary in India.

iii) Whenever Indian subsidiary faces capacity and/or technical constraints, it sends stones for grading to other entities of the assessee's group across the globe, including the assessee. This was done in terms of a 'GIA Gem Grading Services Agreement' which had been entered into by the various entities of the group including the assessee and Indian subsidiary.

iv) Indian subsidiary only had the technical capacity to grade the diamonds below two carats and hence larger diamonds were being sent to other assessee's group entities for grading. Subsequently, with the increase in technical capacities, Indian subsidiary itself started grading diamonds up to 3.99 carats.

v) In terms of the aforesaid agreement, there was a uniform pricing mechanism of 90:10 for grading services i.e., the entity of the group which was requesting for the grading services retains 10 per cent of the fees it collects from its customer and 90 per cent of the said fees was paid to the entity which provides the grading activity.

vi) In the background of such an arrangement, the Assessing Officer (AO) held that the assessee has a PE in India in the name of Indian subsidiary through which it carries on its business in India. Accordingly, 50 per cent of the gem grading fees received by the assessee from Indian subsidiary has been held to be attributable to the Indian PE, and a profit percentage of 20.31 per cent has been applied thereon to determine the total income of the assessee, which has been held to be taxable in India.

Decision

On Appeal, the Tribunal held in favour of the assessee as under:

A) Re: Fixed place PE

i) On perusal of the agreements, the transaction of grading services between the assessee and Indian subsidiary cannot be considered to be in the nature of a joint venture, since Indian subsidiary has its own independent expertise but only due to its technology/capacity constraints, it forwards the stones to the assessee for grading purposes.

ii) It was not an arrangement between two parties where each party contributes its share in order to

undertake an economic activity which was subjected to joint control.

iii) In fact, the arrangement was akin to an assignment or sub-contracting of grading services to the assessee, wherever Indian subsidiary does not have the requisite expertise or technology or capacity for carrying out the grading services.

iv) Further, the aforesaid arrangement has also been accepted as a mere rendering of grading services by the Transfer Pricing Officer (TPO) both in the case of Indian subsidiary and the assessee.

v) Indian subsidiary directly enters into agreement with the client and bears all the risks including credit risks, client facing risks, etc. Also, in terms of the agreement, Indian entity bears the risk of loss or damage to articles while in transit to and from the assessee and also during the time when the articles are at or in the assessee's facilities. Therefore, the economic risks of the gem grading services rendered by the assessee *vis-à-vis* stones/diamonds of customers of Indian subsidiary shipped to it were borne by Indian subsidiary and hence, there was no joint venture arrangement whatsoever between the assessee and Indian subsidiary.

vi) Mere fact that a company has controlling interest in the other company does not by itself construe the other company to be its PE. Accordingly, the assessee does not have a 'fixed place' PE in India.

B) Re: Service PE

i) The assessee renders 'grading services' and 'management services' to Indian subsidiary. In fact, two graders who were earlier employed with the assessee were employed with the Indian subsidiary and were on the payrolls of Indian subsidiary. They were working under control and supervisions of Indian subsidiary and therefore, no Service PE was created in India under the tax treaty.

ii) The Supreme Court has affirmed the decision of the Delhi High Court in *ADIT vs. E-funds IT Solutions Inc [2017] 86 taxmann.com 240 (SC)* wherein it has been held that two employees deputed to e-Fund India (maintain consistency) did not create a service PE as the entire salary cost was borne by e-fund India and they were working under control and supervision of e-fund India.

C) Re: Agency PE

i) Further, considering the functions and the risks assumed by Indian subsidiary *vis-à-vis* its business activities in India (as has been recorded in the transfer pricing study report. Functional and risk analysis has been accepted by the TPO both in the case of Indian and in the case of the assessee), Indian subsidiary was an independent entity which was rendering grading services to its clients in India.

ii) Indian subsidiary also bears service risk and all client facing risks vis-à-vis the stones sent to the assessee for grading purposes (as has been recorded in the Transfer Pricing Study Report).

iii) Hence, Indian subsidiary was not acting in India on behalf of the assessee. Further, Indian subsidiary was not having any authority to conclude contracts and has neither concluded any contracts on behalf of

the assessee nor has it secured any orders for the assessee in India. Thus, Indian subsidiary cannot be regarded as 'agency PE' of the assessee in India.

The Tribunal distinguished the decision of the Supreme Court in the case of *Formula One World Championship Ltd. vs. CIT [2017] 394 ITR 80 (SC)* on the basis of facts and held that the Indian subsidiary was operating in an independent manner and there was nothing to show that the Indian subsidiary constitutes a PE of the assessee in India. Accordingly, it has been held that the assessee does not have a PE in India.

6 *Golden Bella Holdings Ltd. vs. DCIT*

[TS-523-ITAT-2019(Mum)]
Assessment Year: 2013-14

Article 11 of India-Cyprus DTAA – Concept of Beneficial Ownership – Held that Cyprus entity was beneficial owner of interest income for purposes of the tax treaty

Facts

i) The assessee is a limited liability company and a tax resident of Cyprus, engaged in business of an investment holding company. It is a wholly owned subsidiary of a company based out of Mauritius (Mauritius Co). Also, Mauritius Co. held 99.5% in an Indian company (I Co.)

ii) The assessee held compulsory convertible debentures (CCDs) in I Co. It earned interest on CCDs during the relevant assessment year (AY). The assessee filed its tax return for the relevant AY showing income from interest on CCDs in I Co.

iii) Such interest income was offered to tax at the rate of 10% in accordance with Article 11 of the India-Cyprus tax treaty.

iv) The Tax Officer (TO) denied the benefit of the tax treaty on the basis that the assessee was not the beneficial owner of interest income and taxed the said income at rates in force.

v) The Dispute Resolution Panel (DRP) affirmed the finding of the TO and held that the assessee was a mere conduit for the passage of funds.

vi) With regard to the assessee's reliance on the Central Board of Direct Taxes (CBDT) Circular No. 789, the DRP held that the circular was not applicable to the Cyprus entity.

vii) The assessee contended as under:

(a) The term "beneficial owner" is not defined in the Income-tax Act, 1961 (Act) or tax treaty. Internationally, the term denotes the entity that is the legal owner of the property and has dominion and control over the property.

(b) The Revenue had completely failed to prove that the assessee did not exercise full dominion and control over the interest income.

(c) The assessee was the sole owner of the interest income and was under no contractual, legal, or economic obligation to pass on the interest income it received to its immediate shareholder, or to its ultimate parent, or to any other entity.

(d) The fact that the investment was funded using shareholder loan and equity does not *ipso facto,* mean that corporate status may be disregarded.

(e) The assessee stated that the TRC issued by the tax authorities of Cyprus in its name would be a sufficient basis for residential status and "beneficial ownership", as required under CBDT Circular No. 789.

Revenue's contentions.

viii) The Revenue contended as under:

(a) Investment made by the assessee in the I Co. is a back-to-back loan transaction out of the funds received from its immediate parent company, i.e., the Mauritius Co.

(b) The assessee was a mere "name plate" company, carrying out no business activities in Cyprus and a conduit for the passage of funds between the two entities. Hence, it cannot be regarded as a beneficial owner of the interest income.

(c) The CCDs were issued at a hefty premium of 70% over and above the fair market value of each share of I Co.

(d) The Revenue relied on the DRP's observation that the assessee did not possess the CCDs in its own right and its power of disposal is not unhindered. In addition, the financial statements did not indicate the assessee was doing any business other than merely routing the funds.

Decision

On facts of the case, after considering rival submissions, the Tribunal held in favour of the assessee as under:

i) The assessee applied for CCDs using a portion of the share capital and the interest free shareholder loan and was still left with a reasonable cash balance.

ii) The assessee invested in CCDs and received interest for its own exclusive benefit and not on behalf of any other entity.

iii) Reference was made to the provisions of the OECD commentary (2017) to support the meaning of "beneficial owner."

iv) Also, the TO could not establish that the assessee was constrained by a contractual, legal or economic arrangement with any third party with respect to the interest income received.

v) The assessee maintained the foreign exchange risk on CCDs (as they were denominated in INR), and counter-party risk on interest payment arising on the CCDs.

vi) The transactions between the parties cannot be considered as a back-to-back transaction lacking economic substance.

vii) The assessee is eligible for tax treaty benefits, and the interest income from CCDs have been rightly offered to tax at the rate of 10% in the return of income.

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CA Rajkamal Shah

INDIRECT TAXES

GST Gyan – Intra Unit Service Cross Charge under GST

Cross charge on the supply of goods or services or both between different branches or establishments of an entity located in different States is one of the most debated topics under the GST law. Service being intangible, the challenge lies in taxability of the flow of intra unit service of an organisation. In this article, we shall discuss the sustainability of the departmental attempts to levy GST on such intra unit services particularly when no consideration is charged. The following situations of intra unit service cross charge are considered for the purpose of this article.

(A) Identifiable services, specific to a unit

Example – A Delhi based registered branch of Mumbai based cultural programme company (say, Gravity Studio) organise an event in Delhi. The tickets of the event are sold by Paytm Delhi under an agreement between Mumbai HO and Paytm HO in Mumbai. In this case, GST (CGST + SGST) is collected on sale of tickets and paid in Delhi after taking ITC of expenses incurred in Delhi. The Mumbai HO sends trained personnel to Delhi for performance. Mumbai HO pays for services received from trained performers. As services provided to Mumbai HO are identifiable *qua* the supply made from Delhi unit, Gravity Studio, Mumbai will issue a tax invoice with IGST in respect of such performers on Delhi branch. This will ensure a smooth flow of credit and compliance of GST law is ensured.

Cross charge in such a case is necessitated for claiming ITC of expense incurred at Mumbai HO by Delhi branch.

(B) Services not identifiable *qua* specific unit, (cost-sharing) where invoice is issued

A company has a network of branches all over India. It has the practice of sharing certain costs between the HO and the branches located in different States. The employees keep on travelling on different branches as and when required. These expenses are not debited to the concerned branch at the time of incurrence but are debited by HO as common expenses. The company, then periodically allocates such expenses between branches, based on certain pre-determined criteria for cost sharing purpose. The issue to be discussed is whether it is necessary that even the

expenses that are not charged by HO and no consideration is received can trigger the GST liability.

It goes without saying that if GST invoice is issued on the branch, ITC is allowable to the branch.

It can also be said that it is open for the entity to take recourse to the mechanism of input service distributor (ISD) provided that ISD registration is taken and GST invoice is issued by HO on branch subject to the satisfaction of other conditions specified therein. Proviso to R. 36(2) of CGST Rules, 2017 may be referred to.

(C) Sharing of common expense, where intra-unit invoices not issued and no consideration is charged

This can be understood by taking the example of common expenses like remuneration of MD and other employers, audit fees, legal expense, centralized accounting system, other software, etc. These expenses are incurred in the course or furtherance of business of the entity as a whole or as conglomerate of various units and no distribution or sharing of expenses take place. It is noticed that the notices are issued by the department to pay tax on notional basis on the purported intra unit distribution of such expense. In fact, AAR Karnataka in *Columbia Asia Hospital Pvt. Ltd. 2018 (96) Taxmann.com 245* has ruled that such expense constitute supply chargeable to tax on notional basis. The ruling goes on to state that even if employees of corporate office haveno relationship of employee-employer with other units, still it is a case of distinct person and service is performed by the employees at corporate office in course or in relation to employment including accounting, other administration, ITC systems maintenance for units located in other States as well is chargeable to tax on notional basis. The misplaced crux of the Ruling is that the distinctiveness of the units triggers the liability and supply is presumed. With this ruling the issue of cross charge on such common expenditure has generated lot of dust and debate.

The question would be whether in such cases when no invoices are issued or no consideration is charged, can the entity be compelled to pay GST? In the opinion of the writer, GST cannot be thrust upon such common expense that are not charged to the units despite there being Entry 2 of Sch. I.

Let us now examine the relevant provisions of CGST Act in order to fructify the levy on intra unit services.

Legal framework

S. 9 of the CGST Act mandates levy of Central Goods and Service Tax on all *intra State* supplies. The scope of supply is defined u/s. 7 of CGST Act. Accordingly, S. 7(1)(c) refers to Sch. I of the Act wherein the activities listed are deemed to be included in the scope of **supply even without a consideration**. For quick reference the relevant part of S. 7 is reproduced here:

"7. (1) For the purposes of this Act, the expression "supply" includes–

(a) ……..

(b) ……..

(c) the activities specified in Schedule I, made or agreed to be made without a consideration.

…….

……."

Entry 2 of Sch. I provides that, *"supply of goods and services or both between related persons or between distinct persons as specified in S. 25 when made in the course or furtherance of business".*

Thus, deeming fiction is created in Sch. I to levy GST on supplies that are made even without

consideration. Notably, the section also mandates that **such supply is made in the course or furtherance of business.**

Distinct persons

S. 25 relates to the procedure for registration in case the person is liable to register u/s. 22 or 24. Sub-sections 1, 4 & 5 specifies that even within an entity when a person is required to take registration in more than one State or UT, such different registrants are to be treated as distinct persons for the purpose of the CGST Act.

For quick reference the relevant part of Sub-sections 1, 4 & 5 of S. 25 is reproduced here:

"(1) Every person who is liable to be registered under section 22 or section 24 shall apply for registration in every such State or Union territory in which he is so liable within thirty days from the date on which he becomes liable to registration, in such manner and subject to such conditions as may be prescribed".

"4. A person who has obtained or is required to obtain more than one registration, whether in one State or Union territory or more than one State or Union territory shall, in respect of each such registration, be treated as distinct persons for the purposes of this Act".

*"5. Where a person who has obtained or **is required to obtain registration** in a State or Union territory in respect of an establishment, has an establishment in another State or Union territory, then such establishments shall be treated as establishments of distinct persons for the purposes of this Act".*

S. 22(1) requires that every supplier shall be liable to be registered from where he makes a taxable supply of goods or services or both if the aggregate turnover exceeds the minimum taxable limit. S. 24 lists out certain categories of persons compulsorily liable for registration (however, this is not relevant to the purpose of this article).

A conjoint reading of S. 25 & 22 shows that every supplier is required to obtain registration in every such State from where he makes a taxable supply of goods or services or both, thus there can be multiple registrations of an entity in the country. Further, S. 25(4) & (5) deems such separate places from where supplies are made, whether the registration has been obtained or not, to be distinct persons for the purposes of the Act.

Related persons

Explanation to S. 15 (pertaining to the value of taxable supply) provides that certain kinds of persons shall be deemed to be treated as related persons for the purpose of the Act.

"(a) persons shall be deemed to be "related persons" if–

(i) such persons are officers or directors of one another's businesses;

(ii) such persons are legally recognised partners in business;

(iii) such persons are employer and employee;

(iv) any person directly or indirectly owns, controls or holds twenty-five per cent or more of the outstanding voting stock or shares of both of them;

(v) one of them directly or indirectly controls the other;

(vi) both of them are directly or indirectly controlled by a third person;

(vii) together they directly or indirectly control a third person; or

(viii) they are members of the same family;

(b) the term "person" also includes legal persons;

(c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related".

For levy of tax on intra unit transactions of services without a consideration, one has to be mindful of the followings:

a) The cross charge is supplier centric.

b) The cross charge is in relation to outward supplies.

c) Whether or not having obtained registration is of no consequence if the person is liable to take registration.

d) Supply is made in the course or furtherance of business.

Thus, it can be construed that the coverage of maze of the provisions is much wider to target supply to the distinct persons and related persons both in the course or furtherance of business even without a consideration.

However, despite the cluster of legal provisions discussed above, it is worthwhile to examine the sustainability of the cross charge.

1. Fiction within the fiction

Service being intangible in nature, it is difficult to draw a parallel from goods. Furthermore, it is difficult to envisage an outward supply of intra unit service in the course or furtherance of business, especially without consideration.

a) Firstly, a deeming fiction is created in the law by treating intra unit supplies within the same entity as outward supply in the course or furtherance of business of various units including HO, branches, etc., etc., all of them being engaged in the activity in the course or in furtherance of business of the entity as a whole. No unit can be said to be supplying any goods or services to the other in furtherance or in the course of business of the supplier unit.

b) Secondly, by invoking the registration provisions that are essentially framed for actual outward supply by distinct/related persons, the tax is sought to be levied on intra unit non-existent supplies of common services, one more fiction is created in the law.

c) Thirdly, a charge of tax without actual consideration is another fiction created in the law.

Thus, the fiction within the fiction is created in the law to impose tax liability even though technically no service is rendered between the units *inter se*. It is a cardinal principle of the law that the fiction created in one provision should be restricted for the purpose of that provision only and cannot travel beyond it and no fiction can be created within the fiction. All these settled principles of jurisprudence have been done away with that may not be sustainable legally.

The four way test

In *Govind Saran Ganga Saran vs. CST*[1], the Hon'ble Supreme Court has laid down four tests of a valid levy. They are:

i) The certainty of the taxable event

ii) Certainty as to person liable to tax

iii) Rate of tax

iv) Measure or value of tax

Accordingly, any levy that fails to meet with any of the above conditions is not a valid levy. Now let us examine the leviability of GST on cross charge in the context of the tests laid down by the Hon'ble Supreme Court.

i) The certainty of the taxable event

The taxability of GST is a taxable event i.e., supply of goods or service or both.

1. 1985 Supp SCC 205.

The fiction of deeming supply created by the law cannot be said to be a taxable event because no enforceable contract exists between the units. No defined set of activity is carried out by one unit for another unit. For example, a legal issue has cropped up in Gujarat High Court for Ahmedabad based branch of a Mumbai company. The company engages a counsel in Ahmedabad and receives a bill and pays fees to the counsel. The company even debits that payment to the account of Ahmedabad branch. Can it be said that GST is leviable as supply from Mumbai HO to Ahmedabad branch? In the opinion of the writer, the answer is a clear 'no' as no taxable event has taken place between Mumbai HO and Ahmedabad HO.

ii) **Certainty as to person liable to tax**

There is a clear cut confusion that a person on whom the tax liability can be fastened. The actual supplier *qua* the supply of service is the person who has contracted to provide service to the recipient. There is no contract of provision or receipt of service *qua* different units of an entity. It is also possible that two different units rendered service to a recipient. In such a scenario how the person is liable to pay tax can be determined?

iii) **Rate of tax**

This is another example of utter confusion about the rate of tax if the fiction is carried to the extent that one unit supplies service to another. There are different kinds of services having different rates of tax. The rate of tax is to be determined on the basis of the actual rate of tax related to the contract of supply or whether in absence of nature of service between the units a residuary rate of tax is applicable?

iv) **Measure or value of tax**

The value of service between the units is in-determinate in absence of consideration. S. 15 of 'value of taxable supply' has no clarity about the value of supply between the distinct or related persons. S. 15(1) provides for the transaction value which is the price actually paid or payable for the said supply where the supplier or recipient of supply are not related persons and the price is the sole consideration of the supply. Clearly, S. 15(1) cannot be applied in case of supply between the related or distinct persons having no transaction value which is the price actually paid or payable for the supply. Recourse may be made S. 15(4) which provides that the value of goods or service or both cannot be determined under sub-section (1), valuation as provided in R. 27 to 31 of CGST Rules, 2017 shall apply. In absence of any value that can be ascribed to the provision of service between the units *inter se*, various alternates that have been created to determine the value of the supply under Rule 28. This itself brings the ambiguity and uncertainties in the value or measure of tax. Thus, the valuation mechanism fails.

It can be seen that all the conditions laid down to constitute a valid levy in relation to supply of common service between the units *inter se* fails and it can be said that the cross charge being artificially created by introducing multiple legal fictions in the law is not sustainable.

Conclusion

In sum and substance there are significant uncertainties over the implementation of the levy of GST on intra unit "so-called supplies" of services. Despite of maze of cluster provisions, the levy fails to impose GST liability on inter flow of common services between the distinct and/or related person of the same entity in absence of underline supply and consideration.

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CA Naresh Sheth & CA Jinesh Shah

INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

A. Rulings by Appellate Authority for Advance Ruling

1. IMF COGNITIVE TECHNOLOGY PRIVATE LIMITED – AAAR RAJASTHAN (2019-TIOL-65-AAAR-GST)

Facts, Issue involved and Query of Appellant
Appellant is engaged in development, designing and trading in all types of computer software including export of software. Appellant is registered under GST in the state of Rajasthan. For the purpose of trading and export, appellant procures various goods or services both within Rajasthan and outside Rajasthan. It avails the ITC of GST paid on such procurement made within the State of Rajasthan i.e., CGST and SGST (Rajasthan).

There are many instances where vendors (registered in other State say Haryana) charge CGST and SGST on inward supplies procured by the appellant. One of the instance is that if appellant procured hotel services in Haryana, Hotel has charged CGST and SGST (Haryana). Appellant stated that **eligibility for Input Tax Credit** is governed by the provision of Section 16(1) of CGST Act, 2017 which entitles the appellant to claim ITC of CGST. The term **"Input Tax"** has been defined u/s. 2(62) of the CGST Act, 2017 which includes CGST also.

Appellant has sought advance ruling on the following question:

"Whether the input tax credit of Central Tax paid in Haryana be available to the Applicant who is registered in Rajasthan State?"

Discussions by and Observations of AAR
Authority observed that in GST regime, CGST and SGST charged for services provided would be eligible for ITC within the State where such services were provided and consumed. In other words, recipient will be entitled to CGST and SGST charged by the vendor only when recipient is registered in the same state in which vendor is located.

In the present case, the supplier of services and place of supply both are outside the State of Rajasthan, ITC of CGST paid in Haryana is not available to the appellant who is registered in Rajasthan.

ITC of CGST paid by the appellant in Haryana is not allowed to claim. Contention of the appellant is that the ITC provision allow them to claim the credit of the CGST paid on the input services availed in Haryana.

Ruling of AAR
In respect of above discussion, ITC of the CGST paid in Haryana is not admissible.

Appeal to the AAAR

Aggrieved by above-referred ruling, appellant preferred an appeal to AAAR against the same. Appellant reiterated the grounds stated in the application including following:

(i) Is it justified to interpret the law giving preamble of CGST Act, 2017 for levy of GST, whereby appellant has asked question on ITC and not on leviability?

(ii) Is it justified to decide admissibility of ITC on the basis of location of supplier and place of supply, while provision of admissibility of ITC is separately provided under CGST Act and there is no correlation between ITC and place of supply?

(iii) Is it justified to decide the case without giving any specific reference to provision of law, while applicant had requested for the same specifically?

(iv) Is it justified by AAR to go beyond the question raised by appellant by observing admissibility of SGST, while question was in respect of ITC of CGST paid to Central Government?

Discussion and Observations of AAAR

Appellate authority examined whether ITC of CGST paid by the appellant in Haryana is admissible to them. Contention of the appellant is that the ITC provisions allow them to claim the credit of the CGST paid on the input services availed in Haryana.

Appellate authority observed that appellant is asking for ITC of only CGST paid in Haryana and not of SGST paid in Haryana. It means that appellant is sure that ITC of the SGST paid in Haryana is not admissible. It is true also because Rajasthan GST Act allows ITC of SGST paid in Rajasthan only. In GST, both of CGST and SGST Acts go hand in hand. Any transaction attracting CGST will also attract SGST. From this, it naturally flows that if ITC of SGST is not admissible, ITC of CGST should also not be admissible. However, same is to be examined in terms of GST legislation.

Section 16(1) is reproduced below for the sake of convenience:

"Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."

In the above section, the term used "input tax" is defined u/s. 2(62) which includes **"Central Tax"** also. **"Central tax"** defined u/s. 2(21) is levied u/s. 9 of CGST Act.

Appellate authority examined Section 9(1) which stated that CGST is levied on **Intra State supplies of goods/services**. Section 8(2) defines the term **"intra State supplies of services"** to mean where location of supplier and place of supply falls within the same State.

Appellate authority observed that ITC of **Input Tax** is admissible to a registered person, subject to conditions and restrictions and **input tax, inter alia, is CGST** charged on inward supply (intra state supply as defined above) of a register person.

Therefore, ITC of CGST would be available to appellant (Rajasthan) only when location of supplier and place of supply are in Rajasthan.

Ruling of AAAR

The AAAR upheld the order passed by AAR and dismissed the appeal filed by appellant.

B. Rulings by Authority for Advance Rulings

2. BORBHETA ESTATE PRIVATE LIMITED – AAR WEST BENGAL (2019-TIOL-186-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in the business of renting of dwelling units. Applicant has executed agreements for leasing/renting of four dwelling units located in Kolkata. All these residential units are used for residential purpose. Applicant has rented one of the residential unit to M/s. Larsen and Turbo Limited. Concerned officer from Revenue contends that exemption should not be available when the dwelling unit is rented to a commercial entity like M/s. Larsen & Toubro Limited.

Applicant sought an advance ruling as to *"Whether the supplier is liable to pay GST on such supply even if the recipient is using dwelling unit for residential purpose?"*

Discussions by and observations of AAR

AAR observed that the residential units leased/ rented to various recipients are for residential purposes. The South City Apartment Owners Association also confirmed that the flat leased/ rented to M/s. Larsen and Toubro Ltd. is a residential flat and is used by an employee of M/s. Larsen and Turbo for residence.

As per Sl. No. 12 of the Exemption Notification No. 12/2017-CT (Rate), exemption will be available to **dwelling units for residential purpose** and not to dwelling units rented to a commercial entity. Applicant's services are classifiable as rental or leasing service involving own/leased residential property (SAC 997211). AAR observed that all the units are used for residential purposes only.

Ruling of AAR

AAR ruled that the applicant's service of renting dwelling unit to M/s. Larsen and Turbo for residence purpose shall be exempt as per Sl. No. 12 of the exemption notification.

3. M/S. ADITYA BIRLA NUVO LTD – AAR GUJARAT (2019-TIOL-270-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in supply of goods. As per the contracts entered into with customers, they are charging insurance and freight from the customer over and above basic price of product. Considering it as a composite supply, GST is discharged on entire invoice value (including insurance and freight). However, one customer contends that GST is not leviable on freight and insurance and it is to be discharged on basic amount only.

Applicant has thus sought an advance ruling on the following issues:-

a. *"Whether ex-works supply plus freight and insurance to be treated as composite supply?*

b. *"Whether showing and charging freight and insurance portion separately in invoice would attract GST?*

c. *"If as per (b) above, no GST is chargeable, whether they can have two different type of treatments i.e. in one case GST is being paid on freight and insurance and in other case no GST is paid on freight and insurance?*

d. *"Whether section 15(2) of the CGST Act, 2017 encompasses inclusion of Freight and insurance which is being reimbursed by the buyer?*

Applicant's contentions

Under GST, a composite supply would mean a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, **which are naturally bundled and supplied in conjunction** with each other in the ordinary course of business, one of which

is a principal supply. As per terms of contract, price is exclusive of Excise duty, VAT and CST, Entry Tax and other applicable duties, which are reimbursable and payable by the customer. As per definition of composite supply, sale of product is a principal supply and freight and insurance is part of composite supply. **It is not possible to sell the product without freight and insurance.** GST would be liable on composite supply i.e., including freight and insurance.

Discussions by and observations of AAR

Applicant deals in such kind of products where freight and insurance forms an inevitable part of the principal supply (of goods). As per section 2(30) of the CGST Act, 2017, "**Composite Supply** means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply." Applicant supplies naturally bundled products and it will not be possible to sell these products without freight and insurance. It is specifically mentioned in the illustration to section 2(30) of the Act that goods packed and transported with insurance, is a composite supply and supply of goods is a principal supply. The case of the applicant clearly falls under definition of composite supply.

Further, if freight and insurance portion are charged and shown separately in invoice, it would not change the fact that the supply is a composite supply. Hence, there cannot be different type of treatment of tax liability of supply of goods or services naturally bundled together.

As per **Section 15(2)** of the CGST Act, 2017, the value of supply shall include –

(c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;

As per the above, it is very clear that freight and insurance, charged by the supplier to the recipient of a supply, is included in the value for charging of tax under GST legislation.

Arrangement of delivery of goods is the responsibility of supplier and accordingly transportation and insurance (anything done before the delivery of goods) is arranged by supplier. The actual freight cost incurred by supplier varies with pre-contracted price with buyers. GST is applied on supply of goods or services. If there are two values of any supply, then GST is to be taxed on the higher value of supply. Hence, the higher of the two value i.e. the actual cost of freight and insurance or the pre contracted fixed freight per unit of the product, shall be included in the value of composite supply.

Ruling of AAR

In respect of question (a), ex-works supply along with freight and insurance is a composite supply.

In respect of question (b), GST is chargeable even if freight and insurance value is shown separately on invoice.

In respect of question (c), different tax treatment for supply of goods and/or services naturally bundled is not possible.

In respect of question (d), where the value of freight as pre-contracted per unit of product is different from the actual cost, the higher of the two value shall be included in the value of composite supply.

4. M/S. CHENNAI PORT TRUST – AAR TAMIL NADU (2019-TIOL-264-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in the business of supply of port services and incidental supply of goods like disposal old discarded assets. Applicant is one of

the major port under Indian Port Trusts Act, 1908 and the Major Port Trusts Act, 1963. Applicant is functioning under the supervision of Ministry of Shipping. As per the Government regulations and notifications, applicant is maintaining an in-house hospital within its port premises for providing health and medical services exclusively to its employees and pensioners. The hospital is only a cost center. It does not provide hospital/medical services for any consideration.

Applicant has thus sought an advance ruling as to *"Whether they are entitled to take Credit of ITC charged on inward supply of:*

a. Medical and diagnostic equipment;

b. Medical apparatus & instruments, medical consumables & disposable items and other machinery installed in the in-house hospital, spares for medical and diagnostic equipment, medical apparatus & instruments and other machinery installed in the in-house hospital;

c. Spares for medical and diagnostic equipment, medical apparatus & instruments and other machinery installed in the in-house hospital;

d. Repairing Services of medical and diagnostic equipment, medical apparatus & instruments and other machinery installed in the in-house hospital.

Applicant's contention

Medicines are given to the employees free of cost and the medicinal equipments are used to render health benefits to the employees which are part of the package to the employees. These are used for the furtherance of business. Further Mumbai CESTAT bench in case *Hindustan Coca Cola Beverages (P) Ltd. vs. Commissioner of Central Excise, Nashik* has held that the outdoor catering services provided by an employer to employee is qualified to avail CENVAT credit.

Discussions by and observations of AAR

Hospital started originally as a dispensary in the year 1939 and later was converted into a full-fledged hospital. The hospital is a cost center. Medical treatment is provided to the employees and pensioners without charging any separate consideration. Hospital procures medical, diagnostic equipment, apparatus, instruments, consumables, disposals, spares and repairing services for providing the above-mentioned medical services to its employees and pensioners.

Sections 16(1) to 16(4) of the CGST Act, 2017 provides for the eligibility and conditions for taking ITC. Section 17(5) begins with a non-obstante clause, which means even if a person is entitled to claim ITC as per section 16(1) but shall not be entitled to claim ITC in respect of certain cases specified in section 17(5).

Section 17(5)(g) provides that ITC shall not be available in respect of **goods or services or both used for personal consumption.** As stated above, applicant's hospital is a cost center where all the services and medicines are provided free of cost to the employees. Such medical consumables, apparatus, etc. are used for providing **personal medical care** to the individuals who are the employees and pensioners of the applicant. They are in effect used for personal consumption of the employees, pensioners and dependents.

Applicant has stated in their application that these are not "goods or services used for personal consumption" as the applicant pays for the same. The argument does not hold good. The fact of who pays for the goods and services here is irrelevant to the usage of the said goods and services. They are used by the employees and dependents and hence are for personal consumption and the applicant is ineligible to take input tax credit on the said inward supplies.

Ruling of AAR

Applicant is not entitled to claim credit of input tax charged on the inward supply of medical, diagnostic equipment, apparatus, instruments, consumables, disposables, spares and repairing

services, which are used for providing free of cost medical facilities to the employees, pensioners and dependents in the in-house hospital.

5. M/S. INDO THAI SECURITIES LTD – AAR MADHYA PRADESH (2019-TIOL-282-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is a registered stockbroker dealing in purchase/sale of securities for and on behalf of its clients and charges brokerage for its activities. Applicant recovers the cost of security plus the brokerage from its customers. Further, applicant charges interest from customers for delayed payment. Therefore, the amount on which interest is charged consists of two components - cost of securities and brokerage.

Applicant has sought an advance ruling regarding "the tax liability on interest charged from customers on delayed payment received."

Applicant's contention

Under section 15(2)(d) of the Act interest on late fee or penalty or delayed payment of any consideration for any supply, forms part of value. As per sr. no. 27 of Notification no. 12/2017 – Central tax (rate) interest is exempted. It is clear that amount recovered towards securities is not a supply. Hence, interest charged towards securities cost is not a supply and exempted under Notification No. 12/2017-Central Tax (Rate). However, brokerage is a supply and therefore, Interest charged towards brokerage shall only constitute a supply.

Discussions by and observations of AAR

Applicant, being a stockbroker, charges consideration in the form of brokerage as a fixed percentage of transaction value and gives reasonable time to make the payment for security cost as well as brokerage amount. However, if the payment is not received within the stipulated time, an additional amount is charged which can be termed as Interest, Late fees or Penalty. Section 15(2)(d) of the CGST Act, 2017 provides that the classification of interest, late fee or penalty cannot be different from the classification of goods/ service.

As far as classification of interest, late fee or penalty is concerned; it shall be same as nature of principal service and cannot be different from the principal supplies. In this case, the principal supply is stock broking services for which the consideration is charged in the form of brokerage.

Moreover, this view has also been confirmed by the explanation inserted to section 2(102) of the CGST Act, 2017 w.e.f. 1-2-2019 which states – 'For the removal of any doubts, it is hereby clarified that the expression "service" includes facilitating or arranging transactions in securities'.

Entry No. 27 of Notification No. 12/2017 of CGST was referred which speaks about exempting the services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services). Additional amount charged on delayed payment is in the nature of penalty. Interest is charged for failure to make payment within the stipulated time.

Having regard to the nature of transaction it cannot be said that the share broker has extended any deposit, loans or advances to its clients. Hence, the additional amount charged from customers cannot be treated as interest for the purpose of exemption under Notification no. 12/2017-Central tax (rate).

Ruling of AAR

Additional amount charged on delayed payment shall be taxed as per original supply i. e. supply of stock broking services. It is not entitled to exemption under Notification No. 12/2017-Central Tax (Rate).

6. WILHELMSEN MARITIME SERVICES PRIVATE LIMITED – AAR MAHARASHTRA (2019-TIOL-235-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant has the largest maritime services network in the world and is engaged in supplying a wide portfolio of maritime goods and services worldwide to every conceivable vessel type in every market and region. Applicant has three major activities:

(i) Maritime Products – consists of various chemicals, lubricants, solutions etc. procured from parent company and sold to owner of ship (proceeding to foreign port). These products are delivered onboard on vessels at Indian ports.

(ii) Ships Agency; and

(iii) Maritime Logistics.

Applicant has sought advance ruling on the following questions:

a. Whether the delivery of goods to the owner of the ship proceeding to foreign port at the Indian port is an "export of goods" as per Section 16 of the IGST Act, 2017?.

b. Applicant has w.e.f. 1-7-2017 levied and paid GST under protest on all its "Maritime Products" supplies. If the supply is exports as per Section 16 then, will WMSPL will be liable to claim refund for zero rated supply i.e. exports?

c. If at all taxable, whether the tax will be levied as intra-state or interstate supply?

Applicant imports goods from foreign countries, keeps them either in Bonded warehouse or Non-bonded warehouse and supplies the same to ship proceeding to foreign port from Indian seaport. Delivery can be done in following three ways:

(i) Delivery from bonded warehouse by paying duty; or

(ii) Delivery from non-bonded warehouse; or

(iii) Delivery from bonded warehouse under a bond.

Applicant has paid GST under protest on all its 'Maritime products' supplies. If supply is made from warehouse to port located in same state, they have charged CGST + SGST and if the port is in different state then IGST is charged.

Applicant's contention

Exports as defined under GST/Customs/Excise means taking goods out of India

Supply of maritime products is export of goods as the goods will move out of India when the next port call is not within territorial waters of India.

Erstwhile Customs Act and Excise Act treated goods delivered to ship proceeding to foreign port from Indian seaport as export of goods.

Andhra Pradesh AAR in case of M/s. Fairmacs Shipstores Pvt. Ltd. held that as per section 88(A) of Customs Act, goods supplied to merchant ships will be treated as exports. As per Section 16 of IGST Act, export will be treated as zero rated supplies.

Applicant requested to reframe the advance ruling question as under:

a. Whether supply of goods directly from bonded warehouse to foreign going vessel be treated as Schedule III item?

b. Whether the supply will be termed as export of goods? If no, then what will be the supply, whether intra-state or inter-state?

Discussions by and observations of AAR

Applicant imports marine products from their parent company situated abroad. The goods procured are stored at either bonded warehouse or non-bonded warehouses. These goods are

sold from warehouses to owner/operator of ship proceeding to foreign port. Delivery is done onboard and consideration is received in convertible foreign exchange. Owner of ship does not have any place of business in India.

These goods are imported and import duty is paid on them. This would imply that the said goods have been received and cleared by the applicant and are in the taxable territory. Further, on receiving purchase orders from the owners of the vessels, applicant clears the said goods by filing shipping bills and deliver the goods to the vessels at an Indian port. These documents are handed over to the vessels, which are landed at Indian port.

Schedule III to CGST Act 2017 provides that following activities or transactions shall neither treated as a supply of goods nor supply of Services:

8. (a) "Supply of warehoused goods to any person before clearance for home consumption."

8. (b) "Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption."

In give case, supply of warehoused goods is of two types, namely:

1. Clearance from Bonded warehouse to the vessels;

2. Clearance from Non-Bonded warehouse to the vessels.

A bonded warehouse is a customs warehouse for the retention of imported goods until duty is paid. Upon entry of goods in warehouse, liability is incurred by the importer under bond until the goods are further exporter or cleared. Thus, it can be said that goods in the Bonded warehouse are not cleared for home consumption. This satisfies the situation mentioned in Schedule III – Clause 8(a) of the CGST Act specified above.

However in situation 2 above, the imported goods would have been cleared to such non-bonded warehouses on payment of appropriate IGST/ Customs Duty and therefore supply in (2) above will not fall under Schedule III of CGST Act.

The query put forth by applicant to confirm, "Whether the supply will be termed as Exports of Goods. If no, then what will be the supply, whether Intra-state or Inter-State and which tax will be levied" is outside the purview of advance ruling authority in accordance with Section 97 of CGST Act, 2017.

Ruling of AAR

In respect of question (a), supply from bonded warehouse will fall under Schedule III of CGST Act and exempted from GST. Supply from non-bonded warehouse will not fall under Schedule III of CGST Act and therefore not exempted under GST.

Question (b) is outside the purview of Section 97 and hence not answered.

7. YASH NIRMAN ENGINEERS & CONTRACTOR – AAR MAHARASHTRA (2019-TIOL-295-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is a works contractor (sub-contractor) engaged by M/s. Lakhani Builders Pvt. Ltd. (Contractor) for construction of a residential project name 'La-Riveria' located in Raigad. All the apartments to be constructed in the said project are below 60 sq. mt. and fall under the 'affordable housing category'. Hence M/s. Lakhani Builders is entitled to avail benefit of lower rate of GST (12%) as provided in entry 3(v)(da) of Notification no. 11/2017-Central Tax (Rate).

Applicant's scope of work includes excavation work, RCC work, brick work, plaster work and waterproofing work.

Applicant sought an advance ruling as to *"Whether the construction service provided by the applicant in the capacity of a sub-contractor under the Affordable Housing project qualifies for lower rate of GST @12% as provided in Sr. No. 3 - Item (v) sub-item (da) vide Notification No. 01/2018-CT (Rate) dated 25-1-2018?"*

Applicant's contention

Project 'La-Riveria' qualifies to be an affordable housing project, which has been given infrastructure status, *vide* notification of Govt. of India and thus attracts lower rate of GST at 12%. Effective tax rate would be 8% [after 1/3rd deduction of land value].

Entry 3(v)(da) reads as under:

"Composite supply of works contract as defined in section 2(119) by way of construction, erection, commissioning, or installation of original works pertaining to low-cost houses up to a carpet area of 60 square metres per house in an affordable housing project which has been given infrastructure status……"

Interpretation of this service is that all consequent works contract service provider who provides their composite supply of works contract service pertaining to specific project defined as low cost houses in an affordable housing project falls under the above category – 3(v)(da) of Notification No. 11/2017-Central Tax (Rate).

Accordingly, composite supply of works contract service by way of construction of low cost houses in an affordable housing project would attract GST at rate of 12%.

Discussions by and observations of AAR

M/s. Lakhani Builders Pvt. Ltd. (Contractor) has undertaken a development of Residential Project with apartments having an area of less than 60 sq.mt carpet. The contractor has awarded a specific scope contract to the applicant.

In order to qualify for the low rate of GST, the conditions specified in Sr. No. 3 - item (v), sub item (da) of Notification No. 01/2018-Central Tax (Rate) dated 25-1-2018 needs to be satisfied. As per the Notification no. 01/2018-Central tax (rate), *"low-cost houses up to a carpet area of 60 square metres per house in an affordable housing project which has been given infrastructure status vide notification of Government of India, in Ministry of Finance, Department of Economic Affairs vide F. No. 13/6/2009-INF, dated the 30th March, 2017."*, will attract tax rate of 12%.

This clause will be applicable to **any** person if the project undertaken by such person is an affordable housing project which has been given an Infrastructure status vide Government notification.

Department of Economic Affairs' Notification no. F.no. 13/6/2009-INF, dated 30.03.2017 has included Affordable housing under the column "Infrastructure sub sector" against the category of Special and Commercial Infrastructure. The notification further defines "Affordable Housing" as a housing project using at least 50% of the Floor Area Ratio (FAR)/Floor Space Index (FSI) for dwelling units with the carpet area of not more than 60 sq. mtr.

Nowhere does the entry (v)(da) of Notification 01/2018, as mentioned above, restrict the benefit to 'Developer' only. **The Notification entry is *qua* the supply of service and not *qua* the person.** Therefore, once a project qualifies as an Affordable Housing Project, the benefit of concessional rate of tax would be available in respect of works contract services as defined u/s. 2(119) of GST Act, irrespective of it being supplied by the developer or contractor. Thus, the applicant's case is covered under the tax rate of 12%, under Heading 9954 (Construction Services).

Ruling of AAR

Applicant is entitled for lower rate of GST @12% as provided in Sl. No. 3 – Item (v) - sub-item (da) *vide* Notification No. 01/2018-CT (Rate) dated 25-01-2018 for works contract services provided to main contractor.

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CA Rajiv Luthia & CA Keval Shah

INDIRECT TAXES

Service Tax – Case Law Update

1 *Credit Suisse Business Analytics India Pvt. Ltd. vs. Commissioner of Customs, GST Raigarh*

2019-TIOL-2581-MUMBAI CESTAT

Background Facts of the case

The appellants are engaged in providing the services namely, Information Technology (IT) and Information Technology Enabled Services (ITES) to their group companies located in India and abroad. They availed CENVAT credit on the input services used for providing the output services. They have filed refund applications u/s. 5 of CCR, 2004 for the period April, 12 to December, 14 claiming refund of service tax paid on the input services. The refund applications were rejected by the original authority on the ground that the disputed services are not falling within the definition of input service and that the disputed services have no nexus with the output service provided by the appellants.

Arguments put forth

The appellants submitted as under:

a) They provided the note in respect of various input services such as Works Contract Services, Storage/ Warehousing, general insurance, event management, mandap keeper services etc. explaining the reason for extending such benefit i.e., allowance of CENVAT credit to them.

b) They placed reliance on the decision in case of

- *Infosys Ltd. vs. Commissioner of Service Tax 2014-TIOL-409-CESTAT-BANG*
- *BA continuum India Pvt. Ltd. vs. Commissioner of Service Tax II, Mumbai, [TS-260-CESTAT-2018-ST]*
- *Comm. of C. Ex. & Service Tax (LTU) vs. Lupin Ltd. 2012-TIOL-2099-CESTAT MUM*

The Respondents submitted as under:

a) The appellants have not specifically adduced any evidence before the authorities below to show that the services were in fact, used/utilized for providing the output service and not for the personal or welfare measures for the employees.

Decision

a) Input services under Works Contract Services for repair and maintenance of furniture & fittings installed in the business

premises are not excluded from the purview of the definition of input service. Exclusion is only of works contract of a building or a civil structure. Repair and maintenance of furniture & fittings cannot be termed as either building or civil structure, in order to be categorised as excluded service under the said rule. On the other hand, the main part of the definition of input service takes within its ambit the activity of repair of office of the service provider, for consideration as input service. Matter is remanded to the original authority for ascertaining the fact regarding the nature of use of such service by the appellants. If the utilisation of such service is for carrying out the activities of repair/maintenance of furniture & fittings and not for execution of the works contract of a building or civil structure, the benefit of refund should be extended to the appellants.

b) Mandap keeper/event management services were availed by the appellant for advertising/marketing the output service provided by them. The Ld. CCE (Appeals) had denied such benefit to the appellants on the ground that the said services were used for personal or welfare purpose of employees. Since the submissions of the appellants has not been properly examined by the authorities below, the matter should be remanded to the original authority for a proper fact finding on the issue and for that purpose, the appellants should produce relevant evidence to support their stand that such services were in fact, used for providing the output service by them.

c) With regard to storage & warehousing and photography/event management services, the said services were used by the appellant in, or in relation to providing the output service, which will be termed as input service as per the main part of definition provided under Rule 2(l). Hence, denial of refund benefit of service tax paid on storage & warehousing and photography/event management services is not sustainable.

d) The services provided by M/s. Whiteboard Consulting, Blex Training and Oritel Service Apartments were availed by the appellants for conducting trainings for the employees and for relocation of the employees. such service qualifies as input service for the purpose of refund benefit.

e) The credit on medical/accidental insurance for the employees cannot be considered as input service as per the exclusion clause provided in Rule 2(l) since such services were used for the personal use/benefit of the employees.

f) The appeals filed by the appellants are disposed of accordingly.

2 *ESS Infraproject Private Limited vs. Union of India & Others*

2019-VIL-313-BOMBAY HIGH COURT

Background Facts of the case

This petition seeks a declaration that Respondents do not have power under Rule 5A of the Service Tax Rules, 1994 read with Section 174(2)(e) of the Central Goods and Services Tax Act, 2017 (CGST Act) to conduct audit for the period October 2013 to June 2017 i.e., prior to the introduction of CGST Act on 1st July, 2017.

Arguments put forth

The Petitioners submitted as under:

a) Various courts i.e., Gujarat High Court in the case of *OWS Warehouse Services LLP vs. Union of India, 2018 (19) G.S.T. 27 (Guj.) - 2018-VIL-463-GUJ,* the Delhi High Court in the case of *M/s. T. R. Sawhney Motors*

Pvt. Ltd. vs. Union of India in Writ Petition (C) No. 2138 of 2019 and Jharkhand High Court in the case of *M/s. Sulabh International Social Service Organization, (Jharkhand State Branch) vs. Union of India in Writ Petition (T) No. 1599 of 2019 - 2019-VIL-134-JHR-ST*, have in respect of identical challenge granted interim relief to the petitioner.

b) It is also submitted that in any event, the Delhi High Court in *Mega Cabs Pvt. Ltd. vs. Union of India 2016 (43) S.T.R. 67 (Del.) - 2016-VIL-282- DEL-ST* has held that Rule 5A of Service Tax Rules, 1994 is *ultra-virus* to parent Act i.e. Finance Act, 1994. Therefore, bad in law and Rule 5A of the Service Tax Rules cannot be enforced.

Decision

a) The issue of the saving of Rule 5A(2) of Service Tax Rules, 1992 on introduction of CGST Act, 2017 is an issue that requires detailed consideration. This would be appropriately done at the final hearing.

b) Thus, granting of interim relief at this stage would tantamount to granting final relief at the stage of admission. The Respondents seeks to carry out audit in terms of Rule 5A of Service Tax Rules, 1994 and Section 174 of the CGST Act for the period prior to the introduction of CGST Act. Grant of interim relief at this stage would prevent the respondents from carrying out audit as permitted under Rule 5A of Service Tax Rules, 1994 and Section 174(2)(e) of the CGST Act.

c) At the final hearing, if the challenge is negative, there would be a delay in conducting the audit which would then result in difficulty as papers and persons who are in a position to respond to audit queries may not be available and/or their memories may fail. Besides any action to be taken pursuant to the audit may become time barred, if not already so. No prejudice will be caused to the petitioners if it subjects itself to audit at this stage.

d) If any further proceedings are taken on the basis of audit report against the petitioners, they are at liberty to move the Court for interim relief. Such an application, if made which would be considered at that point of time by the court to which served an application is made

Accordingly, the petition was admitted, however without any interim relief to the Petitioners.

3 *GMR Aerospace Engineering Limited vs. Union of India*

2019-VIL-489-TELANGANA HIGH COURT

Background Facts of the case

The petitioner is a unit set up in the GMR Aviation SEZ and are co-developer-cum-Unit providing services of maintenance, repair and overhaul services and facilities for various types of aircrafts. The petitioner was approved as a co-developer by a Letter of Approval dated 20-9-2010 by the Office of Development Commissioner. The main developer of GMR Hyderabad Aviation SEZ entered into sub-lease agreement with the petitioners for rendering following services:

- lease of land to an extent of 24.55 acres for setting up Maintenance Repair and Overhaul facilities,
- supply of electricity for commercial operations and
- supply of water for commercial operations

For the above-mentioned services rendered, the petitioner raised invoices and claimed exemptions under service tax but requisite forms

were not available with them and accordingly the Department authorities denied such exemption. The petitioners applied for such forms from retrospective effect and the same were denied to them and accordingly they filed a writ petition challenging the validity of notifications issued under the Finance Act, 1994.

Arguments put forth

The Petitioners submitted as under:

a) As per Section 26(1)(e) of the Special Economic Zones Act, 2005, (hereinafter called "the SEZ Act) every Developer and entrepreneur shall be entitled to exemption from service tax under Chapter-V of the Finance Act, 1994 on taxable services provided to a Developer or Unit to carry on the authorised operations in a SEZ. Such exemptions are subject to conditions as prescribed under Special Economic Zones Rules, 2006. Therefore, the SEZ Act, 2005 and the Rules framed thereunder entitle a unit located in a SEZ to exemption from payment of service taxes and the same are not dependent on the conditions stipulated in the notifications issued under Section 93 of the Finance Act, 1994.

The Respondents submitted as under:

b) The petitioners have an effective alternative remedy of appeal against the OIO and accordingly writ should not be admitted.

c) The SEZ Act, 2005 and the Rules framed thereunder do not constitute a self-contained Code and hence, the fulfilment of the conditions stipulated in the notifications issued under Section 93 of the Finance Act, 1994 is a sine *qua* non for the grant of exemptions.

d) The notifications issued under the Finance Act, 1994 do not run contrary to or in conflict with the SEZ Act, 2005 and the Rules framed thereunder, the petitioners are obliged to fulfil even the conditions prescribed by the notifications issued under the Finance Act, 1994.

Decision

a) The argument by Respondents for alternative remedy cannot be accepted because of the fact, that if the applicable notification itself is held to be without authority, then there is no question of alternate remedy.

b) Section 26 provides that exemption shall be granted from payment of service tax subject to conditions prescribed. Further, the term prescribed is defined u/s. 2(w) of SEZ Act, 2005 to mean prescribed by rules made by CG under this Act. Therefore, the conditions as prescribed under SEZ regulations only need to be complied. There is no dispute about the fact that the petitioners have complied with the prescriptions contained in Rule 22 of the SEZ Rules, 2006 and that Rule 22 of the SEZ Rules 2006 does not stipulate the filing of forms A1 and A2 as prescribed in the three notifications issued under Section 93 of the Finance Act, 1994.

c) The SEZ Act, 2005 is also a Parliamentary enactment issued later in point of time to the Finance Act, 1994 and Section 51 of the Act declares that the provisions of the SEZ Act, 2005 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

The writ petition was allowed and notification issued in such regards were also set aside.

4 ***Ultratech Cement Limited vs. Commissioner of Central Tax – Tirupati GST***

2019-VIL-603-CESTAT-HYDERABAD

Background Facts of the case

The Appellants are a public limited company and during the course of department audit, it was highlighted that they had taken CENVAT Credit on input services like internet services, mobile phone services, TATA Sky D2H services, employee insurance service and employee Mediclaim policies which were exclusively provided for their employees at their residential quarters. It was alleged that these input services are specifically excluded under Rule 2(l) of CENVAT Credit Rules, 2004. SCN was issued denying such credit and Order was also passed against the appellants.

Arguments put forth

The Appellants submitted as under:

a) They have taken CENVAT Credit on the alleged services, however, they have also recovered amounts for these services from their employees along with service tax and have duly paid the applicable service tax on such services. Accordingly, they are not restricted u/r. 2(l) of CENVAT Credit Rules, 2004.

b) Also, reference was made to draft Circular No. F. No. 354/127/2012-TRU dated 27-7-2012, wherein it was clarified that the CENVAT Credit on services which are used to provide services to employees shall be eligible for claim of CENVAT Credit.

The Respondent submitted as under:

a) The definition of input services as per Rule 2(l) of CENVAT Credit Rules, 2004 clearly excludes services which are meant for personal use or consumption of employees and accordingly the alleged credit is not eligible to the Appellants.

b) Draft Circular as referred above was never issued and accordingly not binding on the Department.

Decision

a) It is true that they are otherwise the employees of the Company but as far these services are concerned, they are services recipients. In order to provide such services to the service recipients, they had to obtain such services from various services providers and accordingly these services are not restricted under Rule 2(l) of CENVAT Credit Rules, 2004.

Accordingly, the appeal filed by the Appellants was allowed.

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Each work has to pass through these stages – ridicule, opposition, and then acceptance.

Those who think ahead of their time are sure to be misunderstood.

– Swami Vivekananda

Janak C. Pandya,
Company Secretary

CORPORATE LAWS

Company Law Update

1

Ad2Pro Global Creative Solutions Private Limited – Appellant/Transferee Company

Ad2Pro Media Solutions Private Limited – Appellant/Transferor Company

vs.

1. Regional Director (SER), Ministry of Corporate Affairs

2. Registrar of Companies, Ministry of Corporate Affairs, Bengaluru

3. Designated Nodal Officer, income Tax Department (For Karnataka State), Bengaluru

4. Pr. Commissioner of Income Tax-I, Bengaluru

5. Official Liquidator, Bengaluru, Ministry of Corporate Affairs

6. Regional Director, Reserve Bank of India – Respondents

National Company Law Appellate Tribunal, New Delhi.

Company Appeal (AT) No. 98 of 2019 AND Company Appeal (AT) No. 99 of 2019 decided on 25th September, 2019

(https://nclat.nic.in/Useradmin/upload/20597085525d8b5a1a8ccfb.pdf)

When a scheme of arrangement provides that the post amalgamation, all the tax liability shall be paid by the transferee company and thus, scheme approved by the NCLT with a pre-condition that transferor company shall pay all tax liability for giving effect to the Scheme cannot be sustained

Brief Note

The Appellants had filed company petition Nos. 45/BB/2018 and 59/BB/2018 before the Hon. National Company Law Tribunal, Bengaluru Bench ("NCLT"). The said company petitions were for the approval of Scheme of Arrangement ("Scheme') between Ad2Pro Media Solutions Private Limited ("Transferor") and Ad2Pro Global Creative Solutions Private Limited ("Transferee"). After completing all process as required under sections 230 and 232 of the Companies Act, 2013 ("Act"), NCLT has passed the order on 8th March, 2019 and allowed the company petitions approving the Scheme which is subject to impositions of certain conditions out of which one is regarding that Scheme can be given effect only after the Transferor pay to income Tax department and Service Tax authorities all outstanding tax liabilities.

The issue raised in this appeal are as follows.

1. Whether the NCLT could impose a condition to make payment of alleged tax liabilities when the same are disputed before the concerned authorities.

2. Whether NCLT could make it a precondition to sanctioning of the Scheme and

3. Whether the NCLT could direct the Transferor to make payment of alleged tax disputes despite and express undertaking given by Transferee to make such payment on behalf of Transferor.

The Appellants have made the following submission.

1. The demand from the Income Tax department and Service Tax Authorities has not yet crystallised.

2. The demand is challenged before the Competent Appellate Tribunals and adjudication is underway.

3. The original demand raised by the Income Tax authorities was subsequently reduced twice by the deputy Commissioner of Income-tax.

4. The Income Tax Appellate Tribunal (ITAT) has stayed the demands raised and as directed, the Transferor has deposits certain amount.

5. As required under section 230(5) of the Act, the notice have been issued to the Income Tax department, however, the No Objection Certificate issued by the Income tax department was not placed on record.

6. Through RTI, a copy of above No Objection certificate was obtained.

7. An undertaking has been provided to the effect that whenever the income tax and service tax demands become crystallized, the Transferee Company shall payoff the same.

8. Clause 12.7 of the Scheme provides that post amalgamation all tax assessment proceedings and appeals shall be continued with the Transferee.

From Income Tax department, Reply was filed disclosing the details of tax demands and also the income tax dues which is likely to arise in scrutiny proceedings against the Transferor.

Judgment

The NCLAT has upheld the appeal. It has ordered that while the Scheme approved by the NCLT remains intact, condition 10(b) of the NCLT order cannot be sustained as to pre-conditions of tax payment for the effecting the Scheme. It has modified the language of clause 10(b) of the NCLT order and instead of Transferor, it has provided that Transferee shall be liable for payment as may be determined by the ITAT. Further, the compliance in relation to the outstanding Income Tax liability shall not be treated as a condition precedent for implementation of approved Scheme of Arrangement. The NCLAT has referred the judgment of Hon'ble High Court of Delhi in Company petition no. 597/2014 reported in 2016 SCC Online Del 1135, wherein the Hon. High Court has accepted the undertaking given by the transferee company related to any liability, which may be legally assessed and payable by the transferor companies to Income-Tax Department, the same shall be paid by the transferee company.

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In Focus - Accounting & Auditing

Amended NFRA Rules

CA. Amit A. Purohit

1.0 Introduction

The Ministry of Corporate Affairs (MCA) *vide* notification dated 5th September, 2019, has amended the National Financial Reporting Authority Rules, 2018 (**"2018 rules"**) by the National Financial Reporting Authority (Amendment) Rules, 2019 [**"the amended rules"**]. The amended rules have notified Form NFRA-2 (Annual return to be filed by the Auditors) as well as certain other amendments to the existing rules. Before, we analyse these amendments, let us first understand the background behind introduction of the NFRA rules and the subsequent amendments thereto.

2.0 Background

The Central Government had formed National Advisory Committee on Accounting Standards (**"NACAS"**) under Section 210A of the erstwhile Companies Act, 1956, for making recommendations on accounting policies and accounting standards to the Central Government. However, **Companies Act, 2013 ("the Act")** marked a shift to an independent regulatory model through introduction of Section 132, wherein a new regulatory authority named **National Financial Reporting Authority (NFRA)** was formed (effective 1st October, 2018) with more independent powers to ensure better quality of audit to enhance the investors' and public confidence in the audit profession.

Consequently, **National Financial Reporting Authority (NFRA) Rules, 2018** were issued under sub-sections (2) and (4) of section 132, sub-section (1) of section 139 and sub-section (1) of section 469 of the Act, effective 14th November, 2018.

2.1 Functions and Duties

As per sub-section (2) of Section 132 of the Act, the duties of the NFRA are to:

- recommend accounting and auditing policies and standards to be adopted by companies for approval by the Central Government;
- monitor and enforce compliance with accounting standards and auditing standards;
- oversee the quality of service of the professions associated with ensuring

compliance with such standards and suggest measures for improvement in the quality of service;

- perform such other functions and duties as may be necessary or incidental to the aforesaid functions and duties.

Thus, it can be seen that NFRA is not only responsible for recommending auditing and accounting standards but also to monitor and enforce compliances with the said standards and oversee the quality of service and suggesting measures for improvement, whereas the role of NACAS was mostly confined to advising on accounting policies and standards to the Central Government.

2.2 Companies and Bodies Corporate Governed by NFRA

Under rule 3 of the 2018 rules, NFRA has the power to monitor and enforce compliance with accounting standards and auditing standards, oversee the quality of service under sub-section (2) of section 132 or undertake investigation under sub-section (4) of such section of the auditors of the following class of companies and bodies corporate, namely:-

(a) Companies whose securities are listed on any stock exchange in India or outside India;

(b) Unlisted public companies having paid-up capital of not less than rupees five hundred crores or having annual turnover of not less than rupees one thousand crores or having, in aggregate, outstanding loans, debentures and deposits of not less than rupees five hundred crores as on the 31st March of immediately preceding financial year;

(c) Insurance companies, banking companies, companies engaged in the generation or supply of electricity, companies governed by any special Act for the time being in force or bodies corporate incorporated by an Act in accordance with clauses (b), (c), (d), and (f) of sub-section (4) of section 1 of the Act;

(d) Any body corporate or company or person, or any class of bodies corporate or companies or persons, on a reference made to the Authority by the Central Government in public interest; and

(e) A body corporate incorporated or registered outside India, which is a subsidiary or associate company of any company or body corporate incorporated or registered in India as referred to in clauses (a) to (d), if the income or net worth of such subsidiary or associate company exceeds twenty per cent of the consolidated income or consolidated net worth of such company or the body corporate, as the case may be, referred to in clauses (a) to (d).

2.3 Companies not within the ambit of the NFRA Rules

- Private companies (unless referred by Central Government to the Authority in public interest); and
- Unlisted public companies with paid-up capital or turnover or aggregate of loans, debentures and deposits below the limit stated under Rule 3(1).

2.4 Reporting requirements

Sub-rule (2) and (3) of rule 3 of 2018 rules provide for filing of Form NFRA-1 by Body Corporates (other than Companies) giving particulars of existing/newly appointed Auditors. The reporting requirement is in two stages, i.e. one time and event based: (a) **one time e-filing of** particulars of existing Auditors (as on the commencement of 2018 rules) to be filed within 30 days of commencement of the said rules (b) **event based** i.e., particulars of Auditors to be e-filed within

15 days of their appointment by the concerned Body Corporate. Due date of filing the Form NFRA-1 was extended till 31st July, 2019 *vide* Notification dated 1st July, 2019. The said form is hosted on the website of NFRA and needs to be e-filed.

3.0 Recent amendment

3.1 Notifying Form NFRA-2 (Annual return)

Rule 5 of the 2018 rules requires filing of Annual return by the auditors of the entities referred to in rule 3, however the format of the said Annual return was not notified. The amended rules now provide for Filing of Annual return in Form NFRA-2 by the auditors. The said form needs to be e-filed by 30th November every year, however the same is not yet hosted on the website of NFRA. Form NFRA-2 is divided in 10 areas of information/compliance requirements, which are summarised as under:

1. Identity of the Auditor and Contact persons

Information about Auditor such as Name, registered address, PAN, Phone no., registration no., category- whether individual/Firm/LLP etc. to be given.

2. Reporting Period

Here the start date and end date of the reporting period of the annual return needs to be given. In the absence of clarification, it seems that the first reporting period will be 1st April, 2018 till 31st March, 2019.

3. General Information concerning Auditor

Here the information about the Quality Control review/Other reviews conducted by the Regulator/Agency to be given. The information contains name of the regulator/agency, date of review, validity period of such review, review rating, details of adverse remarks, if any, given by the regulator/agency etc. It may be noted that Peer Reviews are conducted by the ICAI in respect of certain categories of Auditors which inter alia deal with Quality control systems established by the Auditors. Thus, in case the Auditor has been subjected to Peer review process by the ICAI in the past, then details of the same are to be given under this part of the Annual return.

4. Audit clients and Audit reports of the Auditor

Here the information about the audit clients covered under rule 3(1)(a) to (d) of the rules for which audit report were issued by the auditor needs to be given. The information relates to the number of such audit clients, client wise information as regards name, registered address, CIN/PAN, details of date of the audit report, name of the Engagement partner, registration number, Engagement Quality Review partner, his registration number, Particulars of any modification in the audit report, break up of total fees and expenses charged etc. In case of foreign body corporate, certain other details are required to be mentioned.

5. Audit related memberships, affiliations or similar arrangements of the auditor

In this part, details of membership or affiliation of the auditor with any network for provision of audit services is required to be given. The information includes name of the entity, its address, country, brief description of the relationship with the entity, whether such network is registered with ICAI etc.

6. Partners and employees of the auditor

This part of the Form requires information as regards total number of partners, details of each partner such as name, registration

number (ICAI registration number), names of every firms of auditors in which the person is partner, total number of Chartered Accountants employed by the Auditor etc.

7. Details of disciplinary or other proceedings initiated against the auditor

Under this part, total number of criminal, civil or disciplinary actions or proceedings against any partner or employee of the Auditor in connection with any audit in the past five years are required to be given. It may be noted that such proceedings can be in respect of any matter or client and not necessarily in respect of entities covered under the rules. Further, for each such actions or proceedings, details of name of the partner/employee, name of the regulator/agency initiated the disciplinary action, the date of relevant proceedings, brief description of the same, whether final order has been passed or not.

8. Details of special circumstances such as auditor's resignation, withdrawal of an audit report

Under this part, details of resignation by the Auditors in any company/body corporate during past 3 years are to be given. Though the form mentions 3 years, it seems the intension is to cover three financial years preceding the financial year covered by the Form.

In case, the auditor has withdrawn an audit report on financial statements, or withdrawn its consent to the use of its name in a report, document, or written communication in the past three reporting periods, then entity wise details are required to be given.

In the absence of clarity as to whether the above-mentioned details are to be given only in respect of entities (auditees) covered under the rules or even for other entities as well, reporting may be done irrespective of the fact whether the entity is covered under the rules or not.

9. Quality Control Policies of the Auditor

This part requires a statement of the quality control policies and procedures followed by the auditor for its auditing practice during the reporting period. It may be noted that as per SQC-1 (Standard on Quality Control) read with relevant Standards on Auditing (SAs) issued by ICAI, Auditors are required to establish and maintain the system of Quality Control within the Organisation. Quality Control (QC) Manual/Statement guides the assurance team in conducting the assurance engagements and reporting as per applicable SAs. The Auditor may choose to attach the same or the summary of vital aspects relating to QC may be prepared and presented in the said Form.

10. Consent

Final part of the form requires the Auditor to give explicit consent to co-operate and comply with any request for information or the production of documents made by the NFRA in furtherance of its powers and responsibilities under the Act and the NFRA Rules as amended from time to time.

11. Signature of partner or authorised officer

The Form needs to be signed by the Partner who is duly authorised in this regard by the firm/LLP or any authorised officer. In case of Sole Proprietor/

Individual practitioner, the form needs to be signed by the said person. Apparently, it seems that reference to the practicing individual/sole proprietor has been inadvertently missed out in the form while mentioning about signing of the form.

3.2 Other amendments

The amended rules also make certain other amendments, which are tabulated below for the sake of simplicity and ease of reference:

Sl. No.	*Particulars of the amendment*	*2018 Rules*	*NFRA Rules 2019 (Amended rules)*
1.	Definition of "Division" [Rule 2(1)(g)]	"Division" means a division established by the Authority for the purpose of organizing and carrying out its functions and duties;	"Division" means a division **"including the one headed by the chairperson or a full time member"**, established by the Authority for the purpose of organizing and carrying out its functions and duties;
2.	Classes of companies and bodies corporate governed by the Authority. [Rule 3(1)(c)] (explanation now inserted by the amended rules in Rule 3(1)(c) in respect of Banking Companies)	Though the rules applied to Banking companies, there was no explanation appended for Banking Companies explaining the scope.	"*Explanation*- For the purpose of this clause, "banking company" includes 'corresponding new bank' as defined in clause (d) of section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) and clause (b) of section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980) and 'subsidiary bank' as defined in clause (k) of section 2 of the State Bank of India (Subsidiary Bank) Act, 1959 (38 of 1959)."
3.	Change in the due date for filing Annual return [Rule 5]	Every auditor referred to in rule 3 shall file a return with the Authority on or before 30th April every year in such form as may be specified by the Central Government.	Every auditor referred to in rule 3 shall file a return with the Authority on or before 30th November every year in Form NFRA-2.

Sl. No.	*Particulars of the amendment*	*2018 Rules*	*NFRA Rules 2019 (Amended rules)*
4.	Disciplinary proceedings [Rule 11(5)] The period of disposing of show-cause notice was 90 days. Now the period can be extended by the Chairperson for further period of 90 days and he can also grant further extension under the amended rules.	Prior to the amendment Sub-rule (5) of rule 5 read as under; "(5) The Division shall dispose of the show-cause notice within a period of ninety days of the assignment through a summary procedure as may be specified by the Authority, by a reasoned order in adherence to the principles of natural justice including where necessary or appropriate an opportunity of being heard in person, and after considering the submissions, if any, made by the auditor, the relevant facts and circumstances, and the material on record."	After the amendment following new provisos have been added in the said sub-rule: "Provided that where the disposal does not take place within the said period, the Division shall record the reasons for not disposing off the show-cause notice within the said period, and the chairperson, may, after taking into account the reasons so recorded, extend the aforesaid period by such additional period not exceeding ninety days as he may consider necessary: Provided further that the chairperson may, if he thinks fit, grant the said extension of period more than once."

4.0 Conclusion

With the amended rules, suspense surrounding Annual return has finally been revealed by NFRA by notifying Form NFRA-2 which is required to be e-filed by the auditors of the entities covered under the rules. The Form has been comprehensively drafted and will certainly entail additional time and resources on the part of the auditors to compile the enormous information required to be presented in the Form. The form has so far not been hosted on the website of NFRA and likely to pose teething troubles once it goes live. Further, at present, there is no mechanism to rectify/revise the Form once it is filed. As the due date of 30th November is fast approaching coupled with extended deadline for filing Corporate tax returns/Tax audit and GST Audit returns, it will be challenging tasks for auditors and only way forward is to compile and keep the information requirements of Form NFRA-2 ready on a periodic basis.

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BEST OF THE REST

Rahul Sarda,
Advocate

Whether the amendment in the Insolvency and Bankruptcy Code treating home buyers as financial creditors is Constitutionally valid?

The Petitions in question challenged the Constitutional validity of the amendments made to the Insolvency and Bankruptcy Code, 2016 (the "Code") which deemed allottees of real estate projects to be "financial creditors" so that they may trigger the Code against the real estate developer under Section 7 and were also entitled to be represented in the Committee of Creditors by authorised representatives.

The Petitioners argued that the amendment was discriminatory inasmuch as it treats unequals equally, and equals unequally, having no intelligible differentia. The objection was that entities who have completed building projects in time and are in every way compliant with the law, can yet be jeopardised by Section 7 petitions filed under the Code to blackmail them into making payments which would divert funds which are otherwise to be used for the purpose of the project. It was further contended that the amendment had no nexus with the objects sought to be achieved by the Code and in fact the amendments are contrary to the objects of the Code to maximise assets as even a good management which has several projects on its hands can be removed at the instance of one allottee and the massive funds infused by the developer himself would be set at naught if no resolution plan could be found which would not be in the interest of bulk of allottees themselves who would want possession of flats/apartments. It was also contended that by treating home buyers, who are in substance operational creditors, as financial creditors, infracts the principle of equitable treatment of similarly situated creditors. It was submitted by the Petitioners that in view of RERA, which was a specific legislation, the amendment to the Code should not have been made.

On behalf of the Union of India, it was argued that the Code was an economic legislation and every experiment that the legislature *bona fide* undertakes should not be interfered with by the Court. The agreement between developers and allottees would show that at every stage in the building process, certain amounts have to be paid which are then supposed to be utilised in constructing the apartments/flats which makes the allottees different from operational creditors. It was also submitted that if the company is

solvent, the Committee of Creditors may decide to continue the same management or may decide to accept resolution plans from other developers so that the real estate development company continues as a going concern and winding up was only a last resort which would never really occur in the case of well managed corporate entities.

The Court referred to the findings in the Insolvency Law Committee Report and found that delay in completion of flats/apartments had become a common phenomenon, and the amounts raised from home buyers contributed significantly to the financing of the construction of such flats/apartments. Therefore, it was important to clarify that home buyers are treated as financial creditors so that they can trigger the Code under Section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed. The Court further held that RERA was in addition to and not in derogation of the provisions of any other law for the time being in force. This made it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code.

Also, held that what was unique to real estate developers *vis-à-vis* operational debts, was the fact that, in operational debts generally when a person supplies goods and services, such person was the creditor and the person who had to pay for such goods and services was the debtor while in the case of real estate developers, the developer who was the supplier of the flat/apartment was the debtor inasmuch as the home buyer/allottee funded his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment was to be found and instalment payments were used as a means of finance *qua* the real estate project. Another vital difference between operational debtors and allottees of real estate projects was that an operational creditor had no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who would be concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Therefore, held that an allottee was correctly classified as a financial creditor and there was no discrimination violative of Article 14 of the Constitution.

To the argument of the Petitioners that a single allottee can blackmail a developer by filing a Section 7 application to force him to pay moneys, the Court observed that the developer can point out before the NCLT that the allottee himself was a defaulter not entitled to any relief including payment of compensation and/or refund and that the application was filed with malicious intent. The developer can also point out that in a real estate market which was falling, the allottee did not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wanted to jump ship and really get back, by way of this coercive measure, monies already paid by him.

Therefore, the amendments were held to be Constitutionally valid.

Pioneer Urban Land and Infrastructure Ltd. & Anr. vs. Union of India & Ors. MANU/SC/1071/2019 dated 9th August 2019.

Dismissal of suit for default – Ordinarily, adjudication to be done on merits of matter – *Ex parte* decree set aside at execution stage

The appeal by Special Leave is directed against the Order passed by the High Court of

Uttarakhand allowing the Revision Petition filed by the Respondent under Section 115 of CPC and setting aside the Order passed by the Trial Court Under Order 9 Rule 13 of the Code by which the ex parte decree obtained by the Respondent in this appeal, has been set aside.

Rohit Dora, the Plaintiff, filed the suit seeking specific relief and mandatory injunction which was *ex parte* decreed by Judgement dated 9-10-2004. The Defendant, Robin Thapa, who was Defendant in the suit, filed an application dated 2-12-2015 supported by an application for condonation of delay. The Plaintiff filed the objections which were overruled by the Trial Court allowing the application filed by the Defendant under Order 9, Rule 13 of CPC setting aside the *ex parte* decree dated 9-10-2004.

This order allowing the application of the Defendant setting aside the *ex parte* decree was set aside by the High Court. The Defendant submitted that the original summons was served on 17-12-2013 on his mother. The Trial Court itself issued further summons and thereafter, the Suit came to be transferred to another Court, and thereafter, without any notice to the Petitioner, the suit came to be decreed. The Plaintiff submitted that ample opportunity was given to the Defendant and in spite of the same, he has not contested the matter. The Plaintiff further submitted that after levying execution of the decree, the property has been conveyed to him by the orders of the Court.

Held by the Court that ordinarily a litigation is based on adjudication on the merits of the contentions of the parties. Litigation should not be terminated by default, either of the Plaintiff or the Defendant. The cause of justice does require that as far as possible, adjudication be done on merits. Further held that since specific relief is a discretionary relief, interest of justice demands that subject to putting the Defendant to terms, an opportunity should be given to him to contest the case and the case must be directed to be disposed of within the time limit.

Robin Thapa vs. Rohit Dora (2019) 7 SCC 359

Medical negligence – Death of patient – standard of reasonable care expected of medical services – Timely care

The spouse of Appellant was aged about 56 years. On 14-11-2009, she was diagnosed with dengue fever and admitted to the Respondent hospital. Upon admission, basic investigations were carried out. On the date of admission, the patient was sinking, her blood pressure was non-recordable, extremities were cold and pulse was non-palpable. In meantime, the patient was placed on a regime of administering intravenous fluids. Administration of 2500 ml of fluids was planned over course of 24 hours. Between 7 am and 6 pm, she was administered about 1200 ml of fluids. The patient developed bradycardia. Faced with this situation, the treating doctors administered her about 1.5 litres of extra fluids for increasing blood pressure. Since blood pressure of patient did not improve, she was administered ionotropes (dopamine & non adrenaline). However, the patient suffered a cardiac arrest leading to her death.

A complaint of medical negligence was instituted before Medical Council of India. The Ethics Committee of Medical Council of India came to conclusion on 20th February 2015 that though treating doctors had administered treatment to patient in accordance with established medical guidelines, the treatment was not timely. Ethics Committee, found that there was professional misconduct on part of both Director of Hospital (Respondent No. 2) and another doctor. This recommendation was accepted by Executive Committee of Medical Council.

The Appellant, husband of the deceased patient, instituted a complaint before the State Consumer Disputes Resolution Commission ('SCDRC') seeking an award of compensation of ₹ 48 lakh on ground that his spouse suffered an untimely death due to medical negligence of treating doctors at the hospital. By its judgment, SCDRC came to conclusion that a case of medical negligence was established. An amount of ₹ 6 lakh was awarded to the Appellant by way of compensation, together with interest at rate of 9 per cent per annum. In appeal, these findings have been reversed by the National Consumer Disputes Resolution Commission ('NCDRC') and the claim was dismissed. Hence, the husband of the patient filed the appeal.

Held by the Supreme Court that the requirement of carefully monitoring a patient in a situation like in present case was stipulated both by guidelines of World Health Organisation as well as by the Directorate of National Vector Borne Diseases Control Programme in 2008 and in failing to do so in a timely manner, the Respondents were unable to meet standards of reasonable care expected of medical services. The real charge of medical negligence stemmed from failure of hospital to regularly monitor blood parameters of patient during course of day. Had this been done, there could be no manner of doubt that hospital would have been alive to a situation that there was a decline progressively in patient's condition which eventually led to cardiac arrest.

Further held that in practice of medicine, there could be varying approaches to treatment as there could be a genuine difference of opinion. However, while adopting a course of treatment, medical professionals must ensure that it was not unreasonable the threshold of which was set with due regard to risks associated with medical treatment and conditions under which medical professionals function. However, in a specific case where unreasonableness in professional conduct had been proven with regard to circumstances of that case, a professional could not escape liability for medical evidence merely by relying on a body of professional opinion. Since the judgment of the SCDRC was based on evidence on record, the judgement of the NCDRC setting aside the judgement of SCDRC was held unsustainable.

However, held that there was no basis for recording a finding of medical negligence against Director of hospital who was not the treating doctor or the referring doctor. Hence, while finding of medical negligence against hospital was confirmed, Respondent No. 2 was held not personally liable.

Arun Kumar Manglik vs. Chirayu Health and Medicare Private Ltd. and Ors. (2019) 7 SCC 401

❍□❍

If you really my children, you will fear nothing, stop at nothing, you will be like lions,,,
My prayers and benedictions follow every step you take… everything will come to you if you have faith.

– Swami Vivekananda

THE CHAMBER NEWS

CA Ketan L. Vajani & CA Haresh P. Kenia,
Hon. Jt. Secretaries

Important events and happenings that took place between 1st September, 2019 and 30th October, 2019 are being reported as under:

I. ADMISSION OF NEW MEMBERS

1) The details of new members who were admitted in the Managing Council Meeting held on 13th September, 2019 are as under:-

Type of Membership	No. of Members
Life Member	10
Ordinary Member	12
Student Member	3
Associate Member	1

II. PAST PROGRAMMES

1. COMMERCIAL AND ALLIED LAWS COMMITTEE

Full Day Seminar on Charitable Trusts – Critical Aspects jointly with The Bombay Chartered Accountants' Society was held on 14th September, 2019 at BCAS Hall, Jolly Bhavan, Churchgate. The Workshop was addressed by Mr. Sanjay Mehare, Charity Commissioner (MH), CA Gautam Shah, CA Gautam Nayak, CA Anil Sathe, CA Sunil Gabhawalla, Mr. Rakesh Pandey, Advocate, Mr. Malikaarjun Utture, Add. Commissioner of Income Tax. The seminar was moderated by CA Chetan Shah and the panellists were Mr. Malikaarjun Utture, CA Anil Sathe, CA Sunil Gabhawalla and CA Gautam Nayak.

2. INDIRECT TAXES COMMITTEE

Workshop on Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 was held on 7th September, 2019 at Walchand Hirachand Hall, 4th Floor, IMC, Churchgate. The Workshop was addressed by CA Naresh Sheth. The workshop was moderated by CA A. R. Krishnan and the panellists were CA S. S. Gupta, Mr. Vipin Jain, Advocate and Mr. Harsh Shah, Advocate.

3. MEMBERSHIP & PR COMMITTEE

Half Day Seminar on Audit and FEMA was held on 7th September, 2019 at The Institute of Engineer's Hall, PWD Compound, Nashik-422002. The seminar was addressed by CA Ashok Mehta, CA Prashant Daftary and CA Rajesh P. Shah.

Workshop on Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 jointly with The Kalyan Tax Practitioners Association was held on 21st September, 2019 at Thane Dist. Chemist Association Hall, Zojwalla Complex, Kalyan-421301. The Workshop was addressed by CA Keval Shah and CA Vyomesh Pathak.

4. DELHI CHAPTER

Full day Workshop on Mergers and Acquisitions was held on 14th September, 2019 at Lecture Room-II, India International Centre Annexe Building, New Delhi-110003. The workshop was addressed by Mr. Lalit Kumar, Mr. Suraj Malik, Mr. Shinoj Koshy, Mr. Varun Dhingra, Mr. Hemant Danda.

(For details of the future programmes, kindly visit www.ctconline.org or refer The CTC News of October, 2019)

❍□❍

I am proud to belong to a religion which has taught the world tolerance & universal acceptance. we believe not only in universal toleration but we accept all religion as true.

– Swami Vivekananda

If I have the belief that I can do it, I shall surely acquire the capacity to do it even if I may not have it at the beginning.

– Mahatma Gandhi

Bengaluru Study Group

Bengaluru Study Group meeting was held on 13th September, 2019 at FKCCI, 3rd Floor, Hall No. 4, K. G. Road, Bengaluru–560 009

CA Sachin Kumar BP addressing the delegates on the topic "Practical approach to Income Tax Settlement Commission"

Mr. Bharath Lakshminarayana, Advocate addressing the delegates on the topic "Case Studies on Cross Border – Business Restructuring"

Indirect Taxes Committee

IDT Study Circle meeting on "Issues under GST relating to Real Estate Sector" was held on 5th September, 2019 at AV Room, Jai Hind College, Churchgate

CA Naresh Sheth (Chairman) addressing the delegates

CA Kush Vora addressing the delegates

Direct Taxes Committee

ISG on Direct Taxes on "Recent Important Decisions under Direct taxes" was held on 16th September, 2019 at CTC Conference Room

Mr. Harsh Kapadia, Advocate addressing the delegates

Webinar on "Issues and Information in filing New Corporate IT Return (ITR-6)" was held on 14th September, 2019

CA Dipeesh Vora

Pune Study Group

Pune Study Group meeting on "Practical & Legal Issues in Tax Audit" was held on 14th September, 2019 at ELTIS, Plot No. 419, Model Colony, Gokhale Cross Road, Next to Atur Centre, Pune – 411 016

CA Rajesh Athawale addressing the delegates

CA Vinod Jain addressing the delegates

International Taxation Committee

FEMA Study Circle meeting on "Discussion on Master Direction on ECB Regulations with Case Studies" was held on 18th September, 2019 and 10th October, 2019 at CTC Conference Room.

CA Shabbir Motorwala (Chairman) addressing the

CA Mitali Pakle addressing the delegates

INT Study Circle meeting on "An overview of MLI – India Perspective and Brainstorming session on how to study MLI in next 6 months and chart a course of action" was held on 11th September, 2019 at CTC Conference room

CA Naresh Ajwani addressing the delegates

Study Circle Study Group Committee

Study Group on "Recent judgments under Direct taxes" was held on 10th September, 2019 at Babubhai Chinai Hall, IMC, Churchgate

Mr. K. Gopal, Advocate addressing the delegates

Study Circle on "Issues in Tax Audit & Reporting in 3CD with special reference to ICDS" was held on 13th September, 2019 at Kilachand Hall, IMC, Churchgate

CA Vyomesh Pathak addressing the delegates

Accounting & Auditing Committee

Webinar on "Issue of Audit Reports and Certificates for Special purposes by Chartered Accountants" was held on 4th September, 2019

CA Ashutosh Pednekar

Webinar on "Issue of Audit Reports and Certificates for Special purposes by Chartered Accountants" was held on 6th September, 2019

CA Sandeep Shah

Webinar on "IND AS 116: No more off-balance sheet treatment of Leases" was held on 23rd September, 2019

CA Hemal Shah

Membership & PR Committee

SAS meeting on "Speed Reading" was held on 17th September, 2019 at Babubhai Chinai Committee Hall, IMC, Churchgate

Mr. Srinivas Vakati addressing the delegates.
Seen from L to R: CA Ashita Shah (Convenor), CA Vipul Choksi (President) and CA Rajesh P. Shah (Chairman)

Membership & PR Committee

Full Day Seminar on Charitable Trusts – Critical Aspects jointly with The Bombay Chartered Accountants' Society was held 14th September, 2019 at BCAS Hall, Jolly Bhavan, Churchgate

Mr. Rahul Hakani, Advocate (Chairman) welcoming the speakers and delegates. Seen from L to R: Mr. Sanjay Mehare, Charity Commissioner (Speaker), CA Chetan Shah (Chairman C&AL Committee – BCAS), CA Manish Sampat (President – BCAS) and CA Vipul Choksi (President)

Mr. Sanjay Mehare, Charity Commissioner addressing the delegates. Seen from L to R: CA Chetan Shah (Chairman C& AL Committee – BCAS), CA Manish Sampat (President – BCAS), CA Vipul Choksi (President), Mr. Rahul Hakani, Advocate (Chairman), Ms. Gunja Thakrar (Programme Co-ordinator)

Faculties

CA Gautam Shah

CA Gautam Nayak

Mr. Rakesh Pandey, *Advocate*

CA Sunil Gabhawalla

CA Anil Sathe

Mr. Malikaarjun Utture Add. Commissioner of Income Tax

Half Day Seminar on Audit and FEMA was held on 7th September, 2019 at The Institute of Engineer's Hall, PWD Compound, Nashik – 422002

CA Anish Thacker (Vice-President) giving his opening remarks. Seen from L to R: CA Kishor Birari (Programme Co-ordinator), CA Rajesh P. Shah (Chairman) and CA Pravin Kulkarni (Programme Co-ordinator)

CA Rajesh P. Shah (Chairman) welcoming the speakers. Seen from L to R: CA Kishor Birari (Program Co-ordinator), CA Anish Thacker (Vice-President) and CA Pravin Kulkarni (Programme Co-ordinator)

Faculties

CA Ashok Mehta

CA Prashant Daftary

Workshop on Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 jointly with The Kalyan Tax Practitioners Association was held on 21st September, 2019 at Thane Dist. Chemist Association Hall, Zojwalla Complex, Kalyan – 421301

CA Vyomesh Pathak

CA Keval Shah

Delhi Chapter

Full day Workshop on Mergers and Acquisitions was held on 14th September, 2019 at Lecture Room-II, India International Centre Annexe Building, New Delhi – 110003

Faculties:

CA Vijay Gupta (Chairman – Delhi Chapter) giving his opening remarks

Mr. Lalit Kumar

Mr Suraj Malik

Mr Shinoj Koshy

Mr Hemant Danda

Mr. Varun Dhingra

Mr. Daksh Ahluwalia

Delhi Chapter Members and Standard Chartered Bank executives with Vice-President CA Anish Thacker

Indirect Taxes Committee

CA Ketan Vajani (Hon. Jt. Secretary) giving his opening remarks. Seen from L to R: CA Kush Vora (Convenor), CA Pranav Kapadia (Chairman), CA Naresh Sheth (Speaker) and CA Hemang Shah (Convenor)

CA Pranav Kapadia (Chairman) welcoming the Speakers. Seen from L to R: CA Kush Vora (Convenor), CA Naresh Sheth (Speaker), CA Ketan Vajani (Hon. Jt. Secretary) and CA Hemang Shah (Convenor)

Panellists at the Panel Discussion: Seen from L to R: Mr. S. S. Gupta, CA A. R. Krishnan (Moderator), Mr. Vipin Kumar Jain and Mr Harsh Shah

Group photo of Dignitaries

Faculty

CA Naresh Sheth

Student Committee

Workshop on Tax Audit for Students was held on 5th September, 2019 at Babubhai Chinai Hall, 2nd Floor, IMC, Churchgate

CA Anish Thacker (Vice-President) giving his opening remarks. Seen from L to R: CA Chintan Gandhi (Speaker) and CA Vitang Shah (Vice-Chairman – Student Committee)

CA Vitang Shah (Vice-Chairman – Student Committee) welcoming the

Faculties

CA Ashok Mehta

CA Chintan Gandhi

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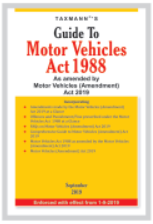

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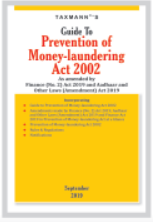

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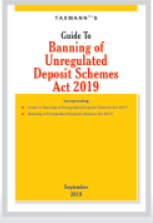

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