COMPILATION OF ARTICLES PUBLISHED IN THE BRANCH NEWSLETTER-MARCH-2018 TO FEBRUARY 2019

LABYRINTH OF LAW

THE BHUJ BRANCH OF WIRC OF ICAI

311, BALRAM COMPLEX, 3rd FLOOR,
NEAR ICICI BANK, STATION ROAD
BHUJ-KACHCHH
Phone:- 258580
E mail:- bhujbranch.wirc@gmail.com

INDEX

SECTION 43B AND SERVICE TAX

By CA Jagrutkumar Avinash Anjaria
B.Com., FCA, DISA(ICAI)

We all are aware of the provisions of section 43B of the Income Tax Act, 1961. The section carries a heading that states "Certain deductions to be only on actual payment." The section refers to seven categories of items, broadly classified as under;

1. Tax, duty, cess or fee
2. Contribution to certain funds for employee welfare
3. Bonus or commission (36(1)(ii)
4. Certain interest on loans-Public Financial Institution
5. Certain interest on loans-Banks
6. Payments by employer in lieu of leave
7. Payment to railways for use of its assets.

In this article, we are going to focus on payments of the nature of "tax, duty, cess or fee" only.

Payments of this particular nature are referred to in clause (a), which reads as under;

"any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, . . ."

The effect and applicability of this section has more or less got settled in the minds of all. Still, at times, we find it difficult to convince ourselves as to why the unpaid amount of tax standing to the credit of the balance sheet (and not routed through the profit and loss account) should get added to the income of the assessee.

The confusion gets confounded when we read the line that commences the section. The section begins with the following line;

"Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this act in respect of-"

The expression "deduction otherwise allowable," is the expression that causes the confusion. An argument is put forward that when a tax is separately collected and parked directly as "Liability" in the Balance Sheet," does it become a "deduction?' It is further argued that as the amount is never routed through the Profit and loss account (or trading account), how can it be described as a deduction? Moreover, the heading of section 43B itself categorically states "Certain deductions to be only on actual payment." Thus, an inference is drawn that section 43B is applicable only to "deductions," and that as the amount of tax collected and parked directly to the liability side of the balance sheet, is not a "deduction," because it has neither been added to revenue nor been reduced from the income or revenue as an item of expense. It has just been identified and parked separately in the balance sheet. To give effect to section 43B in such a situation, what we are doing is not reducing the allowable expenditure but we are adding to the income; this is the way taxpayers feel.

Recently, I came across a judgment by the Hon'ble Bombay High Court which has dealt with this question while deciding on a specific question of applicability of section 43B to the Service Tax

liability in certain situations. Here is an effort to share with you all, my understanding of the principle enunciated by the said judgment.

The judgment seems to address this question by reading section 43B along with section 145A of the Income Tax Act. The judgment appears to be concluding that taxes are not routed through the profit and loss account mainly when they are subsequently recoverable. In such an eventuality, they are parked separately in the balance sheet and paid after adjusting available input credit. However, it is section 145A that will bring even such taxes within the four corners of revenue and expenses.

The declared purpose of section 145A is restricted to determination of income chargeable under the head profits and gains of business or profession and it is an accepted position that it will not have any effect on the accounts or accounting statements. It is the wordings of 145A(a)(ii) that brings these amounts (taxes etc) within the folds of revenue and expenses. It reads as under;

"further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation."

The effect will be that income chargeable under the head profits and gains of business, determined in accordance with the method of accounting regularly employed by the assessee (145A9a)(i)), shall be further adjusted to include such taxes by virtue of 145A(a)(ii). As the explanation to 145A clarifies, even if such taxes carry any rights (of input credit), 145A(a)(ii) will still apply.

Here, the court opines that Section 145A, particularly its sub section (a)(ii), has different implications for those who are engaged in manufacturing or trading of goods vis a vis those who are engaged in provision of services. It is held that 145A(a)(ii) has no relevance for those who are providing services only and do not have any inventory. So, if such a service provider has any unpaid liability of Service Tax, 145A(a)(ii) will not come into play if there are no "goods." In other words, tax duty etc, even if not routed through profit and loss account, will get coloured into the character of revenue and expenses only when there are "goods" and such tax, duty etc have any role in bringing such goods to its present location and condition. The final effect is, if one is a provider of services and has unpaid liability of service tax, don't worry about 43B if there are no goods having direct nexus to the tax. Unpaid liability of service tax will attract 43B only in cases where such tax is debited to the profit and loss account and remains unpaid. If kept out of the profit and loss account, it will not attract 43B.

The decision has been delivered by the Hon'ble Bombay High Court in the case of "CIT2 V/s. KNIGHT FRANK (INDIA) PVT.LTD." It was delivered on 16-08-2016 and pertains to assessment year 2007-08. It can be accessed at the following link;

Being a judgment of Bombay High Court, how far will it be applicable to Gujarat, is a question. Opinions continue to be divided on this particular issue. However, unless there is a contradictory verdict by the jurisdictional high court, any decision of any high court should be a good law. According to one view, even in case there is a contradictory judgment by the jurisdictional high court, the decision of non jurisdictional high court does not become irrelevant at the outset. Let us leave it at that, as I do not think I am capable of discussing anything more on this point.

Next question that may crop up in our mind is, what about GST, as Service Tax is a thing of past, off course, it will be relevant till the AY 2018-19. The ratio of this judgment should hold good in

GST regime also so long as the facts remain in agreement with those discussed in this case. That is, even in GST regime, if one is a service provider only and there is no connection whatsoever with "goods," the unpaid GST liability should be subjected to the same treatment that was given to the unpaid service tax by this decision.

One more twist in the tale is provided by the Finance Bill, 2018. It has inserted new Section 145A (and 145B) to replace existing section 145A. The wordings of the relevant new sub section are;

(ii) the valuation of purchase and sale of goods or services and of inventory shall be adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation;

This section is made applicable from 1st April, 2017, so whatever we discussed with reference to the GST in the preceding paragraph, goes out of the window.

Significant differences from the earlier text are;

1. New subsection, in the beginning itself, talks of valuation of purchase, sale and inventory. Whereas, the earlier sub section was focused on "goods" only. In the earlier section, words purchase and sales did appear, but they appeared in the very beginning of the section and somehow were lost when it came down to subsection (a)(ii), giving sub section (a)(ii) a very restricted meaning.
2. Second noteworthy difference is the inclusion of the words "or services" along with the word "goods." By doing so, the outright exclusion of services from the rigors of this subsection is sought to be negated or at least made difficult.
3. However, continued presence of the expression "to bring the goods or services to the place of its location and condition as on the date of valuation," may continue to create some confusion. However, not of the type addressed by the decision that we are discussing, as the word services has been introduced. The confusion may be on the line that whether the section intends to restrict itself with reference to the date of valuation only or not. What does it mean by expression "to bring the service to the place of its location and condition on the date of valuation?" How much importance does the expression location and condition on the valuation date carries with reference to the whole section? Does this expression carry so much importance as to take it out of the operation if on the date of valuation there is nothing on hand, say the stock of goods is nil and still there is unpaid liability with reference to the tax on those very goods?
4. The liability that generally arises for payment under the indirect tax regime that we know arises on the occurrence of "sale," be it goods or services. The continued stress on the expression "bringing the goods/services to present location/condition," does go on to make us wonder whether they seek to address the unpaid liability that arose on account of sale or is the real intention something different?

In the labyrinth of law, at times, time only has the ability to answer.

LIABILITY OF AGRICULTURIST UNDER GST

CA SONALI ASODIYA
B.Com., ACA

India is a nation of farmers with the agriculture sector contributing a large chunk of the economy. Small scale agriculture has been exempted under GST and most of the basic produce sold in fresh form do not attract any GST. However, GST registration and GST compliance may be mandatory for large scale farmers and companies involved in agriculture. In this article, we look at the taxation of agriculture under GST in detail.

First of all who is covered under the definition of **'an agriculturist'**? Section 2 of CGST Act defines the word 'agriculturist'. As per definition

> *'Agriculturist' means an individual or a Hindu Undivided Family who undertakes cultivation of land-*
>
> *(a) by own labour, or*
>
> *(b) by the labour of the family, or*
>
> *(c) by servant on wages payable in cash or kind or by hired labour under personal supervision or the personal supervision of any member of the family*

So it is clear from the definition that only **an individual** or **a HUF** engaged in agriculture business are covered.

Now what is the liability of an agriculturist under GST Act regarding taking registration and payment of tax? To understand this lets take an example.

Determining liability of an agriculturist under following situation

- An agriculturist is engaged in supply of one taxable produce cultivated by him. His income from this supply is Rs. 500000/-. Now suppose he is also engaged in retail business of taxable goods and his income out of that business is:

i) NIL

ii) Rs.1000000/-

iii) Rs.1800000/-

iv) Rs.2500000/-

First we have to decide whether an agriculturist is liable to take registration under GST Act or not.

- Section 22 talks about person liable to be registered under the Act. As per section 22

> *Every supplier shall be liable to be registered under this Act in the state or union territory, other than special category States, from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees.*

- And Section 23 of CGST Act,2017 deals with a person not liable for registration

> *(1) The following persons shall not be liable to registration, namely:—*
>
> *(a) any person engaged exclusively in the business of supplying goods or*
>
> *services or both that are not liable to tax or wholly exempt from tax under this Act or under the Integrated Goods and Services Tax Act;*
>
> *(b)* ***an agriculturist, to the extent of supply of produce out of cultivation of land.***
>
> *(2) The Government may, on the recommendations of the Council, by notification, specify the category of persons who may be exempted from obtaining registration under this Act.*

- So from above it is clear that in first two situations he is not liable to take registration under GST. Thus no tax liability arises.
- Now in third situation, the question arise is that whether his liability arise to take registration under section 22 or not. For this query section 23 clearly says that agriculturist is not liable to take registration **to the extent** of supply of produce out of cultivation of land. Thus his turnover from agricultural activity is not considered while calculating threshold limit of 20lacs. His taxable turnover is 18lacs which does not exceeds threshold limit. So in third situation also GST liability not arises.
- In fourth situation it is clear that he is liable under section 22 to take registration under this Act. But here confusion is that what is his GST liability on his agriculture produce?

- Charging section 9 says;

Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and service tax on all intra-state supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified be the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

- Now here ***taxable person*** *means a person who is registered or liable to be registered under section 22 or section 24.*

As an agriculturist is not a person liable to be register under section 22 to the extent of supply of produce out of cultivation of land, he is not a taxable person to the extent of supply of produce out of cultivation of land. Thus GST liability not arises on his agriculture produces.

So in forth situation he his liable to registered under GST but tax liability only arise on his taxable supply of Rs.25lacs and not on his agricultural turnover of Rs.5lacs

Conclusion

On going through above example and provision of the Act related to an agriculturist, it may be argued that neither an agriculturist is liable to take registration under the Act to the extent of his produce out of cultivation of land nor his agriculture turnover taken into account while calculation threshold limit under section 22.

RELIEF U/S. 89(1) AND INTEREST U/S. 234

CA Kaushalendra Dholakia
B.Com., FCA, DISA(ICAI)

Whenever salary is received in arrears, a special tax treatment for the same is resorted to. The reason for the special treatment is that the tax payer should not suffer by paying an extra amount of tax, since the amount though received in the current financial year is actually belongs to more than one financial year.

With a view to provide the relief in arrears of salary received by an employee, Section 89 has been introduced in the Act. The same is reproduced below:

"Where an assessee is in receipt of a sum in the nature of salary, being paid in arrears or in advance or is in receipt, in any one financial year, of salary for more than twelve months or a payment which under the provisions of clause (3) of section 17 is a profit in lieu of salary, or is in receipt of a sum in the nature of family pension as defined in the ***Explanation*** *to clause (iia) of section 57, being paid in arrears, due to which his total income is assessed at a rate higher than that at which it would otherwise have been assessed, the Assessing Officer shall, on an application made to him in this behalf, grant such relief as may be prescribed.]"*

Further, the relevant rules for calculation of relief and procedure of application to be made in Form 10E are prescribed vide Rule 21A and 21AA respectively.

It is also important to read Section 192 (2A), which is reproduced here-in-below:

"(2A) Where the assessee, being a Government servant or an employee in a ***[****company, co-operative society, local authority, university, institution, association or body] is entitled to the relief under sub-section (1) of section 89, he may furnish to the person responsible for making the payment referred to in sub-section (1), such particulars, in such form and verified in such manner as may be prescribed, and thereupon the person responsible as aforesaid shall compute the relief on the basis of such particulars and take it into account in making the deduction under sub-section (1).]"*

Hence, an eligible employee can make an application to his employer, in Form 10E and the employer is authorized to compute relief on the basis of such particulars and deduct the tax accordingly, and provide the relief to the employeein the tax deduction.

In brief, the combined reading section 89 and 192 (2A)read with rule 21A and 21AA, the relief has been provided to the assesse from the additional burden of tax, which the assesse would otherwise have been liable to pay.

The Controversy regarding Section 234B and Section 234C:

Section 234B:

Interest for default in payment of Advance Tax:

(1) Subject to other provisions of this Section …….. the assessee shall be liable to pay simple interest…….. to the date of determination of total income under sub-section (1) of section 143 [and where a regular assessment is made, to the date of such regular assessment on an amount] equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

Explanation 1.-In this section, "assessed tax" means

(1) the tax on the total incomedetermined under sub-section (1) of section 143 and

(2) Where a regular assessment is made, the tax on the total income determined under such regular assessment as reduced by the amount of,-

(ii) Any relief of tax allowed under section 90 on account of tax paid in a country outside India;

(iii) Any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;

Computation of Total Income under Sub-section (1) of Section 143:

[(1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:-

(a) the total income or loss shall be computed after making the following adjustments, namely:-

(i)
(vi)

The computation method to be followed while calculating the relief U/s 89, “total income” would be the figure including the amount of salary received in arrears. The relief is provided in the Income tax and not by reducing the amount of income itself.

Section 143 (1) prescribes the tax calculation method on the “Total income” so arrived at.

(b) The tax [, interest and fee], if any, shall be computed on the basis of the total income computed under clause (a);

(c) The sum payable by, or the amount of refund due to the assessee shall be determined after adjustment of the tax [, interest and fee], if any, computed under clause (b) by:

(1) any tax deducted at source,

(2) any tax collected at source,

(3) any advance tax paid,

(4) any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91,

(5) any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax [, interest or fee];

Here, both of the above clause, does not refer to the relief allowable under Section 89, and hence the "assessed tax" means the tax calculated on the total income including arrears, is liable for interest computation U/s 234B.

Presently, CPC is calculating the interest on the income tax payable before granting of relief, citing the reason that "assessed tax on total Income" is the criteria for interest U/s 234B and 234C, which is resulting in adverse consequences to the assesse. As an example, I have attached the Intimation Order as reference:

Sl.No.	Particulars	Reporting Heads	As Provided by Taxpayer in Return of Income	As Computed Under Section 154
25	TAX DETAILS	TOTAL INCOME AFTER DEDUCTIONS 25=(4-24)	11,91,200	11,91,200
26		TAX PAYABLE ON TOTAL INCOME	1,82,360	1,82,360
27		Rebate u/s 87A 87A	0	0
28		Tax Payable after Rebate 28=(26-27)	1,82,360	1,82,360
29		EDUCATION CESS (SECONDARY & HIGHER) (on 28)	5,471	5,471
30		GROSS TAX LIABILITY BEFORE TAX RELIEF 30=(28+29)	1,87,831	1,87,831
31	TAX RELIEF	RELIEF U/S 89	1,87,538	1,87,538
32	TOTAL INCOME TAX LIABILITY	TOTAL INCOME TAX LIABILITY	293	293
33	INTEREST PAYABLE	234A INTEREST	0	0
34		234B INTEREST	0	14,912
35		234C INTEREST	0	9,414
36		TOTAL INTEREST LIABILITY 36=(33+34+35)	0	24,326
37		AGGREGATE INCOME TAX LIABILITY 37=(32+36)	293	24,619

As per the law, the Section 234B gets active only when the assesse defaults in payment of advance tax as prescribed U/s 211. As far as question of arrears of Salary is concerned, it is amply clear that arrears of Salary are not the "Current Income" of the assesse, and hence the relief provisions are introduced.

Subsection (1) of Section 210 reads as "*Every person who is liable to pay advance tax under section 208 (whether or not he has been previously assessed by way of regular assessment) shall, of his own accord, pay, on or before each of the due dates specified in section 211, the appropriate percentage, specified in that section, of the advance tax on his current income, calculated in the manner laid down in section 209".*

The section clearly *mentions the* word "Current Income", and hence, the amount without arrears of Salary should be treated as "Current Income" and only and only if tax of it exceeds the threshold as per Section 208, the person is liable to pay advance tax.

If the person is not liable to pay advance tax, the question of activation of Section 208 does not arise and accordingly the same rule applies to 234C and 234B.

Further, Section 192 (2A) specifically authorizes the employer to compute the tax on the basis of declaration furnished by the employee in the prescribed form and in the prescribed manner, and deduct the tax accordingly. Hence, the CPC, while processing the return, should compute the interest liability U/s 234B and 234C, on the income tax arrived at after providing for relief, as Section 192 (2A) should be covered U/s 143 (1) (c) (i) – Any tax deducted at source.

To conclude, it seems a fair statement to say that the action on the part of the CPC is difficult to understand and agree to as it leads to an apparent contradiction. On the one hand, the law and procedures prescribed permits the employer not to deduct tax to the extent of relief available under section 89(1) and on the other hand the CPC is demanding interest for not paying tax in advance on the same amount of relief. It is absolutely fair for the tax payer to expect that the law and implementation will speak the same language. It is more than fair for the tax payer to expect that he shall not be put to a disadvantage if the law and procedure do not agree with each other.

The reason behind the treatment preferred by the CPC can only be speculated by us in the absence of any definite answer from the CPC. One assumption may be that the sections imposing interest (234B in this case) talk about reducing TDS and Double Taxation Relief (Sections 90, 90A and 91) but do not specifically refer to section 89(1), and hence, the thought might have prevailed that section 234 does not envisage relief to be reduced from tax liability. However, this assumption is flawed in so far as it fails to realize the distinction between relief under section 89(1) and Double Taxation Relief. While double taxation relief is not an integral part of calculation of tax liability and comes into picture only after tax liability has been arrived at, relief under section 89(1) is an integral part of the process of arriving at the liability to tax. In other words, tax liability can not be determined unless section

89(1) is taken into account, and interest can become chargeable only after tax liability is determined. So, it is absolutely natural that section 234B (etc) do not talk about section 89(1). It may be pertinent to note here that while narrating the items to be deducted from tax liability, section 234B (and other similar sections) has treated double taxation relief at par with TDS, thereby, in a way, accepting the similarity between the two with reference to their role in discharging tax liability. Like TDS, Double Taxation Relief also goes on to DISCHARGE the tax liability and as such has been allowed to be excluded while demanding Interest. With section 89(1), the case is different. The role of 89(1) is not for DISCHARGE of tax liability but in DETERMINATION of tax liability. Unless 89(1), if applicable, is taken into account, no liability to tax can be DETERMINED. In other words, determined tax liability has to be net off the relief envisaged by 89(1) and interest can only be charges on determined liability, that too after deducting therefrom certain modes of discharge of the determined liability such as TDS and Double Taxation Relief.

Views, opinions and comments on this are welcome.

SCOPE OF LIMITED SCRUTINY
IN THE BACKGROUND OF A HIGH COURT JUDGMENT

CA YASH BHINDE
B.Com., ACA

SUNRISE ACADEMY OF MEDICAL SPECIALITIES (INDIA) PRIVATE LIMITED VS. ITO (KERALA HIGH COURT) (2018)

FACTS OF THE CASE:

Assessee has filed the return of income of A.Y. 2015-16 disclosing NIL income. However, it has issued share having a face value of Rs. 100/- each at a premium of Rs. 291/- per share amounting to Rs. 2,13,92,000/- during the year. In respond to this return, Assessing Officer has issued the notice - A limited scrutiny notice u/s 143(2). The reason stated in the notice for the scrutiny was whether the funds received by the assessee in the form of share premium are from disclosed sources and whether the same have been correctly offered for tax. In reply, assessee has disclosed the source of such share premium amount and the same has been correctly offered to tax. However, Assessing officer has issued further notice stating fair valuation of the share can only be Rs. 100/- and therefore the share premium shall be chargeable to tax u/s 56(2)(viib) under the head of Income from Other Sources and assessee was asked to furnish the objection against it if any. Assessee in reply takes a disputed stand against the assessing officer. However, after giving an opportunity of being heard to the assessee, Assessing Officer has issued the order demanding the tax on share premium of Rs. 2,13,92,000/-. At this point of time, assessee has an option to appeal it against the higher authority, however assessee has filed a writ petition to the High Court challenging the proceedings of the order on the grounds that the said order is beyond jurisdiction and thus invalid. For this, assessee has relied on the instructions issued by the CBDT which are applicable in cases of limited scrutiny.

INSTRUCTIONS:

(Instruction No. 7/2014, 20/2015, 5/2016)

The aforesaid said documents issued by CBDT instructing the assessing officers that when the cases are being selected for the scrutiny on the basis of AIR/CIB/26AS mis-matches data (i.e. limited scrutiny) **the scope of the enquiry should be limited to verification to that particular aspect only.** Further, if during the proceeding, if it is found that there is potential escapement of income beyond stated limit (i.e. Rs. 10.00/- lakh for metro cities and Rs. 5.00/- lakh for the rest) or any other matter which require substantial verification, the case may be taken up for comprehensive scrutiny with the prior approval of the PRINCIPLE CIT/DIT in writing after being satisfied him about the merit of the issues and the same shall be monitored by the Jt. CIT/Add. CIT.

QUESTION BEFORE COURT:

On the basis of aforesaid instructions, whether the assessing officer has acted beyond scope of the issue mentioned in the notice while passing the aforesaid order?

HELD:

While judging the case, the court has put the emphasised on the notice issued by the department to the assessee, which reads as follows:

"Whether the funds received in the form of share premium are from disclosed sources and have been correctly offered for tax."

The issue consists of two parts: (i) whether the funds received in the form of share premium are from disclosed sources and (ii) whether the same has been correctly offered for tax.

Court noted that whether the funds haves been correctly offered for the tax or not, the same can only be examined in accordance with section 56(2)(viib) of the act and which says that *where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares is liable to be assessed as income from other sources* and thus assessee cannot challenge the impugned order merely on the ground that the funds have been assessed with reference to section 56(2)(viib).

Further court has stated that circulars/instructions relied by the assessee have no application to the fact of this case and the same would apply only in cases where the assessing officer needs to take the case for the comprehensive scrutiny on basis of the findings that there is potential escapement of income on other issues. In this case, assessing officer has not taken the case for the comprehensive scrutiny by inquiring the other issues of the assessee. And thus petition of the assessee cannot be accepted.

SUMMARY:

Main purpose of CBDT by issuing such documents is to avoiding unnecessary harassment to taxpayers and to ensure that in such cases, the scrutiny should be completed expeditiously in minimum possible number of hearing without unnecessary dragging it. But the same cannot restrict the scope of the assessing officer to assess the particular reason properly. Aforesaid documents can only be helpful when the department go beyond the scope of limited purpose notice and demanding other information.

SECTION 40A(3) : IN THE LIGHT OF AN ITAT JUDGMENT

CA YASH BHINDE
B.Com., ACA

M/S A DAGA ROYAL ARTS Vs. ITO (ITAT, JAIPUR) (May, 2018)

FACTS OF THE CASE:

Assessee firm during the year 2012-13, has purchased the plot of land from various persons for a total consideration of Rs. 2,46,28,425/-, out of which payment amounting to Rs. 1,71,67,000/- were made in cash, payment amounting to Rs. 59,48,920/- were made through cheque to various persons and remaining amount towards the stamp duty and Court fees. Assessing officer while assessing the return of the year sent the notice that why the purchases made in cash should not be disallowed u/s 40A(3) of the Act. In response to the notice assessee has explained that the said plots were initially purchased as capital asset and thereafter same have been converted into stock-in-trade, which was duly reflected in annual accounts. Further, payments were made in the cash because the sellers were new to the assessee and refused to accept the payment other than by cash. If there were delay in making the cash payment, it could have lost the land deals. In addition to that assessee put across the intention behind introduction of the provision of the section 40A(3) which is to check evasion of tax so that the payment is made from the disclosed source. For this the assessee has relied on Circular No. 220, dated 31.05.1977 and some the landmark judgements of the various courts. These considerations are being rejected by the assessing officer as well as CIT(A). Further the matter was raised to the Appellate Tribunal.

OBSERVATION OF ITAT:

The main question before the ITAT was whether there is any violation of the section 40A(3) or not.

Section 40A(3) : "*Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, [or use of electronic clearing system through a bank account, exceeds ten thousand rupees,] no deduction shall be allowed in respect of such expenditure.*"

ITAT, first went into the history of the section. Basically the section was introduced through Finance Act, 1968 w.e.f. 01-04-1968. At that time there were no exceptions given to it. A year later Rule 6DD has been introduced by the Government. Again a year later rule 6DD has been amended and clause (j) was introduced in the rule.

"(j). In any other case, where the assessee satisfies the assessing officer that the payment could not be made by a cross cheque drawn on a bank or by crossed bank draft-

(1). due to exceptional or unavoidable circumstances;

(2). because payment in the manner aforesaid was not practicable, or would have caused genuine difficulty to the payee, having regards to the nature of the transaction and the necessity for expeditions settlement thereof;

and also furnishes evidence to the satisfaction of the Assessing Officer as to the genuineness of the payment and identity of the payee."

Now the above provision was highly subjective matter as what could be exceptional or unavoidable circumstances would be at the discretion of the Assessing Officer. There were various representation were made before the CBDT to seek the clarification regarding this matter. So, it has come up with the circular, "*Circular No. 220, 1977: Circumstances when AO can relax the requirement of making payment by crossed cheque under clause (j) of Rule 6DD."* The circular came with possible six circumstances under which the payment could be allowed in cash with disallowances mention in the section. However it has been clearly stated in that all the circumstances could not be spelt out and these were the only illustrative list of circumstances and not the exhaustive.

Now out of these points, the point on which the assessee has put rely and also submitted in their response to the AO was:

(d). the seller is refusing to accept the payment by way of crossed cheque/draft and the purchaser's business interest would suffer due to non-availability of goods otherwise than from this particular seller;

After that in the year 1995 the said clause was omitted and reintroduced, which allows the payment in cash by employer to employee for salary when he was temporary posted in a place other than his normal place of duty or does not have bank account.

And the latest amendment took place in the year 2008 and which was continue till time which allows the cash payment only in case where the payment is required to be made on a day on which the banks are closed either on account of holiday or strike.

Further ITAT observed the changes took place in the disallowances for non-compliances of the section. Earlier when the section was introduced there were 100% disallowance of expenditure, thereafter the same rate was decreased to 20% of the expenditure and finally it was again shift back to 100% which was stand still today.

There were several amendments have been taken place till today in the section and rule. So, it was important to understand the ultimate object behind the section. The object was defined in one of the landmark judgement of Attars Singh Gurmukh Singh Vs. ITO (Supreme Court) (1991) relating to the similar matter where honourable court has defined intension behind section 40A(3) :

"It will clear from the provisions of the section 40A(3) and Rule 6DD that they are intended to regulate the business transaction and to prevent the use of unaccounted money or reduce the chances to use black-money for business transaction."

Further in this case court has put the emphasis on the matter that if the section is read together with the rules, it would be clear that provisions are not intended to restrict the business activities. The payments by crossed cheques or crossed bank drafts were insisted on to enable the assessing authority to ascertain whether the payments were genuine or from the disclosed sources of income. The court added further that terms of the section were not absolute. Consideration of business expediency and other relevant factors were not excluded. Genuine and bona fide transactions were not taken out of the sail of the section. It is open for to the assessee to furnish the to the satisfaction of the assessing officer the circumstances under which the payment in the manner prescribed in section was not practicable or would have cause genuine difficulty to the payee.

So, it is evident from the court verdict that provisions have been enacted as one of the measure for countering of tax evasion, however genuine and bona fide transactions are taken out of the sweep of this section.

But the question stood against the ITAT whether the above judgement is still relevant as after this judgement there were various amendment have been taken place in the section and rules. In this context, ITAT has mentioned that they do not believed that by virtue of amendments, the legal proposition so laid down by the Honourable Supreme Court regarding consideration of business expediency and other relevant factors has been diluted in any way. The same continues to be relevant factors which need to be considered and taken into account while determining the exceptions to the disallowance as contemplated under this section so long as the intension of the legislature is not violated. For that ITAT has put the reliance on the various courts judgements which were taken place after the amendments from time to time. The observation from these judgements such as Smt. Harshila Chordia Vs. ITO (Raj.) Anupam Tele Services Vs. ITO (Gujarat), Gurudas Garg Vs. CIT(A) (Punjab & Hariyana) and many more, the common ground that were emerged that consequences which were to befall on account of non-observation of the section must have nexus to the failure of the object of the section. Therefore, the genuineness of the transactions and it being free from vice of any device of evasion of tax is relevant consideration and which should be examined before invoking the rigours of this section.

Now, with regards to this case, ITAT observed that certain payments were made through cheque and certain through cash. Assessing Officer in his order clearly stated that there were no unavoidable circumstances which could have led the assessee to make cash payments. Assessee in response explained that generally in real estate transactions the terms would be discretion of the seller and sellers were new to the assessee and required to be paid in cash. Delay in making cash payment, could have turned into losing the deal. Further, assessee has put up the records before ITAT that all the payments made in cash were by withdrawing the amount from the bank account on the same day of registry. Thus, it was clear that assessee was having sufficient bank balance and only on the insistence of the specific seller, it has paid the amount in cash. And this makes out that assessee has business expediency and due to which it has to pay in cash and without which transaction could not be completed. Assessee has also put copies of the sale deed which contains the name and address of the seller, date of sale deed, plot number, purchase value, stamp duty and mode of payment i.e. cash / cheque. Therefore identity of the persons has been made and genuineness of the transaction was also established and even the lower authorities have not raised any doubts regarding that.

HELD:

ITAT has observed through the history of the section and various judgement of the honourable courts that if the transactions are genuine and therefore are free from vice of any device of evasion of tax, the rigour of section 40A(3) may not be apply. In this case also, these things were clearly stated out and therefore bring a case of genuine business transaction, no disallowances was called for by invoking the provision of section 40A(3) of the Act. ITAT has rejected the contention of the department and appeal of the assessee was allowed.

COMMENT:

In routine practice, it is quite obvious that we tend not to worry about the object of the each and every section. However, sometimes there were ways to save the genuine business transaction by understanding the ultimate object behind the section or legislature. No section or the legislature had been framed to restrict the business activity. So, through the legislature or the section, if the assessee faces the genuine business expediency, the contention of the assessee definitely takes the serious attention in court of law and in most of the cases the answer were in the favour of assessee.

INTERPRETATION OF EXEMPTION NOTIFICATION A SUPREME COURE JUDGMENT

CA Jagrutkumar Avinash Anjaria
B.Com., FCA,DISA(ICAI)

Recently, the Hon'ble Supreme Court has come out with an interesting and elaborate judgment dealing with the Interpretation of Statute, specifically focusing on interpretation of exemption notification in a taxing statute.

The background of the case is equally interesting and informative of the hierarchy of judicial decisions. The facts are set around a notification which conferred a concessional rate of tax to item of prescribed description. The assessee relied on a particular decision (Sun Export) of the Supreme Court. The claim for exemption was denied by the department. On first appeal, Assistant Commissioner also denied the claim of the assessee, distinguishing the Sun Export decision. On further appeal, the Commissioner reversed the decision of the Asstt Comm and held the judgment cited as applicable. Tribunal also went on to affirm the order of the Commissioner. In due course, the matter reached to the Hon'ble Supreme Court and was placed before a two judge bench. The two judge bench was not comfortable with the principle laid down by Sun Export judgment. It also observed that there were various subsequent decisions of the Supreme Court which were not in exact conformity with the ratio laid down by the Sun Export judgment on which the case under consideration was totally dependent. The Beanch noted its doubts down and put the matter before the Chief Justice to constitute an appropriate bench to resolve the issue. The matter then was placed before a three judge bench. The three member bench also was of the view that the Sun Export judgment needs to be reconsidered. Now that Sun Export judgment also was delivered by a three member bench, hence, the current three member bench thought it proper not to pass any opinion and once again approached the CJI to constitute an appropriate bench. Thereafter, a five member bench was constituted and the matter was "referred" to that bench. This five member bench was required to reconsider the view expressed in Sun Export case with regard to "interpretation of exemption notification."

There are two things that make this proceeding a special for beginners like us; One, the procedural hierarchy that the judiciary follows. The second is that this bench was to give an opinion on a particular aspect. Hence, there were no

"facts" involved here in the way they are in most of the cases. Thus, the judgment caters to the technicalities all the way and while reading it and trying to understand it, we should also try and keep to technicalities only.

Though the actual task of the bench may be taken as quite "narrow" or "restricted," because of its pure technical nature, the bench has occasion to discuss finest of nuances of interpretation related issues.

WHY PRINCIPLES OF INTERPRETATION NEEDED

The judgment has addressed this question in its decision. It was observed that legislature tries to answer a question before it by enacting legislation, with a view to solve that problem. Information and past experience go into the making of that law. The uncertainty regarding the applicability of a legislation takes place mostly for two reasons;

1. *Legislature can not foresee all future situations and consequences.*
2. *At times, language and phrases used in the statute are not perfect.*

So, the courts come into picture and decide on two things;

1. *If the case falls within the broad principles of the legislation*
2. *The court may need to interpret words and phrases.*

This explains why rules or principles of interpretation are needed.

WHAT ARE THOSE PRINCIPLES OF INTERPRETATION

- *Principles of interpretation may come from evolved law or they may come from specific enactment such as General Clauses Act.*
- *For any undefined word in any legislation, recourse has to be made to General Clauses Act, if that word is defined in GC Act.*
- *If there is a conflict between the GC Act and the provision that is being interpreted, either in subject or context, courts will need to look into the provisions of statute.*
- *There are also some internal and external aids or tools for interpreting statutes.*
- *Internal aids are; the long title, the preamble, the heading, the marginal note, , punctuation, illustrations, definition or a dictionary clause, a proviso to a section, explanation, examples, a schedule to an act etc.*

- *External aids are; parliamentary debate, history leading to a legislation, other statutes which have a bearing, dictionaries, thesaurus.*

WHAT THE INTERPRETATION WILL LEAD TO

Interpretation will try to know the intention of the legislature, whether it intended to

- *Apply the law in a given case*
- *Exclude operation of law in a given case*
- *Give discretion to to enforcing or adjudicating authority*

The accepted principle is that

- *A statute must be construed according to the intention of the legislature*
- *While applying or interpreting a law, courts should act upon true intention of legislation.*
- *When provision is open to more than one meaning, choose the one that represents the intention of the legislature.*

When the words in a statue are clear, plain and unambiguous;

- *Courts are bound to give effect to that meaning, whatever the consequences may be.*
- *No other hypothetical construction is permissible on the ground that it is more consistent with the object and policy of the act.*
- *Hardship or inconvenience can not be the basis to alter the meaning to the language employed.*
- *Words are to be taken in their natural and ordinary sense.*
- *Because, the words used, declare the intention of the legislature.*
- *This is more true for fiscal and penal statutes.*

When words in a statute are not clear, plain and unambiguous;

- *When the plain language results in absurdity, court is entitled to determine the meaning of the word in the context in which it is used and keeping the purpose of legislature in mind.*
- *If plain reading results in anomaly or absurdity,*
    - *Court may take into account the hardship and consequences that flow from this anomalous or absurd provision*
    - *And can even explain the true intention of the legislature*

WHAT IS SPECIAL ABOUT TAXATION STATUTES

In constructing penal and taxation statute, strict rule of interpretation has to be applied. State can not levy tax without specific authority. When legislature mandates taxing certain persons or certain objects in certain circumstances, it can not be given an extended meaning so as to cover those who were not intended by the legislature.

Equity has no place in interpretation of a taxation statute.

In a taxation statute, there is no room for any intendment;no presumptions can be drawn, context, purpose and other supporting material are not to be allowed, if the words used carry clear meaning.

HOW TO HANDLE AMBUGUITY

- *The bench concludes that every taxing statute should be interpreted strictly.*
- *Here, the expression statute is sought to include charging clause, computation clause and the exemption clause*
- *In case there is any ambiguity in charging provision, the benefit must necessarily go in favour of the assessee or subject*
- *Whereas, in the case of exemption notification, it should be strictly interpreted in favour of the revenue or state.*
- *Three components of taxing statute are identified in the judgment; 1, subject of the tax, 2, person liable to pay tax and 3, rate at which tax is levied. If there is any ambiguity in understanding any of these three components, no tax can be levied, till the ambiguity is removed by the legislature.*
- *There can not be any implied concept either in identifying subject of the tax or the person liable to pay tax, both of these need to be there in strict language of law.*
- *While deciding liability to tax, only the letter of the law is relevant and interpreter is not to be guided by the spirit of the law.*
- *Hardship and non equity are to be ignored.*
- *When tax exemption is to be interpreted, the benefit of doubt should go in favour of the revenue.*

The judgment discharges its duty by concluding the on reference made to it on the following lines;

- *While claiming under any exemption notification, burden of proving applicability would be on the assessee to show that his case falls within the parameters of exemption clause or notification.*
- *When there is ambiguity in exemption notification, the benefit must go to the revenue.*

As the issue referred to the bench was restricted to examine the view on ambiguity with reference to a particular judgment (Sun Export), it may have restricted its final opinion on the lines narrated just above. However, while citing various previous cases, the bench has also referred to distinction between;

- *stage of finding eligibility to seek exemption and*
- *the stage of applying the nature of exemption made.*

The principle held at one of the cases referred to in the judgment is;

- *Do not extend or widen the ambit at the stage of applicability of exemption,*
- *But, once that hurdle is crossed, that is eligibility to exemption is established, switch to liberal interpretation.*

This judgment was pronounced on 30th July, 2018. It is a relatively lengthy judgment, running into 80 odd pages. Here, an effort at summarizing the same is made, trying to highlight interesting points and rearrange them in an order which may help the reader understand it in better context.

GST on commercial activities by charitable and religious trusts with reference to an AAR Ruling

CA Chunauti H.Dholakia
B.Com., FCA,DISA(ICAI)

Generally charitable and religious trusts are formed with the main object of advancement of religion and spirituality. In addition to main object, these trusts also arranges Satsangs, Shibirs, yoga camps etc. and sales spiritual materials like books, magazines, CDs, DVDs, MP3 etc for the object of spreading of knowledge of the religion. It is general understanding that as the purpose of these activities is charitable, and these activities undertaken by the trust is incidental/ancillary to main charitable object, GST is not leviable on it. But recent advance ruling by Maharastra Authority for Advance Rulings in case of Shrimad Rajchandra Adhyatmik Satsang Ssadhna Kendra has negated this view. It has established that exemption from payment of GST is based on nature of activities undertaken and not on the status of the entity. Facts and ruling of the case is as under:

Brief fact of the Case:

Shrimad Rajchandra Adhyatmik Satsang Sadhna Kendra, registered under section 12AA of the Income Tax Act is a public charitable and religious trust formed with the main object of spreading of knowledge of Jain Dharma and advancement of teaching of Param Krupaludev Shrimad Rajchandra. The ancillary and incidental objects of the trust are to carry out activities for advancement of main objects such as Satsang, Shibirs, yoga camps etc. and to spread knowledge of Jain dharma through publication and sale of books, DVDs, MP3 and other spiritual products including diary, calendar, greeting cards, statue, stickers, box covers etc. for students and public in general. The trust has other ancillary objects also. The trust has sold spiritual products and income from sale of such products was used for charitable purpose. The trust was registered under erstwhile Maharastra Value Added Tax Act, 2002 and migrated to GST after its implementation. But no return was filed as the trust was containing that it is not engaged in any "business activity" as defined u/s. 2(17) of CGST Act, 2017. The trust contended that there is no motive of profit out of such activities. Hence the same cannot be said to be business in the commercial sense. Moreover, main object of the trust being advancement of the religious and spiritual teaching cannot be said to be the business as defined u/s. 2(17) of the CGST Act. As the main object of the entity cannot be considered as business, the ancillary or incidental objects also cannot be considered as business. Hence sale of spiritual products which is ancillary to main charitable object of the trust cannot be considered as business. But after verifying definition of "business" and "supply" as per CGST Act and after considering other facts of the case, the AAR ordered that such activities undertaken by the charitable trust cannot be considered

as "charitable activities". Hence generation of income from sale of spiritual products and income from accommodation of foods in various satsang/shibir/yoga camps on payment/chargeable basis attracts GST.

Analysis of the case:

The case seeks to verify whether ancillary activities undertaken by the trust can be considered as business in commercial sense and whether it is liable for GST. To verify the same, it is necessary to examine whether such activity is covered under "supply". It is also necessary to verify definition of the term "business" and "commerce" to determine taxability of these activities.

Portion of section 7 of CGST Act, which is relevant in this case is as under:

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

(a) All forms of supply of goods or services or both, such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

The term "supply" is all-encompassing, subject to exceptions carved out in the relevant provisions. E.g. supplies mentioned in Schedule III of the Act. Hence if above form of transactions are made for consideration and made in the course or furtherance of "business", it will be covered under "supply".

The term "business" is defined in section 2(17). Clause (a), (b) and (c) of section 2(17) of CGST Act which is relevant in this case is as under:

2(17) "Business" includes:

(a) Any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity whether or not it is for a pecuniary benefit;

(b) An activity or transaction in connection with or incidental or ancillary in sub-clause (a);

(c) Any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction.

Meaning of the word "trade" as per business dictionary" is "a commercial transaction involving sale and purchase of goods, services or information".

Meaning of the word "commerce" as per business dictionary is "exchange of goods or services for money or in kind, usually on a large scale enough to require transportation from place to place or across city, state or national boundaries."

The trust sold spiritual materials for consideration. Even if selling of such material is not made for profit motive, and the amount received from sale of such material is used for charitable purpose, such activity can be considered as "business" u/s. 2(17) of CGST Act. Hence such activities of the trust are covered under the scope of "supply" as given in section 7 of the CGST Act and therefore liable to GST.

Moreover, supply of goods by the trust is not exempt supply, as "exempt supply" defined u/s. 2(47) of CGST Act is "supply of goods or services or both which attracts nil rate of tax or which may by wholly exempt from tax u/s. 11, or u/s.6 of the IGST Act and includes non-taxable supply". Hence supply of goods which are taxable and are not nil rated are liable for GST in the hands of Charitable Trust as well.

Some court rulings directs that if the primary and predominant object of the trust is charitable, any other object which might not be charitable but which is incidental or ancillary to the dominant object will also be considered as charitable. Similar judgment was reiterated by Supreme Court in case of CIT vs. Gujarat Maritime Board (2007) 14 SCC 704 (SC) and in case of Commissioner of Sales Tax vs. Sai Publication Fund (2002) 4 SCC 7 (SC). Bombay High Court has also reaffirmed this view in case of Commissioner of Sales Tax vs. Cutchi Dasha Oswal Mahajan Udyog Committee (36 STC 1) (Bom.).

But GST Act not considers ancillary or incidental activities of the charitable trust as "charitable activities". The definition of the term "charitable activities" as per notification No. 12/2017- Central Tax (rate) is as under:

"Charitable activities means activities relating to

I1) Public health by way of (a) care or counseling of (i) terminally ill persons or persons with severe physical or mental disability, (ii) persons afflicted with HIV or AIDS or (ii) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol or (b) Public awareness of preventive health, family planning or prevention of HIV infection.

(2) Advancement of religion, spirituality or yoga.

(3) Advancement of educational programs or skill development relating to (a) abandoned, orphaned or homeless children, (b) Physically or mentally abused and traumatized persons, (c) prisoners or (d) persons over the age of 65 years residing in a rural area,

(4) Preservation of environment including watershed, forests and wildlife

In this case the accommodation and food provided in various Satsang/Shibirs/yoga camps are not free for the participants, as the trust charges some amount from

participants in the name of accommodation or participation. The activity undertaken by the trust on payment/chargeable basis is commercial activity and it cannot be covered under advancement of religion, spirituality or yoga. Hence activity of arrangement of Satsang/Shibirs/yoga camps or arrangement of fitness camps cannot be considered as "charitable activity" within the meaning of definition mentioned above. Hence even if the charitable trust is registered u/s. 12AA of the Income Tax Act, it does not satisfy criteria for exemption under GST.

Advance Ruling in this case:

Maharastra AAR ordered that sale of any goods in the form of spiritual materials by the charitable trust for consideration is covered under the term "supply" and shall attracts GST. Also, accommodation and food provided in various Satsang/Shibir/yoga camps on payment/chargeable basis cannot be considered as "charitable activities" and therefore liable for GST. The charitable trust having main object of advancement of religion, spirituality or yoga is liable to registration subject to threshold limit prescribed under section 22 of the CGST Act.

Conclusion:

Applicability of GST depends on nature of activity not on the purpose of activity.. If the activity is undertaken on chargeable basis, the nature of activity cannot be considered as "charitable" even if the amount received from the activity is used for the charitable purpose. Hence the amount received for such activity in the name of accommodation or participation fee or in the name of donation for such activity is taxable under GST. Similarly irrespective of purpose of sale of goods or material, such activity undertaken by the charitable and religious trust is taxable under GST.

GST: ANNUAL RETURN AND AUDIT: QUEER QUESTIONS, UNCERTAIN ANSWERS

CA Jagrutkumar Avinash Anjaria
B.Com., FCA,DISA(ICAI)
CA Jeel Dineshbhai Shah
B.Com., ACA

Audit under GST Law rests on the following pillars;

1. *Section 35(5) of the Act*
2. *Section 44(2) of the Act*
3. *Rule 80(3) of the Rules*
4. *Form No GSTR 9C*
    a. *Verification part, and*
    b. *Certification part*

These four pillars cover everything that is there in GST with reference to Audit in particular.

GST is not the first or the only legislation that talks about or requires AUDIT. There are other legislations also which carry a requirement of getting accounts audited, the prominent legislations that come to mind are the Company Law and the Income Tax Act.

The way GST Audit has evolved during last few months, it does give an impression that the procedural modalities of it are mainly derived from or designed in line with the Audit under section 44AB of the Income Tax Act. The way "Certification" part of the Form GSTR 9C is designed is a major pointer leading to this impression.

When audit regime as a whole, under the GST regime, is compared with the provisions that are contained in other statutes, mainly The Company law and the Income Tax Act, there are a few questions that present themselves which are difficult to understand and answer. The questions are of "mere technical" relevance, still they may interest someone interested in reading and interpreting nuances of law. In this article a few of such 'QURRE QUESTIONS" are sought to be discussed.

Before we proceed further, let us reproduce the text of the sections and rule that govern the Audit mechanism in the GST regime;

SECTION 35(5)
"every registered person whose turnover during a financial year exceeds the prescribed limit shall get his accounts audited by a chartered accountant or a cost accountant and shall submit a copy of the audited annual accounts, the reconciliation

statement under sub-section (2) of section 44 and such other documents in such form and manner as may be prescribed".

SECTION 44(2)
"every registered person who is required to get his accounts audited in accordance with the provisions of sub-section (5) of section 35 shall furnish, electronically, the annual return under sub-section (1) along with a copy of the audited annual accounts and a reconciliation statement, reconciling the value of supplies declared in the return furnished for the financial year with the audited annual financial statement, and such other particulars as may be prescribed".

RULE 80(3)
"every registered person whose aggregate turnover during a financial year exceeds two crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of the audited annual accounts and a reconciliation statement, duly certified, in GSTR 9C, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner".

Question 1:- WHERE DOES THE AUDIT REPORT FORM COME FROM?

If we examine the provisions of other laws that mandate audit of the accounts, all of them do refer to report in one way or the other and go on to either elaborate about the contents of such report or explicitly provide that such contents will be notified in due course.

If we refer to Section 143 of the Company Act, 2013, at sub section (2) it states that "the auditor shall make a report to the members . . ." That subsection go on to talk about the contents of such a report and at the end also makes a reference to ". . . and such other matters as may be prescribed."

If we visit section 44AB of the Income Tax Act, that section says, 'Every person . . . get his accounts . . . audited by an accountant . . . and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed."

Continuing with the Income Tax Act, there are a cluster of sections that give certain relief or deduction or concession. We take Section 80-IA as a representative of all such sections. If we read sub section (7) of that section, it states that "The deduction under sun section (1) . . . unless the accounts of the undertaking . . . have been audited by an accountant . . . and the assessee furnishes . . . the report of such audit in the prescribed form duly signed and verified by such accountant."

It can be seen that all the three sections operate in the following sequence;

1. *They require audit to be conducted*

2. *They talk about report to be made up of the audit carried out*
3. *They talk about what that report should contain*
4. *They keep the window open to ask for something more as a report of audit by using the words to the effect "as may be prescribed" or like*
5. *They talk about signing and verifying the report.*

Now if we read section 35(5) of the GST, it simply casts an obligation to get accounts audited. It does talk about "audited annual accounts," but is silent about "report of audit or contents of such audit report." The section does not even empower the rules to ask for anything via audit by way of prescribing any additional format; as there are no such words which can suggest the intention to empower the rules to devise a form that should be a part of the audit envisaged by section 35(5).

In the absence of such an express provision in the section or express empowerment of rules to prescribe a format, one can reasonably wonder as to from where the CERTIFICATION portion of GSTR 9C came from! Can it be argued that the Rule that prescribed GSTR 9C has exceeded its authority with reference to section 35(5) in devising CERTIFCATION part of the GSTR 9C? If not, from where did it derive the authority to prescribe this certification requirement? Which expression of which section permitted it to prescribe this CERTIFICATION? Difficult to answer, isn't it?

Question 2:- GSTR 9C AND AUDITOR

Section 35(5) requires every registered person to do two things;

1. *Get his accounts audited*
2. *Submit three things*
    a. *Copy of audited annual accounts*
    b. *Reconciliation statement under 44(2)*
    c. *Such other documents in form and manner as may be prescribed.*

Remember, the duty here is on registered person.

Now, section 44(2) applies to those registered persons who are required to get their accounts audited under section 35(5). This subsection requires such registered persons to furnish four things;

1. *Annual return*
2. *Copy of audited annual accounts*
3. *Reconciliation statement*
4. *Such other particulars as may be prescribed.*

Here also, it is worth noting that every ting revolves around "registered person," the "auditor" is not in the picture at all.

The "reconciliation statement" that both the sections refer to has come in the form of GSTR 9C. The wordings of both the sections give an impression that reconciliation statement, that is GSTR 9C, is concerned with "registered person" only. However,

the GSTR 9C that has found its place in the Rules does not have any place for "Registered Person." The GSTR 9C has been thurst upon the "auditor" in its entirety. Now the question is, does the law, through either of the sections, 35(5) or 44(2), ever envisages the "reconciliation statement" to be a duty of the "Auditor?" If yes, through which words? If not, can rules usurp the power to prescribe something that the law does not even envisage? It is also pertinent to note that section 44(2) does spare a good number of words to describe what it intends the reconciliation statement to do. If the idea was that this reconciliation statement is to be "verified by an auditor," then nothing would have prevented the legislature to add a few more words in that subsection to declare its intention to get the reconciliation statement verified by auditor. The fact that it did not do may lead to an undeniable conclusion that it did not envisage that reconciliation statement to be verified by the auditor.

In fact, once again it is Rule 80(3) that suddenly introduces the word "duly certified" while talking about "Reconciliation Statement." Strangely, it stops simply at using the words "duly certified" and forgets to clarify as to "who it intend to certify that statement, registered person or auditor!" This becomes clear only when we reach the notified form GSTR 9C, which requires the signature of the Auditor under "Verification."

It is also interesting to note that both the sections talk of "reconciliation statement" and "other matters as may be prescribed." As the "reconciliation statement (GSTR 9C)" is specifically referred to in both the sections, adding any additional requirement to that form should not be possible by taking recourse to the words giving residual power to prescribe other matters. It may be argued that had the "Certification" and other "Verification" requirements been brought outside of the reconciliation statement, the words conferring residual empowerment may come to help them attain the required legitimacy. Thus, the question is, considering the way the sections stand, do the rule and the prescribed form carry any authority from the act to shift the onus of reconciliation on to the auditor? The question is QUEER and the answer, definitely, UNCERTAIN.

Question 3:- AUDIT UNDER OTHER LAWS AS COMPLIANCE TO 35(5)

As we move to PART-B-CERTIFICATION under GSTR 9C, we come across two formats of certification. First format takes care of the situation where the same person (auditor) carries out two tasks, conduct of audit of accounts and draws up reconciliation statement. Under this format, at para 3(b) the auditor goes on to report on the books of accounts, balance sheet and profit and loss account. The second format is for a situation where books of account are audited in pursuance of any other law (may be not by the auditor preparing reconciliation). In this format there is no reference to traditional audit expressions about books of accounts, balance sheet and profit and loss account. This format simply refers to the audit conducted under

other applicable law. This scheme of things, the way it is designed and presented, go on to convey that if accounts are audited in pursuance of any other law, such audit shall be a sufficient compliance of the requirement of section 35(5) of the GST Act.

The entire scheme of things sound so familiar to what we are used to under section 44AB of the Income Tax Act. Under that act we do not express opinion on balance sheet and profit and loss account when accounts are audited under any other law. We use form 3CA in such cases which does not have those audit specific statements. We use Form 3CB when books of accounts are not audited under any other law. In Form 3CB, there are all the customary lines related to expression of opinion on books of accounts, balance sheet and profit and loss account.

Thus, if accounts are audited under any other law that audit is accepted as compliance of section 44AB and no opinion is required to be expressed on books of accounts, balance sheet and profit and loss accounts. If audit of PQR Ltd is carried out under the Company law by ABC and Co. and XYZ and Co is carrying out 44AB audit, XYZ and Co. need not express any opinion on books, BS and PL and will simply furnish what is required by Form 3CD.

So, is this a rule that audit under one law will carry itself to another law? Well, section 44AB may prompt us to conclude that it is. But wait, let us move a step further. Suppose that PQR Ltd is entitled to deduction under Section 80-IA. To avail that deduction it has to get a report in Form 10CCB from its auditor XYZ and Co. Now when XYZ and Co prepares report in 10CCB, that format will require it to express an opinion on Accounts, BS and PL, like any other audit operation. In other words, Form 10CCB (Section 80-IA(7)) will not allow XYZ and Co to rely on report of Audit conducted under the Company Law by ABC and Co (which section 44AB allowed).

Why this disparity? The answer lies at the last proviso to Section 44AB. It reads; "Provided also that in a case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this section if that person gets the accounts . . . audited under such law . . ." Thus, section 44AB specifically recognizes the audit under any other law as sufficient compliance of its requirement. Section 80-IA does not have similar words in its text. Hence, 80-IA will not recognize audit under Company law as sufficient compliance of its requirement and hence another audit needs to be carried out and report or opinion on Accounts, BS and PL needs to be expressed.

This comparative study of two sections may lead us to conclude that when a section of any statute require accounts to be audited, audit under another statute can be taken as compliance only if the section of the statute that requires the audit accepts the audit under that other law as sufficient compliance of its requirement. Section 44AB does this while Section 80-IA does not. The question is, where does Section

35(5) stand? Does section 35(5) contains any words or expressions that suggest that it intends to consider audit under any other law as sufficient compliance of its mandates? Apparently, the text of the section does not reveal any such intention. It is only through the design of the CERTIFICATION FORMAT at PART B of GSTR 9C that a hint is given that such an audit under other law may be taken as compliance of the provision of section 35(5). The question is, how valid can this "indirect confirmation" be? Is it the case here that Forms are overstepping the mandate passed on by Rules and Rules are overstepping the mandate passed on by the Law? Isn't it that when a section of any law casts an obligation, it also prescribes the ways in which it can be discharged and that the discharge of that obligation has to strictly confirm to the manner prescribed by that section, nothing can be implied in such cases of compliance. In the absence of any clear recognition in 35(5) of audit under any other law as discharge of obligation cast on registered person by 35(5), how safe will it be to conclude that audit under any other law is a valid compliance of requirement of section 35(5)? Isn't the question QUEER and answer UNCERTAIN!

Question 4:- ". . . AND NOTHING HAS BEEN CONCEALED THERE FROM."

These words occur at the "verification" part of form GSTR 9C and are causing significant amount of discomfort and apprehension. The whole text is;

"I hereby solemnly affirm and declare that the information given herein above is true and correct to the best of my knowledge and belief and nothing has been concealed there from."

Here the question to be asked is, what do the word "there from" qualify with reference to "concealment" or "non concealment." In other words, what does the word "there from" refer to in this sentence? The words that occur immediately prior to "concealment" and "there from" are "best of my knowledge and belief." So, it will be quite logical to conclude that "there from" refers to "best of my (auditor's) knowledge and belief." Thus, what is expected of the auditor here is that he should not hold back anything which has come to his knowledge or which he has come to believe, while carrying out the task entrusted by the law. These words can not be taken as referring to any "possible or probable concealment on the part of the registered person." Such an interpretation will be inconsistent with the grammatical convention as well as the principle of enforceability of legal responsibility.

At least for this point, the question remains QUEER, may be, the answer can reasonably be taken as CLEAR.

Please think it over and take the discussion forward.

GST: ANNUAL RETURN AND AUDIT: QUEER QUESTIONS, UNCERTAIN ANSWERS

CA Deep Koradia
B.Com., FCA, DISA(ICAI)

Dated: 29th Nov 2018

GST **Annual Return** and **Audit** Forms has been prescribed via **Notification No 39-2018 CT Dated 04th Sept 2018**&**Notification No 49-2018 CT Dated 13th Sept 2018** Respectively. It's been almost 3 months since such forms are notified but not made available on portal. While going through these forms, a few anomaly has been raised in minds which are presented as "Queer Questions" As here which might not have any certain answers as of now!

1. WHICH TURNOVER TO BE TAKEN TO DECIDE THE LIABILITY OF GSTR9C – RECONCILIAITON? "12 month's Turnover" VS "9 Month's Turnover"?

It is now settled that for the Tax Payer having multiple-state branches, they need to consider the Turnover as PAN INDIA Basis to decide the liability. However, since the Law came to force during the year from 1st July 2017, dooneneed to see the Full 12 Month's Turnover to decide by Audit and Reconciliation Liability or only 9 Month will be suffice?

Section 35(5) of the C/SGST Act govern the liability of auditing which is produced as below:

*"(5) Every registered person whose **turnover** during a financial year exceeds theprescribed limit shall get his accounts audited by a chartered accountant or a cost accountantand shall submit a copy of the audited annual accounts, the reconciliation statement undersub-section (2) of section 44 and such other documents in such form and manner as may beprescribed."*

The section speaks about only turnover and nowhere in the Act the word Turnover has been defined. However, the Rule 80(3) of CGST Rules has clarified the same which is reproduced as below:

*"(3) Every registered person whose **aggregate turnoverduring a financial year** exceeds two crore rupees shall get his accounts audited as specified under sub-section (5) of section 35 and he shall furnish a copy of audited annual accounts and a reconciliation statement, duly certified, in FORM GSTR-9C, electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner."*

Now, the 1st Question is, when the Act itself mentioned the word "Turnover" then can the Rule go beyond the section and rectify it to **"Aggregate Turnover"?** Is it merely clarification in nature or rectification?

Giving he benefit of doubt, and accepting **"Aggregate Turnover"**as the term to decide the liability of the Tax payer for Audit and reconciliation, then the Word is also defined in the Act in Section 2(6) which is reproduced as below"

"(6) "aggregate turnover" means the aggregate value of all taxable supplies(excluding the value of inward supplies on which tax is payable by a person on reversecharge basis), exempt supplies, exports of goods or services or both and inter-Statesupplies of persons having the same Permanent Account Number, to be computed on allIndia basis but excludes central tax, State tax, Union territory tax, integrated tax and cess;"

Now, Reading Rule 80(3) with Section 2(6), 2 things can be understood:

1. It has to be aggregate Turnover
2. It has to be for the whole Financial Year (as highlighted in Rule 80(3) Above)

So, Even the Law came to the force after July, Do I need to add the Turnover of Q1 FY17-18 to arrive at the figure of aggregate turnover to decide my audit and Reconciliation liability?

Now, for the time being, let's accept that Aggregate Turnover needs to be computed for the whole financial year then another question came as for the Q1, which Valuation is to be taken? Vatable Turnover/ Excisable Turnover /

Service Taxable Turnover or any combination thereof? Whether these Indirect Taxes is to be added in the Turnover of is it excluding all there Indirect Taxes? These are the Queer Questions which needed to be addressed by Government. Again, Very few Taxpayer with borderline Turnover Cases are affected due to this anomaly, nut it's better to clarify the same and save the Taxpayer from litigation.

2. Comparison Between Book's Credit and Credit Reflecting in GSTR2A – Various Issues

In Table 8 of GSTR9, There is comparison between Book's Credit Vs Credit Reflected in GSTR2A. Though the same information doesn't have direct impact on eligibility of credit, but there are certain issues with respect to the same.

First is, Since the counter party still can add the invoice pertaining to the FY2017-18 in the returns of the OCT 2018 and subsequent period, (Counter Party Can't Amend, but always can add the new invoice of last year), So how to freeze the data? What is the deadline for that comparison? What if after submitting the GSTR9, the auto populated credit as per 2A increased due to additional invoices submitted by the supplier/ counter party?

8	Other ITC related information				
A	ITC as per GSTR-2A (Table 3 & 5 thereof)	<Auto>	<Auto>	<Auto>	<Auto>
B	ITC as per sum total of 6(B) and 6(H) above	<Auto>			

Another one is, there is comparison between GSTR2A vs Book's credit. Section 8A and 8B, both are auto populated. Now, after looking closely, it is felt that in Table 8B, it has to be "6(B)+6(H)-7(A). When the taxpayer has shown the original credit taken in 6B, reversal in 7A and again taken in 6H, all the 3 filed should be mentioned here, which is left in the form. One may argue that since the credit which is "availed, reversed and again availed" is to be mentioned only in 6H so there is no question of taking the same as twice so no need to deduct the reversal. But, to my observation, Table 6 has to match with Table 4A of GSTR3B. So if one has followed the method of showing the reversal separately in Table 4B of GSTR3B, then he has to mention the credit twice in 6B and 6H as well and has to show as reversal in 7A.

In the same table, for the entry 8G and 8H, the comparison has been shown between all the IGST for import of goods actually paid (in 8G) and all the IGST claimed as ITC during the FY201718 (in 8H). However, there is

possibility that IGST on import of the goods has been paid in FY201718 and taken in April to Sept 2018. But there is no filed where one can mention such availment and ultimately such non-availed credits are getting lapsed. All such are queer questions for which some changes in forms or clarification is much needed.

3. **RCM liability found by Auditor during audit and reconciliation, what about the availment of such credits?**

There are cases that RCM liabilities Under Section 9(3) or 9(4) was found by the auditor and Tax Payer is also paying the taxes. Since the same has been "found" after the due date of sept 2018 month's return, it can never be taken as credit before that. So can the credit be denied on that ground? Or can it be taken that since the "Self Invoice" for the RCM liability and "Payment Voucher" has been prepared now, so the document is of the current year (Even though the liability of the previous year) and credit can be taken till next year's Sept month? Clarification is needed for the same.

4. **Which data is to be used for GSTR9? GSTR1's data or GSTR3B's Data?**

The instruction given for the Table 4 & 5 has used the words "data from so and so Table of **GSTR1 may be used**" For the Table 6 and onwards, the words are used "Data from so and so Table of **GSTR3B may be used**". While there are cases (infact many cases) where the data uploaded in GSTR1 are not in sync with GSTR3B. So how to interpret these "May be" Words? Is that only directive or suggestive in nature? If for the table 4& 5 data of GSTR 1 is used and for table 6&7, the data of 3B is used then the details in Table 9 will not get matched. Following 2 opinions are getting formed

- 1St Opinion

The instructions given in the GSTR9 is only of suggestive and clarification in nature. Since the each head of the Table 4&5 of GSTR9 is having the heading which are similar to the GSTR1, they have mentioned the Form GSTR1. If incase 3B varies from the GSTR1, then the figures in Table 4&5 needs to be come from 3B with proper headwise bifurcation. If followed so, then only the Table 9's Tax payable and paid will get matched.

- 2nd Opinion

Use the figures strictly as per GSTR1 in Table 4&5 of GSTR9. For the rest of the table, use the figures from the GSTR3B. There might possible that whatever

the liability mentioned in GSTR1 is under discharged or over discharged in GSTR3B. In that case, 2nd column of Table 9 will show Tax Payable as per GSTR1. The column 3 to 7 of Table 9 is for discharging of liability, and data for that column will come from GSTR3B. The difference between these will be reversed while showing the data in Table 14 Where the correction should have been done in April 2018 to Sept 2018 and exact reverse difference between Tax payable and tax paid to be arrive to match the total GSTR9's liability. However, to do this, GSTR9 Must allow to proceed even if there is difference between "Tax Payable" and "Tax Paid" in Table 9 & table 14.

Both of the opinions have valid arguments. However, It's the queer question as to which method is to be followed. The Government must come with possible clarification and solutions to avoid any litigation for procedural part in the future.

ITC IN CASE OF DEFAULT (NON PAYMENT) BY SELLER

JUDGEMENT OF DVAT ACT READ IN HARMONY WITH THE PROVISIONS OF GST ACT

CA Nilam Nenshibhai Katarmal
B.Com, ACA

This article seeks to discuss the decision of the Hon'ble Delhi High Court in the case of Arise India Limited vs. Commissioner Of Trade & Taxes, . on 26 October, 2017, with reference provisions of the GST Act, particularly Section 16(2)(c) of The CGST Act.

Highlights of the case

The hon'ble supreme court has dismissed the special leave petition filed by revenue against the decision of The Hon'able High court of Delhi that disallowance of ITC(Input Tax Credit) to the bonafide purchase on the basis of default of selling dealer in depositing Tax to the government as it is the violation of Articles 14 and 19(1)(g) of the constitution of India.

Now on the basis of above *judgment will be read in harmony with the provisions of the GST Act* or it is *just limited to the provisions of the DVAT Act*??

Whether as per provisions of GST Act also credit would not be denied to the bonafide purchasing dealer for default of selling dealer by non-making payment to the Govt.

Let understood the contentions of the case of DVAT Act:

→According to the **section 9(2)(g) of DVAT** Act Guilty purchaser and Innocent purchaser both constitute different classes. Thus In light of the above legal position, the Court hereby holds that the expression „dealer or class of dealers" occurring in Section 9 (2) (g) of the DVAT Act should be interpreted as not including a purchasing dealer who has **bona fide** entered into **purchase transactions** and have issued tax invoices as per section 50 of the Act and where there is no mismatch of the transactions in Annexures 2A & 2B.

Unless the expression „dealer or class of dealers" in Section 9 (2) (g) is „read down" in the above manner, the entire provision would have to be held to be violative of Article 14 of the Constitution.

→Another condition of section 9(2)(g) of the Act is that the **selling dealer** has actually deposited or ought to **have deposited amount** of Tax and the expression **dealer** read down with the provisions **does not include Purchasing dealer**. There is no responsibility of the purchasing dealer to ascertain all the compliances related to the selling dealer.

Section 40A inserted by the DVAT to take care about the conditions, situations and provisions where selling dealer and purchasing dealer act in collusion with a view to defrauding the revenue.

→The courts holds that in the present case the purchasing dealer is being asked to do the impossible i.e to ensure that selling dealer has deposited amount of tax to the government or not and if not than not to enforce any transactions with such dealer.

Indeed *Section 9* ***(2) (g) of the DVAT Act places an onerous burden on a bonafide purchasing dealer***.

→In legal jurisprudence, the liability can be fastened on a person who either acts fraudulently or has been a party to the collusion or connivance with the offender. However, law nowhere envisages imposing any penalty either directly or vicariously where a person is not connected with any such event or an act. Law cannot envisage an almost impossible eventuality.

→On the contrary While **denial of ITC could be justified** where **the purchasing dealer** has **acted without due diligence**, i.e. by proceeding with the transaction without first ascertaining if the selling dealer is a registered dealer having a valid registration, denial of ITC to a purchasing dealer who has taken all the necessary precautions fails to distinguish such a diligent purchasing dealer from the one that has not acted bonafide.

Extracts of the situations of the above case are summarised as under. It is pertinent to note that the Supreme Court has dismissed SLP filed by the revenue challenging this decision and hence the ratio of this decision becomes that much more relevant.

- **Section 9(2)(g)** defines the dealer and class of dealer but **does not includes the purchasing dealer** who acted as **bonafide** and have issued tax invoices as per section 50 of the Act.

- According to another condition of the section 9(2) (g) of the Act that it is the **responsibility of selling dealer** to **deposit the amount of tax** with the

government. There is no responsibility of the purchasing dealer to ascertain all the compliances related to the selling dealer.

- **Purchasing dealer should not be asked to pay the primary liability of selling dealer** unless some fraudulent or connivance is proved between seller and purchaser.

- Only requirement for availing the ITC is to ensure that selling dealer is registered and all compliances are made with the provisions of DVAt Act. Thus if purchasing dealer ensured that he has complied all the requirements than he cannot be denied the ITC only because selling delaer fails to discharge obligations under the DVAT act.

- If subsequent to the puchases made by the purchasing dealer the registration of the selling dealer is cancelled, such cancellation cannot be given retrospective effect so as to refuse the ITC to the purchasing dealer.

- ITC also cannot be denied if there is any no mismatch in 2A & 2B.

Thus, **purchasing dealer (petitioner) has complied the conditions as stipulated in section 9 and therefore ITC cannot be denied merely because selling dealer had failed to fulfill the conditions of the Act.**

Now some limelights of the GST Act constitute some same provisions of the DVAT Act:

- As per section **16 of the CGST Act** every registered person shall subject to such conditions and restrictions as may be prescribed **be entitled to take credit of Input tax** charged on supply of goods or services which are used for the furtherance of the business.

- According to the section 16(2) of the CGST Act purchasing dealer called Registered person shall **not be entitled to take ITC** of any of supply of goods or services :
    a) **If** he is **not in possession of tax invoice** issued by the supplier (selling dealer) as may be prescribed.
    b) **If** he has **not received the goods or services** or both.
    c) **Tax** charged on supply has **not been paid to the government** either by cash or by utilization of electronic credit ledger by the selling dealer (supplier).
    d) Has **not furnished return** under section 39.

Now come to the provisions of DVAT Act these all conditions are primary conditions for availment of ITC as same as prescribed under the GST Act.

Is there any difference between section 9(2)(g) of DVAT Act and Section 16(2)(C) of the CGST Act???

1.Payment of amount of Tax to the Govt.

GST Act:

As per section 16(2) (C) of the CGST Act if tax charged on supply is actually required to pay the government for the availment of ITC. If it is not than recipient (Purchasing dealer) shall not be entitled to take credit of ITC. Primary responsibility of payment of amount of Tax Is of supplier.

If supplier fails to pay the amount of Tax to the government than revenue cannot place burden on the recipient by transferring liability to pay the amount of taxor by refusing availment of ITC and if it is do so than it is violation of Article 14 of the constitution.

DVAT Act:

Above provision is same as mentioned in DVAT Act under section 9(2)(g) is that ITC shall not be availed to the purchasing dealer If amount of tax is not paid to the government. But primary responsibility of the payment of tax is of selling dealer and not of purchasing dealer.

Section 9(2)(g) of the DVAT act denies to a bonafide purchaser the benefit of ITC only because of default of the selling dealer over whom such purchasing dealer has not control. This provision for purchasing dealer is harsh and therefore violative of Article 14 of the constitution.

Thus reason for non-allowance of ITC by revenue is same as mentioned in the DVAT and in GST and which is against the Article 14 of the constitution.

2. Right to access the confidential details of the seller:

GST Act:

According to section 158 of the CGST Act registered person here it is called as recipient has no right to view or access any details contained in any statement /returns/accounts/documents which are submitted as per the act by the supplier.

Denial of ITC could be justified if recipient has acted without due diligence but denial on the basis of above provision is not justified at all.

DVAT Act:

Purchasing dealer has verified TIN of the seller and also matched the transaction reported by the sseller in the annexure 2A and 2B but he cannot be expected to keep track of whether the selling dealer has deposited the amount of tax collected from purchasing dealer.

Purchasing dealer would have no access to the return filed by the selling dealer because those details are meant to be confidential.

Either GST Act or DVAT Act purchasing dealer or recipient has no right to access the details of selling dealer or supplier related to the returns. Therefore on the ground that purchasing dealer fails to check the details of the seller that he has not deposited amount of tax to the govt revenue cannot reject ITC of the recipient.

3. Transactions entered for the fraudulent purpose

GST Act:

Section 132 of the CGST Acts clearly states that if supply is made without issuance of proper tax invoice or Invoices issued without any supply and avail ITC or collects amount of tax but fails to deposit it or fraudulently avails ITC than revenue has right to reject ITC or put liability on the registered person to pay the liability to the Govt.

DVAT Act:

Section 40A of the DVAT Act deals with the provisions where fraudulent transactions done. If there is any arrangement or agreement has been entered into between two or more dealers to defeat the law or fraudulently avail the ITC then commissioner has right to increase the liability of tax payment which is payable by the dealer.

Thus As per section 132 of the CGST Act or section 40A of the DVAT Act the liability can be fastened on a person who either acts fraudulently or has been a party to the collusion or connivance with the offender.

GST Act constitutes same provisions as contained in the DVAT Act. Thus this judgment may not limited only to the DVAT Act but may also be considered as applicable to the GST Act.

Reopening of Assessment u/s. 147 to Rectify 154 Mistakes

CA. Chunauti H. Dholakia
B.Com.,FCA, DISA(ICAI)

Introduction:

The general principle is that once the assessment is completed, it becomes final. However, in case of mistake in the order of the Assessing Officer, three remedies are possible under the Act namely (1) Rectification u/s. 154 (2) Revision u/s. 263 and (3) Reassessment u/s. 147. It is exercisable by different authorities within different period of limitation.

Section 147 empowers the assessing officer to reopen the assessment subject to following conditions:

(1) The assessing officer has to record reason for taking action under section 147;

(2) Recorded reason must have a live link with the formation of belief. Meaning thereby, the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year and those reasons cannot be supplemented or improved upon subsequently;

(3) Reason must be based on relevant material on record at the time of recording reason. It is not open for AO to relook at the same material only because he was subsequently of the view that conclusion arrived at earlier was erroneous; and

(4) No action can be initiated under section 147 after expiry of 4 years from the end of relevant assessment year unless the income chargeable to tax has escaped assessment by reason for the failure on the part of the taxpayer to disclose fully and truly all material facts for the assessment.

Section 154 empowers the income tax authorities including AO to amend any order passed by them to rectify any mistake apparent from the record within four years from the end of the financial year in which the order sought to be amended was passed. Hence when mistakes are apparent from the record, AO should invoke section 154 and when mistakes are not apparent from the record, AO can reopen the assessment u/s.147 subject to satisfaction of preconditions. Hence where the powers to rectify order of assessment under section 154 are adequate to meet a mistake or error in the order of assessment, AO must take recourse to that power as opposed to wider power to reopen the assessment. Moreover, the AO cannot initiate

both proceedings at the same time. Hence when proceedings under section 154 are pending on the same issue and not concluded, parallel proceedings under section 147 initiated by the AO are invalid ab initio, especially when except the return and its enclosures, no other material or information are in the possession of the assessing Officer. There are some judicial rulings supporting this view.

Rectification of Computational errors by invoking section 147:

In case of Bhawana Adwani vs. ITO Jaipur, AO received information that the stamp authority has enhanced the value of sale of land. Accordingly AO issued order to reopen the assessment u/s. 147. Assessee submitted that section 155(15) of the Act specifically provides that where the value adopted by stamp duty authority is subsequently revised in an appeal or revision or reference, the AO is empowered to take such value by amending order u/s. 154. Thus when there is specific provision to deal with a particular situation, then the action taken by the AO to reopen the assessment is bad in law. ITAT Jaipur held that computational error cannot be attributed to any act or omission on the part of the assessee when assessee has clearly disclosed it in statement of income. The provisions of statute lay down overlapping remedies which are available to the revenue but the exercise of these remedies must be commensurate with the purpose that sought to be achieved with the legislature. When a statute confers an idea of discretion, the exercise of discretion is structured by the requirement that the discretionary powers must be exercised reasonably. When one or more remedies are available with the taxing authority, the authority must adopt the remedy which is a matter of least prejudice to the assessee, Hence when the revenue has efficacious remedy open to it in the form of rectification under section 154 for correcting the computational error, the consequent recourse to the provisions of section 147 are not warranted and it is set asiide.

Similarly, in the case of Hndustan Unilever Limited vs. DCIT, Bombay High Court held that in the event that the AO was to exercise the power of rectification u/s. 154, the order would have to be corrected to the extent of computational error. Exercising the power of reopening the assessment on that ground of a simple computational error is a matter of serious prejudice to the assessee since in such an event, entire assessment would be liable to be reopened including all other issues which come to the notice of AO in the course of proceedings u/s. 147.The assessee cannot be penalized for the fault of AO. A simple computational error can be resolved by rectifying an order of assessment u/s. 154. It would be entirely arbitrary for the AO to reopen the entire assessment u/s. 147. Hence in this case proceedings u/s.147 are set aside.

Simultaneous invoking of section 147 and 154:

In the case of Mahinder Freight Carriers Vs. DCIT, 129 ITD 278 (2011) there was no regular assessment u/s. 143(3). AO issued notice u/s. 154, which was not responded by the assessee. Hence the AO initiated proceedings u/s.147 by issuing notice u/s.148 for same reason. But except the return of income and its enclosures no other extra material or information was in possession of the AO. Assessee challenged the notice before ITAT. AO argued that if he has initiated proceedings u/s.154, it is not necessary that the issue should be concluded in the same proceedings and then only he can resort to proceedings u/s.147. Moreover, the AO has full power to opt for alternative proceeding to bring the tax escaped income. But ITAT Mumbai held that merely because the return filed by the assessee was accepted u/s.143(1) and the AO failed to take action u/s.143(2) within the specified time limit, that will not take away AO's power to take action u/s.147, if there is escapement of income. But at the same time mandate of s.147 must be fulfilled. If the AO initiated proceeding u/s.154 and said proceeding has not reached the finality, either by dropping the same or passing any order in the said proceeding and at the same time the AO initiated proceedings u/s.147, mandate of s.147 is not fulfilled, as AO himself is not sure whether the issue in controversy can be subject matter of s.154 or the subject matter of s.147. As per law, there is no bar to invoke s.147, but the AO has to demonstrate why he is required to do so..Where noting has been demonstrated by the AO, proceedings u/s.147 are not justified and void ab initio Same decision is followed in case of CIT vs. Jandu Construction Co.(2018) 61 ITR 235 (Chand).

However, there are some contrary judicial decisions also, which directs that section 154 and section 147 both are self contained provisions wherein conditions for invoking powers, procedure to be followed and time limit of passing the order is mentioned. The fact that AO initiated proceedings u/s.154 does not mean that he should stick to the same only and proceed to issue order as proposed. It cannot be said as general principle that if notice u/s.154 is issued, then notice u/s.147/148 is barred or prohibited. . .

RES JUDICATA, CONSISTENCY AND TAX MATTERS

CA. Jekil V.Shah
B.Com.,ACA

The world of law is fundamentally known for a lot many concepts. Today, trying to throw some light on two of them, namely Res Judicata and Consistency and how do they impact the tax matters.

What is Res Judicata ?

Res judicata is a Latin term meaning "a thing decided". It is a common law doctrine meant to prevent re-litigation of cases between the same parties regarding the same issues and preserve the binding nature of the court's decision. Once a final judgment has been reached in a lawsuit, subsequent judges who are presented with a suit that is identical to or substantially the same as the earlier one will apply the doctrine of res judicata to uphold the effect of the first judgment. It is pertinent to note that res judicata does not prevent appeals to a higher court. This concept has been kept in law to prevent injustice to the parties of a case supposedly finished, and also to avoid unnecessary waste of resources in the court system.

What is consistency?

Consistency means that the decisions which are being taken should generally be the same as taken earlier, unless there is a change in facts or change in law.

Res Judicata – Consistency – Tax Matters:

There are various decisions taken by legal authorities that "*Res Judicata does not apply in matters pertaining to tax* for different assessment years, because the cause of assessment for each assessment year is distinct." So, to that extent, the concept of Res Judicata does not apply to taxation matters in regards to opening the assessment for the new year afresh, and so the Tax Authorities are not barred from opening the assessment, merely on the grounds of res judicata.

However, If during earlier years, in the assessment, if the facts of the matter were same and there has been no change in law, the assessing officer may not take a different view, than that which was taken by him in earlier years, merely by stating that, "Res Judicata is not applicable to Income Tax."

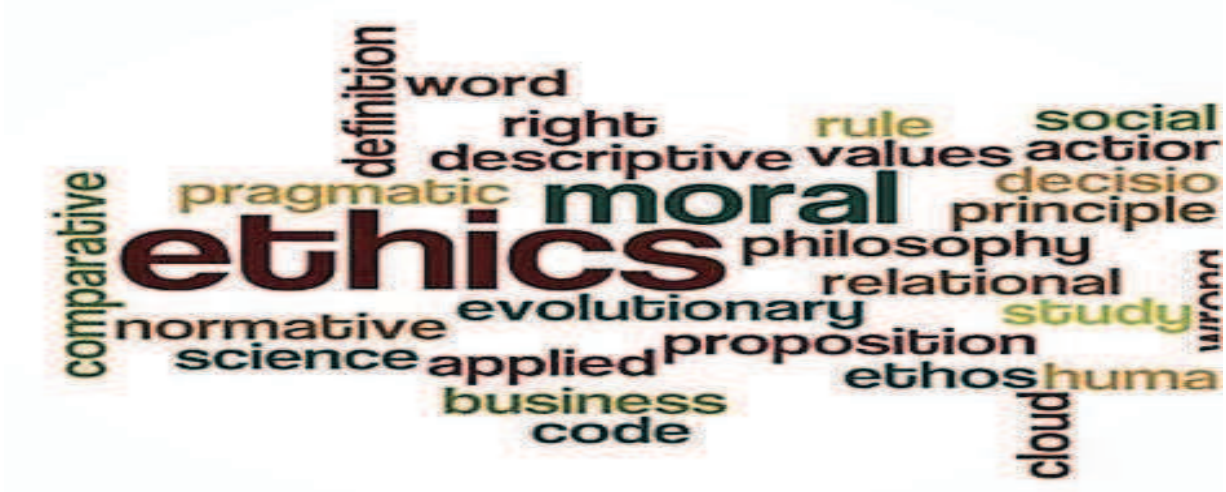
The Bombay High Court in the case of *Principal Commissioner of Income Tax v/s M/S Quest Investment Advisors Pvt Ltd* held that unless the revenue can point out any distinguishing features in the facts of the case or law, which would warrant a different view in the assessment year in contention, from the earlier assessment years, the matter of consistency needs to be applied, and disallowances cannot be made, that have not been made earlier.

The Apex Court in the case of *Bharatiya Sanchar Nigam Ltd v/s Union of India* observed that, "The reason why courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent assessment year is not because of the principle of res judicata, but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view."

Fundamentally, it hereby so appears that, "Res Judicata doesn't have applicability in Income Tax in regards to opening of the assessment of a subject assessment year. However, the principle of consistency and the theory of precedent can not be ignored by the tax authorities, by citing Res Judicata not being applicable to Income Tax."

MISCOUNDUCT UNDER THE CHARTERED ACCOUNTANTS ACT

CA Darshana Varu
B.Com,ACA



ANY ACT OF CA, NOT BEING IN RELATION TO PROFESSION BUT WHICH BRINGS DISREPUTE TO THEPROFESSION OR THE INSTITUTE AS A RESULT OF HIS ACTION, CAN BE HELD AS GUILTY OF OTHER MISCONDUCT

The Chartered Accountants Act,1949, an Act to make provision for the regulation of profession of Chartered Accountants and for that purpose it established the Institute of Chartered Accountants.

As per the act, Section 2, Sub-Section (1)(b) defines **a Chartered Accountant**means,*a person who is a member of the Institute*".

Further, Sub-Section (2) of Section 2 provides that **a member in practice** when,individually or in partnership with chartered accountants, he, in consideration of the remuneration received or to be received, does any of the acts mentioned in the four clauses of the sub-Section. The four clauses read: -

"(i) engages himself in the practice of accountancy; or

(ii) offers to perform or performs services involvingthe auditingor verification of financial transactions,books, accounts orrecords, or the preparation,verification or certification of financialaccounting andrelated statements or holds himself out to the publicasan accountant; or

(iii) renders professional services or assistance in orabout matters of principle or detail relating toaccounting procedure or the recording, presentationor certification of financial facts or data; or

(iv) renders such other services as, in the opinion ofthe Council, are or may be rendered by a charteredaccountant and the words "to be in practice" withtheir grammatical variations and cognate expressionsshall be construed accordingly."

While section 30 of the Act confers power on the Central Government to make regulations. Accordingly, Regulation 78 provides, "*Without prejudice to the discretion vested in theCouncil in this behalf, a Chartered Accountant may actas liquidator, trustee, executor, administrator,arbitrator, receiver, adviser, or as representative forcosting financial and taxation matter or may take up anappointment that may be made by Central or StateGovernments and Courts of law or any Legal Authority,or may act as Secretary in his professional capacity notbeing an employment on a salary-cum-full time basis."*

After discussing what is right or what are the function the memberin practice generally discharges, let's discusswhat can be conductedas professional misconduct or other misconduct.

Professional or other misconduct defined as per Section 22 of the Act

For the purposes of this Act, the expression "professional or other misconduct" shall be deemed to include any act or omission provided in any of the Schedules, but nothing in this section shall be construed to limit or abridge in any way the power conferred or duty cast on the Director (Discipline) under sub-section (1) of section 21 to inquire into the conduct of any member of the Institute under any other circumstances.

Further, as per section 21(3) of the act,

"(3) Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, he shall place the matter before the Board of Discipline and where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, he shall place the matter before the Disciplinary Committee."

Now the question is why we are discussing about all these section?

In a recent judgement of **Council of the Institute ofChartered Accountants of India vs.Gurvinder Singh (DelhiHigh Court)**, the ApexCourt ruled that disciplinaryaction can be takenagainst CAs if their conduct,professional or otherwise, brings 'disrepute' to theirprofession.

DETAILS OF THE CASE IS AS UNDER -

Mr. Mohit Gupta (complainant) claimed that Mr. Gurvinder Singh (respondent),Chartered Accountant by profession, sold 100 shares of AbanLyodChiles Offshore Ltd. to him in November 1999 but he lodged thetransfer deed for transfer of the shares on November 04, 2004.

In theinterregnum, respondent continued to receive dividends and in July2004obtained duplicate share certificates in his name by misrepresentingthat the original share certificates were lost.

The complainant made good his complaint before the Disciplinary Committee of the Institute of Chartered Accountants.

The view taken by the Disciplinary Committee found that the conduct of the Respondent Chartered Accountant was derogatory in nature and highly unbecoming and held him guilty of 'Other Misconduct' under Section 22 read with Section 21 of the Chartered Accountants Act, 1949.

The Council of the Institute of Chartered Accountants of India, therefore, made its recommendation to the High Court to remove the aforesaid Chartered Accountant for a period of six months from the rolls.

While the Delhi High Court in the instant case held that the respondent was acting as an individual in hisdealings with the complainant which were purely commercial. Whileselling the shares held by him the respondent was not acting as aChartered Accountant. He was not discharging any function in relation tohis practice as a Chartered Accountant.

Thus, no penalty is imposed upon respondent by High Court by taking reference of above cited section.

Aggrieved by the decision, the **COUNCIL OF THE ICAI** has filed appeal in **SUPREME COURT.**

The Court by taking reference of section 21 (3) as discussed above and Schedule-I Part-IV which reads as under;

"*Other Misconduct in Relation to Members of the Institute* *Generally*

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

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

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

Held that the Chartered Accountant can be held guilty of a practice which was not in the Chartered Accountant's professional capacity but whose act brings disrepute to the profession whether or not related to his professional work.

Accordingly, the impugned judgment of High Court is incorrect and must, therefore, be set aside and remand the matter to the High Court to be decided afresh leaving all contentions open to both parties.

To Conclude,A Chartered Accountant can be held guilty of professional misconduct even whenhe is acting as an individual in commercialdealings and is not acting as a CA nor discharging any function in relationto his practice as a Chartered Accountant. Under the CA Act, anyaction which brings disrepute to the profession orthe Institute ismisconduct whether or not related to professional work.

It will be relevant to refer to the opinion expressed by a former office bearer of the ICAI;

"This Judgement now settles and vindicates ICAI's position. The example that we normally use is if a CA drinks and drives or creates a scene in public space that can bring disrepute to the profession, action should be taken against him."

Now Chartered accountants (CAs) might face disciplinary action for 'lapses' in behavior even outside their field of work.