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KARNATAKA STATE CHARTERED ACCOUNTANTS ASSOCIATION ®

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31st KSCAA Annual Conference 2019

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15th & 16th March 2019
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From the President

Dear Professional friends,

It is never too late to bring in the change that you always want to see around you. Let this New Year be the one that will see you being at the forefront of introducing new ideas and new concepts to make the world a better and safer place. I wish you all Happy New Year 2019!!

KSCAA celebrated its 63 glorious years of existence. It had its humble beginning on 7th December 1957. As a conscious effort of taking the Association across Karnataka, a maiden attempt was made to organize Sports and Talent meet for our members and their families across the State in November 2018, we were overwhelmed by the outpour of participants and good responses. Members participated in various outdoor and indoor events, showcased their hidden talents, and exhibited excellent sportsmanship and camaraderie. We realized, there is no dearth of talent among our members, but there is real dearth of platform to showcase such talents. This kindled a spirit in EC to conceive an event which creates a platform for our members and their families. After lot of brainstorm, why not celebrate foundation day of KSCAA, which lead to birth of **'KSCAA Habba'**. Habba by very nature is an event of celebration, belongingness and companionship. Assimilating this theme forward, we wish to enhance belongingness and companionship among our own members towards this glorious association. Over couple of years, tremendous changes in regulatory environment may it be Demonetization, GST and so on have kept our members too busy and stressed out, KSCAA Habba definitely acted as a stress buster. We hope to continue the trend to future as well.

As you all are aware, the results of elections to the 24^{th} Central Council and 23^{rd} Regional Council of ICAI have already been declared, I congratulate all the elected members and sincerely hope that they will take our dear profession to greater heights. Winning is earning, but losing is learning. Don't let a win to get to your head or a loss to your heart. At the moment, I take this opportunity to extend my best wishes to all of them.

News Roundup

The GST Council in its 31st meeting held on 22nd December 2018 inter alia has decided to extend the due date of annual return in GSTR 9 and GST Audit and Reconciliation Statement in GSTR 9C up to 30th June 2019 with an option to pay the additional liability and tax. HSN-wise reporting has been relaxed for the inward supply to 10% value or more instead of complete details, while filling these forms. It has also been decided to extend the time limit for claiming the ITC for the FY 2017-18 from 20th October 2018 to 31st March 2019. Late fee has been waived for filing forms GSTR-1, 3B and 4 for the period from July 2017 to September 2018 after 22nd December 2018 but not later than 31st March 2019. Payment through single-tax ledger, rationalisation of interest calculation, and single authority for refund disbursement are key changes that have been approved in this meeting.

The GST Council during its 32nd meeting on 10^{th} January 2019, doubled the threshold exemption limit to Rs.40 Lakhs and raised the threshold limit for availing the composition scheme to Rs.1.50 Crores. The council also increased the threshold exemption limit to Rs.20 lakh for North Eastern states. The compliance burden on composition tax payers are eased further to allow them pay taxes quarterly and file returns annually. Service providers with a turnover up to Rs.50 Lakhs will now be entitled to avail composition scheme with rate of tax pegged at 6%. The move aims to give significant relief to micro, small and medium enterprises. The council also allowed Kerala Government to levy 1% calamity cess on intra-state sales for a period of up to two years. A seven-member group of ministers is formed to comprehensively study on including real estate and lottery under the Goods and Services Tax.

As you are aware that ICAI has implemented an innovative concept **'UDIN'** – *Unique Document Identification Number* to secure the certificates and documents attested or certified by practicing Chartered Accountants and to trace the forged or wrong documents prepared by any third person misrepresenting himself as Chartered Accountant. The Council of ICAI has decided to mandate UDIN with effect from 1st February 2019 in a phased manner as against the earlier announced date of 1st January 2019. I request our members to familiarize themselves and get acquainted with this new system soon.

The Committee of Experts formed by the Ministry of Corporate Affairs has suggested the Government to allow the audit firms to practice law and to incorporate necessary amendments to the Advocates Act. According the report submitted by COE, the major hurdle in the growth of Indian audit firms is lack of development of MDPs in India. COE observed, quality auditing requires specialists in many areas like law, valuation, IT systems, actuarial etc., The need for specialization increases with the complexity of the business model of the clients. The Committee opined that fundamental legal reforms would be necessary to facilitate development of MDPs in India and MDPs would be beneficial for Indian Corporates.

Representations

On the representations front, we are pleased to inform you all that we have joined hands with a host of premier association IMC Chamber of Commerce & Industry s, BCAS, CAAA, CAAS and LCAS to file a representation on the issues in Income tax relating prosecution launch by department in the backdrop of delay in TDS payments etc. We have elaborated on how it is unfriendly and contrary to the intention of the Government to create a tax payer friendly atmosphere and minimum governance agenda. You can find the content in full elsewhere in this newsletter. We appeal our members to present us with worthy matters and issues for representation going forward too.

Upcoming Events and programs

We are organizing workshop on Issues on Assessment, Demand and Recovery under GST on Thursday 24^{th} January 2019 at KLE Society's Nijalingappa College Rajajinagar, Bengaluru. I earnestly request members to actively participate in our programs and make use of it.

For registrations, please visit www.kscaa.com.

Sincerely,

CA. Raghavendra Shetty
President

Together We Serve
Together We Grow

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CONTENTS

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Angel Tax - Clarification by CBDT

CA. S. Krishnaswamy

- Only 1% of recognised startups have received angel tax exemption.
- Assessing officers often reject the startups' method of valuation.
- Why all startups not exempted from angel tax, asks fraternity.

Angel tax a topic hotly debated today is a tax on premium collected by unlisted companies on sale of their shares to investors in excess of fair market value. An unlisted company does not have the benefit of its share value determined by market as in the case of listed companies. In the capital market listed shares are valued/traded by investors on the basis of company's potentials i.e., future earnings, rather than only on past earnings basis. There are many listed companies which have created huge wealth but have no profits and enjoy high market value.

Sec.56 (2) (viib) of the Income tax Act, 1961 states 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, then such excess is to be treated as income from other sources of such receiver company and accordingly such company has to pay tax on such excess amount @ 30% plus cess as applicable. The word '*receives*' has been a matter of interpretation.

The unlisted company has two options in respect of fair market value. It can demonstrate through a method chosen by it that the premium is not in excess of fair market value. The method available are mainly Discount Cash Flow method wherein a given time horizon the cash flows are determined and projected and the current value is determined. The projections are not accepted by the Department on the ground that the projections are imaginary, given by the interested company in justification of premium and there is no scientific evidence to defend it. Startups usually come up with an invention or innovation. It is extremely difficult to determine the time span to determine when the invention or innovation gets productised and yields profit. The Rule prescribed by the Department has the following base for calculation of market value.

1. Profit multiple
2. Net Asset Value principle
3. PE Ratio

Startups do not generate profit in initial years in most of the cases. There is no accretion to asset value because the expenditure of initial years are not capitalised as an intangible asset and in absence of profit the PE can only be negative and hence the Rule does not capture the startups eco system realities.

Therefore justly many startups are agitated against the levy of angel tax. All startups do not necessarily get DIPP recognition for one reason or the other. One of the cordial principles of valuation is that *'the buyer knows the value best'* and why he is paying higher premium for making the purchase. The buyer could be a serial investor with a wide portfolio or it could be another startup which buyout competition or synergises it's own product.

Young companies see value where others don't or able to extract value where others can't and hence the price they pay seems more than fair market value.

A buyer may also pay higher prices to gain control, for example when Walmart invested in Flipkart buying its founder's share valuing Flipkart at a phenomenal price of $16 bn for 77% shares.

The $16 bn Walmart is putting up for its majority stake in Flipkart makes it the company's largest acquisition ever. The acquisition spend is much more than the company has spent over the previous two years on all of its e-commerce acquisitions combined.

The deal will pave the way for Walmart in many ways like take on competition and become a dominant e-commerce player.

The below table shows the valuation of Flipkart over the years-see the variations

Month	Funding	Investor	Valuation
Jan-2009	$140k	Angel funding from Shekhar Kirani and Junglee founder Ashish Gupta	Not known
Oct-2009	$1mn	Accel Partners	Not known
Jan-2010	$10mn	Tiger Global	Less than $50mn
Mar-2011	$20mn	Tiger Global	Less than $1bn
Aug-2012	$255mn	Iconiq, Accel Partners, Tiger Global, Naspers	$1.6bn
Oct-2013	$160mn	Tiger Global, Dragoneer, Vulcan Capital, Morgan Stanley, Sofina	$1.6bn
May-2014	$210mn	Iconiq, Naspers, Tiger Global, DST	$2.6bn
July-2014	$1bn	Tiger Global, Naspers, Accel Partners, Morgan Stanley, DST, Sofina, Iconiq, GIC	$7bn
Dec-2014	$700mn	Tiger Global, Qatar Investment Authority	$15.2bn
July-2015	$700mn	Tiger Global, Qatar Investment Authority	$15.2bn
April-2017	$1.4mn	Tencent, Microsoft, eBay	$11.6bn
Aug-2017	$2.4bn	Softbank Group	$11.6bn
May-2018	**$16bn**	**Walmart**	**$20.8bn**

One more example is, Facebook which fearing that Whatsup may intrude on its turf, bought out the five year old for a high price of $20 bn.

These illustrations will show that the determination of fair market value should factor the buyer's view of value.

In valuation there is another factor, particularly in the case of e-commerce companies like Flipkart called GMV (Gross Merchandise Value). In valuing Flipkart what was kept in mind was its' GMV. The GMV value of a company like Amazon or Flipkart or Snapdeal does not figure out in Balance Sheet.

- **Case laws on Angel Tax:**

a) In the case of ***DCIT Cir-8(1), Kolkata v. M/s. Microfirm Capital Pvt. Ltd vide ITA No.513/KOL/2017,*** ITAT Kolkata held that that all types of shares are covered by this Section 56(2)(viib). The argument that the preference shares are quasi-debt and that it was not the intention of the legislature to bring such instruments within the ambit of this Section, is not acceptable.

b) It was held by ITAT Mumbai in the case of ***ACIT v. M/s. Golden Line Studio Pvt. Ltd 2018 (10) TMI 1393*** that equity shareholders are only real owners of the company and not preference shareholders. Hence, while computing 'book value' of the shares equity shares only should be taken into consideration and not preference shares.

c) In case of ***DCIT vs. M/s. Ozoneland Agro Pvt.Ltd***, ITAT Mumbai in its order pronounced on May 2nd, 2018 held that Section 56 allows the assessees to adopt one of the methods of their choice. It is beyond the jurisdiction of the AO to insist upon a particular system, especially when the Act allows to choose one of the two methods. Until and unless the legislature amends the provision of the Act and prescribes only one method for valuation of the shares, the assessees are free to adopt any one of the methods.

d) It was held by the Hon'ble High Court of Kerala in case of ***Sunrise Academy of Medical 56 Specialities (India) Private Limited vs. Income Tax Officer*** in its order pronounced on July 18th, 2018 that Section 56 falls under the Chapter "Computation of Income". Section 68 under "Aggregation of Income and Set Off or Carry Forward of Loss". The provisions of 56(2) (viib) of the Act, cannot be controlled by the provisions of Section 68 of the Act.

e) It was held by Hon'ble ITAT of Chennai in case of ***Ascendas (India) Private Ltd. vs DCIT, ITA No. 1736/Mds/2011*** that Rule 11UA prescribes a book value method for determination of fair market value of a property other than immovable property for the purpose of sec.56 of the Act and cannot be taken as a basis for valuation in a transfer pricing matter. Though DCF methodology is a preferred methodology for determination of arm's length price for sale of shares, yet net asset value as per Rule 11UA is only intended for application of section 56 and never intended for arriving at a fair market value for comparing an international transaction.

- **Recent Development:**

o CBDT has directed its officials to desist from taking any coercive action against angel tax notices being slapped on startups or recovery of demands of completed assessments from these firms till a policy decision is taken. This has given some instant relief to the startups. However, the core issue of selecting valuation method still unresolved and this has to be addressed without giving further absence as it is a *need of the hour* to many startups.

- On 31st of December 2018, CBDT has issued a circular vide No.10/2018 stating that Sec.56 (2) (viia) is applicable in cases where a company in which public are not substantially interested (Specified company) or firm receives shares of the specified company through transfer for no or inadequate consideration and provisions of the said Section is not applicable to fresh issuance of shares.

  Post issue of this circular, large debates started to erupt and some of political parties welcomed the move and started to absolve themselves from tax adjudications.

- With these developments, CBDT through its Circular No.02/2019 dated 04th January 2019, has withdrawn the earlier Circular No.10/2018 stating that the matter relating to interpretation of the term "*receives*" used in Sec.56 (2) (viia) is subjudice in many forms, needs a fresh examination of the matter and a comprehensive circular on the subject shall be issued in due course.

  This means, the Income Tax Department will again start challenging valuations in cases where there was a fresh issuance of shares and these recent moves of CBDT created confusion for several companies and firms.

- On January 9th, 2019 The Nasscom, TiE Global, Indian Private Equity & Venture Capital Association, and Indian Angel Network made a joint appeal to the Government to provide relief for startups on angel tax provisions.

- **Sec.56(2)(viia), Sec.56(2)(viib) and Sec.56(2)(x)(c):**

  Sec.56 (2)(viia) and Sec.56(2)(viib) postulates two difference situations-

a. Sec.56 (2)(viia) whereby shares of unlisted company are **received** without consideration and the aggregate FMV of such shares received during a previous year exceeds Rs.50,000 or alternatively, the shares are received for a consideration which is less than the FMV and the aggregate of differences (between FMV and consideration) of all such shares received during a previous year exceeds Rs. 50,000, then such difference is taxable as income under the head 'income from other sources.

   This section is applicable on or after 01-06-2010 but before 01-04-2017.

b. Sec.56 (2)(viib) applies to a closely held company (i.e. a company in which the public are NOT substantially interested) receiving any consideration for **issue of shares** from any resident for which consideration for the issue of shares exceeds the face value of the shares i.e., shares are to be issued at a premium and the aggregate consideration received for issue of shares exceeds the fair market value of the shares. Such excess over and above the Fair Market Value shall be taxable in the hands of the Company as income under the head 'Income from other sources'

c. Sec.56(2)(x)(c) applicable where any person receives, any property other than immovable property on or after 01-04-2017:

i. Without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property shall be chargeable to tax as 'income from other sources'.

ii. For a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration shall be chargeable to tax as 'income from other sources'.

   To sumup, Sec.56 (2) (viia) applies in the case of receipt of shares by a firm or unlisted company where consideration is zero or below FMV. Whereas Sec.56 (2)(viib) applies to unlisted companies in which consideration for issue of shares are over and above the FMV of shares. Sec.56 (2) (x) (c) is application from 01-04-2017 for receipt of money and properties other than immoveable properties (which includes shares and securities) of which consideration is zero or below FMV.

- **Conclusion:**

  The DIPP asserted that the Government is committed to protect bonafide investments into startups and it has raised the issues with the Department of Revenue so that there is no harassment of angel investors or startups. On the other hand, intention of the Government to tighten the fishing hands by way of taxing through Sec.56, straightaway cannot be pushed out. Startups are also part of economic development and as earlier stated startups operate in a highly uncertain environment, many companies are not always able to perform as per their financial projection and face financial crunch, on top of it taxing the company in many ways drills down the startup. However, some companies exceed the projection by a long mile if they are doing well. On balance the industry wants this provisions to go.

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Opportunity extended for ITC claim again

CA Madhukar N Hiregange & CA Mahadev R

The due date for claim of ITC of GST paid on procurement of goods and services for FY 2017-18 had ended on the date of filing GST returns for September 2018 which was 25th October 2018. However, there were many assessees who could not claim the complete ITC due to reasons such as lack of awareness of law, suppliers ignorance, glitches in the GSTN and non-availability of invoices or debit notes. There were also instances wherein the ITC was not claimed due to non-appearance of tax amounts in GSTR-2A on account of non-filing of GSTR-1 by the registered vendors (though this was not the condition). The revenue had also in between raised a few 1000s notices for the difference which caused fear of dispute in tax compliant persons. The tax payers also faced lot of technical issues in GST and there was a request to extend the due date for claim of ITC for the FY 2017-18 at least till March end 2019. The order no.2/2018 was issued in this regard subject to conditions. In this article, we have put across a few points which could be useful for the tax payers in claim of missed ITC.

Order no.2/2018 dated 31st December 2018

In terms of powers under Section 172 of CGST Act 2017, order no.2/2018 dated 31.12.2018 was issued to add a proviso to Section 16 (4) of CGST Act 2017 to facilitate the ITC claim for missed out invoices or debit notes. The benefit has been provided subject to following conditions:

a) ITC should be availed by the due date of furnishing of the GST return (GSTR-3B) for the month of March, 2019. The normal due date would be 20th April 2019 unless extended.

b) ITC would be eligible in respect of invoices or debit notes for supply of goods or services or both made during FY 2017-18.

c) The details of such invoices or debit notes should have been uploaded by the supplier in their GSTR-1 by March, 2019. In other words, the assessee should ensure that he has the details of the ITC in his GSTR-2A return to claim the ITC. To address this, the due date for rectifying error or omissions in GSTR-1 for FY 2017-18 has also been extended till March 2019.

Details to be reflected in GSTR-2A

The facility of ITC till March 2019 is subject to condition that the details get reflected in the GSTR-2A which can happen only when the suppliers upload the details in their GSTR-1 outward supply statement. However, there could be bill of entries as discussed in previous paras and also reverse charge payments for which self-invoice needs to be issued. Both these details would not get reflected in GSTR-2A. The question arises as to eligibility of such credits, if any, missed out by assessees. The following discussion could be helpful in understanding the eligibility and decision making for claiming credits:

Bill of entries - If one were to observe the provisions of Section 16(4), the restriction to claim the ITC by return filing due date of September is only in respect of any invoice or debit note for supply of goods or services or both. For the purpose of GST, 'invoice' means the tax invoice referred to in Section 31 and 'debit note' means a document issued by registered person under Section 34(3) of CGST Act 2017.

In terms of Rule 36 of CGST Rules 2017, bill of entry or any similar document prescribed under Customs Act 1962 is also a document for on the basis of which ITC could be claimed by the registered person. As Section 16 (4) does not restrict the time limit for bill of entries, it could be contended that the missed-out ITC, if any, could be claimed in respect of bill of entries irrespective of time limit in case of imports. This is equally applicable for bill of entries filed for procurements from SEZ units as well. It appears that with the same intention, even the order no.2/2018 does not discuss anything about bill of entries. Therefore, the registered persons could identify the missed credits on imports and claim it at the earliest even though the same is not reflected in GSTR-2A as such details would not be uploaded by registered suppliers.

RCM credits - In our previous article we had discussed about possible arguments to claim ITC on tax paid under RCM after September end. Though the new order no.2/2018 does not specify anything about such cases, the credits eligibility could be considered based on the following arguments:

I. The provision restricts the credit in respect of invoice or debit note for supply of goods or services. RCM is levied on receipt of goods or services and therefore, Section 16(4) is not applicable.

II. Restriction is only in respect of invoices which are dated in previous financial year and linked to financial year and not to supply made in financial year.

However, there could be counter arguments also as these payments would be still made in respect of previous financial year. Decision should be made based on risk appetite of assessee considering the amounts involved.

Action points for assessee

Now as the due date is extended, the tax payers could take up following actions to ensure that all eligible credits are duly identified and claimed by due date of filing return for March 2019:

(i) Identify the invoices in respect of entries found in GSTR-2A but credit not claimed.

(ii) Out of above, identify the eligible credits and claim it in the GSTR-3B returns before filing return for March 2019. This would become credit of FY 2018-19. Income tax implications, if any, to be considered as there are chances that expenses could have accounted including taxes.

(iii) Identify the expenses which are with GST but details not reflected in GSTR-2A. In such cases, instruct / request the vendors to provide the details in GSTR-1 which could be missed out or wrongly entered as B2C transaction.

(iv) There are also possibilities that debit note details not disclosed in GSTR-1 by the vendors. Even those cases should be brought to the notice of vendors for entry in GSTR-1 to claim credits.

(v) Wherever the details are not disclosed by the vendors, the option of withholding the GST amounts could be considered.

(vi) Identify credits reversed after October 2018 due to time limit specified and explore the option to re-claim such credits subject to eligibility.

Conclusion

The government has provided a great opportunity to tax payers to claim the missed out credits. It is prudent for them to identify the missed credits or knowingly left out due to wrong understanding of law/ fear of dispute and claim them before filing returns for March 2019. Professionals could play vital role in assisting the assessees at this stage as there is ample time left for GST annual return and GST audit certification as well.

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Inspection, Search, and Seizure under GST

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The Central and State GST Acts confer wide-ranging powers on the officers of the Central and State Governments to conduct inspections, searches, and seizures. These powers are crucial for the purpose of ensuring compliance with the provisions of the Act, and needless to state, the powers are not limitless, but are subject to various checks and balances. This article analyses the relevant statutory provisions and some case law on the distinction between inspections, searches, and seizures.

Section 67(1)(a) of the GST Acts states that where a proper officer, not below the rank of a Joint Commissioner, has reasons to believe that a taxable person has: (a) suppressed any transaction or stock of goods held by him; or (b) has claimed input tax credit in excess of his entitlement; or (c) has indulged in contravention of any of the provisions of the Act or Rules to evade tax under this Act, he may authorize in writing an officer to inspect any places of business of the taxable person.

Similarly, Section 67(1)(b) empowers a proper officer to authorize in writing any officer to inspect a place of business of a person engaged in transporting goods or the owner or operator of a warehouse/godown, in cases where he has reason to believe that such person is: (a) keeping goods which have escaped payment of tax; or (b) has kept his accounts or goods in such a manner as is likely to cause evasion of tax. It can, therefore, be seen that an inspection can be authorized only in writing and in cases where an officer not below the rank of a Joint Commissioner has reasons to believe that a taxable person/transporter of goods/owner or operator of a godown/warehouse is indulging in one of more of the activities mentioned under the provision.

Section 67(2) states that where a proper officer, not below the rank of a Joint Commissioner, either pursuant to an inspection or otherwise, has reasons to believe that any goods liable to confiscation, or any documents, books, or things, which in his opinion would be useful or relevant to any proceedings under the Act, are secreted in any place, he may authorize in writing any officer to search and seize such goods, documents, books, or things.

The conditions to be satisfied to authorize a search and seizure are, therefore, different from those required for authorization of an inspection. The first circumstance in which a search and seizure can be authorized is if the proper officer has reasons to believe that any goods that are liable to be confiscated are secreted in a place. Section 130 of the Act sets out the circumstances in which goods are liable to be confiscated. The said provision states that if any person: (a) supplies or receives any goods in contravention of any of the provisions of the Act or Rules, with the intent to evade payment of tax; or (b) does not account for any goods on which he is liable to pay tax; or (c) supplies any goods without applying for a registration; (d) contravenes any provisions of the Act or Rules with the intention of evading payment of tax; or (d) uses any conveyance for carrying goods in contravention of the provisions of the Act or Rules, then such goods or conveyance shall be liable to confiscation. Therefore, if any goods that satisfy the conditions set in Section 30 are believed to be secreted in any place, the proper officer can authorize in writing a search or seizure of such goods.

The other circumstance in which a search and seizure can be authorized is if the officer has reasons to believe that some documents or books or things, which would be relevant for any proceedings under the Act, are secreted in a place. The use of the words "useful for or relevant to any proceedings under this Act" means that the officer merely has to be of the belief that the documents, books, or things that are going to be useful for or relevant to any proceedings under the Act are secreted in a place. The power to authorize a search and seizure is, therefore, very vast and can be exercised in numerous circumstances by the proper officer, with the primary purpose of ensuring compliance with the provisions of the Act and the Rules.

It is relevant to note that, as per Rule 139 of the CGST/SGST

Rules, the authorization for conducting an inspection, search, or seizure is to be issued by the proper officer in Form GST INS-01. Pertinently, the prescribed form requires the proper officer to specifically state the precise contravention that the officer believes the person to have committed. For instance, the officer must specifically state that he has reason to believe that goods liable for confiscation are being secreted in the premises or that a taxable person is engaging in suppression of transactions relating to supply of goods or services. After recording the nature of transgression he believes to have been committed, the officer must then specifically authorize an inspection, search, or both to be conducted, and if necessary, a seizure of goods, documents, or things found at the premises. It is critical that the officer follows the procedure to the minutest details, as any deviation from the procedure prescribed would vitiate the entire proceedings and render the whole exercise futile. Moreover, since the authorization for conducting an inspection, search, and seizure under the GST Acts have to be specifically stated in the Form GST INS-01, it is important to delineate the differences between inspections, searches, and seizures. For instance, if an officer is authorized to conduct an inspection and he conducts a search or a seizure instead, then the proceedings would be illegal and liable to be quashed. It is, therefore, relevant to note the differences between the three.

In Mangat Rai v. State of Madhya Pradesh, (1970) 26 STC 1 (SC), a sales tax inspector, along with two other officers, visited the appellant's shop for a surprise check and informed the appellant that he intended to inspect the dealer's account books. The appellant took out three books, which the officer thought was going to be given to him for inspection. However, the appellant kept one book, handed over two to his son, and told him to run away and keep the books in their house. The officer immediately demanded that all three books be handed over to him for inspection, and tried to snatch the books by catching hold of the son's hand. However, the appellant caught hold of the officer's hand and jerked him away, which allowed the son to run away with the books. When the officer tried to free himself, the appellant caught the officer's waist with both hands and said, "Do not touch the books, it would be dangerous."

The Magistrate who tried the case convicted the appellant under Sections 353 of the Indian Penal Code, 1860 ("IPC"), which states that assaulting or using criminal force to deter a public servant from the discharge of his duty shall be a punishable offence. In appeal, the Sessions Judge held that the officer had attempted to "seize" the books, and that as he was not authorized to effect a "seizure," his attempt to hold the boy and relieve him of the copy-books was not in the discharge of his public duty. The High Court thereafter reversed the Sessions Court's judgment.

The Supreme Court, in affirming the judgment of the High Court, made a distinction between a "seizure" and an "inspection." The Supreme Court observed that the former entails taking physical possession of the accounts away from the dealer, whereas the latter merely requires an examination of the books at the dealer's premises for a temporary period, without taking possession of the account books away from the dealer. Therefore, the Supreme Court held that an officer is entitled to demand that a dealer produces his account books for a temporary period, and by merely holding the books and examining them for a temporary period at the dealer's premises, the officer cannot be said to be seizing the books but merely inspecting them.

In G.M. Agadi & Bros. v. Commercial Tax Officer, (1973) 32 STC 243, the Karnataka High Court explained the difference between a search and an inspection. In the said case, based on information that a dealer registered under the Mysore Sales Tax Act, 1957 ("MST Act"), was maintaining two sets of accounts, one for the purpose of assessment under the Act, wherein some sales that were exigible to tax were not recorded, and another for their own private purposes, wherein all their sales were recorded, an officer of the Commercial Taxes Department inspected the petitioner's premises. When the officer inspected the dealer's premises at approximately 8:00 p.m., after the shop premises were closed, one of the partners of the firm produced the regular books of accounts that were maintained for assessment purposes. However, the officer found two credit books on the counter of the petitioner's premises. Upon conducting a test check of the sales recorded in the said credit books with the regular account books, the officer found several discrepancies between the two sets of books. Accordingly, the officer made an order for seizure of the account books and seized the books in exercise of his powers under Section 28(3) of the MST Act.

The petitioner challenged the seizure on the ground that the officer made an illegal search of the premises without obtaining a search warrant and complying with the provisions of the Code of Criminal Procedure ("CrPC").

The petitioner further contended that since the search itself was without the authority of law, the seizure of the account books was also illegal. The question before the High Court was whether the account books were seized after a search of the petitioner's premises or after an inspection. If the books had been seized after merely an inspection, there would be no illegality that would attach to the seizure. However, if the books had been seized after a search of the premises, the seizure would be illegal as the search itself was not in compliance with the provisions of the CrPC.

The State contended that there was no search conducted by the officer since the books of accounts were in plain sight and the officers did not have to explore or pry into any hidden places in order to find something that was concealed. On examining the rival contentions, the High Court observed that if the private account books had been kept on the counter in plain sight during the dealer's regular working hours, and they could have been found on inspection during any time of the day, then the private books can be said to have been found as a result of an inspection and not a search. However, since in this case, the officer visited the dealer's premises after the premises was closed and only then found the private books, which were otherwise kept concealed during regular working hours, the Court found that the officer had conducted a search of the premises and not merely an inspection.

Therefore, the Court found that the actions of the officer, who visited the petitioner's premises after closing hours, amounts to a search of the petitioner's premises for the purpose of securing hold of the private books of accounts that had been concealed during regular working hours.

Thus, one can see that the Courts have drawn fine distinctions between inspections, searches, and seizures. The distinctions drawn by the Courts will be crucial in determining the validity of actions initiated by the officers under GST as well, since Section 67 permits inspections, searches, and seizures to be conducted in different circumstances. Therefore, if an officer conducts a search and the ingredients for conducting a search, as set out under Section 67(2) are not present, then the entire action would be vitiated as being illegal.

The remaining provisions under Section 67 are primarily procedural in nature and, inter alia, set out time periods for which goods, etc. can be retained by the officers and the manner in which goods seized are to be released. The provisions in this regard are quite clear and unambiguous and, in my opinion, do not leave much scope for interpretation or discussion. Section 67(10), however, states that the provisions of the Criminal Procedure Code, 1973 ("CrPC"), relating to searches and seizures shall be applicable to searches and seizures under Section 67, too. The applicability of the CrPC to searches and seizures under taxing enactments has been the subject matter of numerous judgments and could, perhaps, for lack of space, be the subject of a separate article.

In conclusion, the power to conduct inspections, searches, and seizures are wide-ranging under the GST Acts and are conferred on officers to ensure compliance with the provisions of the Act and check evasion. Since these powers are, by their very nature, intrusive, the Acts have set out specific procedures to be followed by the officers in order to conduct such operations, and it is imperative that such procedures are strictly followed by the officers, failing which they run the risk of the entire proceedings being vitiated.

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Financial Reporting and Assurance

CA Vinayak Pai V

1. **Changes To Financial Reporting And Assurance Literature – Monthly Roundup**

AS (Accounting Standards)	
1	Exposure Draft of **AS 37 – *Provisions, Contingent Liabilities and Contingent Assets*** • To replace AS 29 – *Provisions, Contingent Liabilities and Contingent Assets.*
2	Exposure Draft of **AS 1- *Presentation of Financial Statements*** • To replace AS 1 – *Disclosure of Accounting Policies.*
3	Upgraded ASs cleared by ICAI Council • **AS 19** – *Employee Benefits* • **AS 38** – *Intangible Assets* • **AS 40** – *Investment Property*
IND-AS (Indian Accounting Standards)	
1	**IND-AS XBRL Taxonomy** – Exposure Draft • Applicable to specified class of companies that need to mandatorily file financial statements in XBRL format. • Exposure Draft issued as consequence of introduction of IND-AS115 and amendments to other IND-ASs.
2	**ITFG Clarification Bulletin** No. 17 on IND-AS issued.
IFRS (International Financial Reporting Standards)	
1	Proposed Amendments to **IAS 37 – *Provisions, Contingent Liabilities and Contingent Assets*** • *Onerous Contracts – Costs of Fulfilling A Contract* o Specifying which costs a reporting entity needs to include when assessing whether a contract will be loss making.
2	The International Accounting Standards Board (IASB) proposes narrow scope amendments to **IFRS 17 – *Insurance Contracts.***
3	Summary Report of IASB – **Post Implementation Review** of **IFRS 13 – *Fair Value Measurement.***
Assurance	
1	**UDIN** (*Unique Document Identification Number*) – ICAI decision to **mandate UDIN from February 1, 2019** in a *phased manner* as against earlier announced date of January 1, 2019.
Company Law – Accounts and Audit Related	
1	Filing of **Form NFRA-1** • MCA Circular dated December 13, 2018 – The time limit for filing will be 30 days from the date of deployment of form on the website of MCA/ National Financial Reporting Authority (NFRA) for all body corporates governed by the said rule.
Certain Reserve Bank of India Notifications	
1	**Basel III Framework on Liquidity Standards** – *Liquidity Coverage Ratio, FALLCR against credit disbursed to NBFCs and HFCs* – Notification dated December 28, 2018.
2	**MSME sector – Restructuring of Advances** – Notification dated January 1, 2019.

2. **Case Studies Section (Case 1) – Impact Of New IND-AS Revenue Recognition Standard**

IND-AS 115 – *Revenue From Contracts With Customers* is effective from the current fiscal year ending March 31, 2019. It is based on its IFRS counterpart standard IFRS 15 which became effective for annual periods commencing January 1, 2018. IND-AS 115 is based on the **Transfer of Control Model** to revenue recognition and requires a ***5-Step approach to revenue recognition*** for contracts with customers.

It may be noted that a customer is a party that has contracted with an entity to obtain goods or services that are an output of the entity's **ordinary activities** in **exchange for consideration**.

Case Study:

The following case study is based on quarterly results of a company based on information available in the public domain.

Impact on topline –revenues of comparative previous year	• **Increase of 2.2%**

- The company has determined that, in case of certain contracts, **shipping services provided to customers** is a *separate performance obligation* and accordingly the revenue attributable to such shipping services has been recognized as revenue (IND-AS 115) from operations, which was hitherto (IND-AS 18) netted off against the corresponding freight expenses included under the expenditure line item in the Statement of Profit and Loss.

3. **Upcoming Changes: AS 1 – *Presentation Of Financial Statements* - Aligning With IND-AS**

Our Institute has issued an exposure draft of AS 1 – *Presentation of Financial Statements* to replace extant AS 1 – *Disclosure of Accounting Policies* which is one more step taken towards bringing the AS framework closer to IND-AS. Key points of distinction between the exposure draft and AS 1 are summarized herein below.

a. Requirement for an entity to make an **explicit statement of compliance with ASs** in the notes to the financial statements.

b. New AS1 requires presentation and provides criteria for classification of assets and liabilities into current and non-current.

c. **Prohibition** on presentation of any item in the statement of profit and loss/notes as '**extraordinary item**'.

d. Requirement of **disclosures** of management judgments, key assumptions about future and sources of estimation uncertainty.

e. Requirement to include a **"statement of changes in equity"** to be shown as a separate component of financial statements that includes reconciliation between opening and closing balance for each component of equity.

f. **Other comprehensive income (OCI)** layer included in the financial statements.

g. Clarification that **long-term loa**n arrangements need not be classified as current liability on account of ***breach of a material provision***, for which the lender has agreed to waive before the approval of financial statements for issue.

4. **Case Studies Section (Case 2) - IND-AS Transition Impact**

The following case study of an **IND-AS first-time adopter** is based on published financial statements available in public domain.

IND-AS Measure	Transition Impact (%)
Net profit for the comparative period	**Increase** of **5.1%**
Total **Equity at end of comparative period**	**Increase** of **2.8%**
Total income for the comparative period	**Increase** of **0.4%**

Key **Contributing Factors** for IND-AS Impact:

- Under AS, **leasehold land** was capitalized at an amount equal to the upfront payments made at the time of the lease. Under IND-AS, such leases have been capitalized at the present value of the total minimum lease payments to be paid over the lease term.
- Under AS, **employee loans and other long-term advances** were recorded at cost. However under IND-AS, such assets that meet the definition of a financial asset have been classified as financial assets at amortized cost. In case the interest rates on such financial assets are lower than the market rate, these financial assets have been discounted to present value.
- The company has entered into **power purchase agreements** with beneficiaries for generation and supply of electricity whereby the beneficiaries pay fixed capacity charges primarily for recovery of capital cost, return on investment, fixed operations and maintenance expenses and interest on working capital and variable energy charges. Under AS, the respective power plants were capitalized as fixed assets and the amounts receivable were recognized as revenue from sale of electricity. Under IND-AS, the amounts receivable under these arrangements have the substance of a lease as these arrangements are dependent on the use of specific assets and convey the right to use those assets. The entity has identified the arrangements entered into with its customers as leases and analyzed with reference to the lease standard for classification as either finance or operating lease.

5. **Back to Basics Section: IND-AS Accounting For Impairment Of Non-Financial Assets – A High Level Overview**

IND-AS has separate impairment accounting models for financial and non-financial assets. Herein below is discussed the salient aspects of IND-AS accounting for the impairment of non-financial assets.

- Assets that have an indefinite useful life (for example goodwill, intangible assets and intangible assets not ready for use) are not subject to amortization but are required to be tested annually for impairment.
- Assets that are subject to amortization need to be reviewed for impairment whenever events or changes in circumstances indicate that its carrying amount may not be recoverable.
- An impairment loss is recognized for the amount by which the asset's carrying amount exceeds its recoverable amount. The recoverable amount is the higher of an asset's fair value less costs to sell and its value in use.
- For the purposes of assessing impairment, assets are grouped at the lowest level for which there is separately identifiable cash flows (Cash Generating Units).
- Non-financial assets other than goodwill that suffered impairment are reviewed for possible reversal of the impairment at each reporting date.
- Charges or credits of impairment are passed through the Statement of Profit and Loss.

6. **Upcoming Changes: Exposure Draft of AS 37 – *Provisions, Contingent Liabilities and Contingent Assets***

Our Institute has issued an exposure draft of AS 37 – *Provisions, Contingent Liabilities and Contingent Assets* to replace extant AS 29 – *Provisions, Contingent Liabilities and Contingent Assets*. Key points of distinction between the exposure draft and AS 29 are summarized herein below.

a. **Revised definitions** for Provision and Obligating Event. (***Provision*** – Provision is a liability of uncertain timing or amount; ***Obligating event*** **–** is an event that creates legal or constructive obligation that results in an entity having no realistic alternative to settling that obligation).

b. AS 37 requires creation of provisions in respect of **constructive obligations** also.

c. Specifies that before a separate provision for an **onerous contract** is established, an entity shall recognize any impairment loss that has occurred on assets dedicated to that contract.

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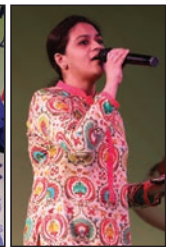






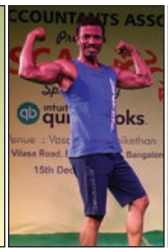


















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Taxing times for start-ups again: Will angel tax fear go away?

CA Sandeep Jhunjhunwala

The chronicle of angel tax related miseries seems to be developing new twists and turns every now and then with no end in the sight. The angel tax seems to have become an inimitable artefact in the Indian income tax law, as it taxes capital receipt as revenue. "Angel tax" or "Share Premium tax", a hot-button issue for start-ups, is a term used to refer to the income tax payable on capital raised by unlisted companies via issue of shares, where the share price is seen in excess of the fair market value of such shares. The excess realisation is treated as income and taxed accordingly. The law reasons that this excess amount is akin to "Income from other sources" and should be taxed under Section 56(2)(viib) of the Income Tax Act. It has come to be called angel tax since it largely impacts angel investments in start-ups. In what has again triggered tax issues recently is the surge of tax notices to start-ups, which have fretted these enterprises. The Government has, however, assured that no coercive action would be taken to recover the demand and has announced setting up an expert committee with members from institutions such as IITs and IIMs to review the entire issue of share premium tax and other connected matters. Despite the CBDT notification that says no coercive measures to be taken, the issue remains uncertain (uncertainty is one thing the investors dread), as in order to get a stay order on the demand notices issued, one may still have to pay 20 percent of the tax demand to get a right to appeal further.

This tax was introduced by the Finance Act of 2012 to arrest laundering of funds. The Government had issued notifications in April 2018 (Notification 24 of 2018 issued by the Central Board of Direct Taxes in continuation of Notification dated April 11, 2018 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce, Government of India) to give exemption to start-ups under Section 56(2)(viib) of the Income Tax Act, in cases where the total investment including funding from angel investors did not exceed INR 100 million. According to the notification of April 2018, the exemption applies only when the angel investor had a minimum net worth of INR 20 million or an average returned income of over INR 2.5 million in the preceding three financial years. These riders are very restrictive and cover only a small part of the new-age economy. For the exemption, start-ups were also required to get approval from an eight member Inter-Ministerial Board and a certificate of valuation by a Merchant Banker specifying fair market value of shares under income-tax rules. As per the statistics available on the portal of Start-up India, ~14,000 start-ups have been recognised so far by the Department of Industrial Policy and Promotion and only 91 start-ups have been approved for availing tax benefits by the Inter-Ministerial Board. Many start-ups have been rejected on the "innovation" factor and inability to convince the Board that the business is scalable in terms of employment generation or wealth creation.

The angel tax controversy surrounds the valuations during various rounds of start-up funding. These valuations are based on optimistic future projections, potential and promise of the idea, background and competence of the founding team etc – supposing that the idea underlying the business would thrive. In several cases, the revenues at start-ups kept reducing or remained stagnant, but their valuations kept increasing in the successive rounds of funding. The taxmen have questioned the premium paid by the investors and wants to categorise them as income that would be taxable at steep 30.9 percent. While tax officials prefer to value these enterprises based on their Net Asset Value (NAV), companies tend to be valued based on estimates of their future earnings (DCF – Discounted Cash Flow). Infact, the Bangalore Income Tax Appellate Tribunal (ITAT) has recently in the case of Kottaram Agro Foods Pvt Ltd [ITA Nos 2852 & 2853/ Bang/ 2018] held that in terms of the restrictions laid under Rule 11U(a) of the Income Tax Rules, 1962, the Auditors of a company cannot double up as Accountants, in situations of share valuation for the purpose of excess share-premium taxability.

Insertion of Section 50CA into the Income Tax Act has created certain other barriers for the start-up ecosystem. There is another provision under the Income Tax Act -

Section 68, under which additions on account of unexplained cash credits are being made in the income tax assessment of these new-economy companies. Besides having to prove the genuineness of the transaction and the identity and capacity of the investor, the recipient company is also required to prove the source of the funds in the hands of the investor. Income tax authorities require a confirmation of the investor and copies of balance sheet and bank accounts of the investor to corroborate the source of funds for the investor. Income tax authorities insist for such proof of source of funds of the investor, even in case of foreign investors, though the law is applicable only to domestic investors (there exists another argument that this section only applies to domestic investors and hence discriminates them against foreign investors, who are not subject to this clause). Not only start-ups, but large MNCs which have received foreign funding by way of Foreign Direct Investment (FDI) have also been subject to adjustments under Section 68 of the Income Tax Act on failure to provide satisfactory evidence. Investments by multinationals in their subsidiaries and by foreign investors in Indian companies through share transfer have been questioned. The Indian Exchange Control regulations mandate Indian unlisted companies to get a valuation of their company done from an independent Chartered Accountant before FDI deal. The company cannot sell the shares at value lower than the prescribed valuation or fair market value. In all the cases where notices have been served, the deal was done over and above the valuation or fair market value.

A simpler approach of mandatory mentioning of Permanent Account Number (PAN) of the investor before investment into a start-up, could solve the core issue related to Sections 56(2)(viib) and 68, ensuring that the funds received are from accounted sources and also that investments are out of tax-paid funds. PAN is already mandatory for a variety of dealings, both financial and non-financial. Data Analytics may then be used to identify cases of tax evasion. Efforts at detecting money laundering should not be allowed to impede innovation in India. The Income tax Department uses Computer Aided Scrutiny Selection (CASS) to select cases for scrutiny examination on the basis of certain broad based selection filters. Certain filters such as reported losses, negative book value, huge share premium or low share capital base as entered in the return of income filed by the start-ups could be the determining factors for selection of cases for limited or complete scrutiny in a fairly mechanical manner. For most of the start-ups, share premium is extraordinarily high due to small share base or large valuation. Capital structuring (backed with adequate commercial substance or consideration) in the form of issuance of bonus shares can definitely increase the share base of the company, which the valuation intact and without incurring anti-dilution protection. Similarly, increasing the face value or par value of shares could lower the share premium on an overall basis.

2018 was the year when India churned out unicorns at an exceptional rate - 8 of them. India continues to be the world's third-largest start-up ecosystem after the US and the UK. To continue the momentum on the Start-up India programme, India should state cues from the neighbouring countries such as China and Singapore. Preferential tax policies in China allow 70 percent of total investment to be deducted from taxation, two years after investment in high-tech start-ups. Singapore offers tax exemption amounting to SGD 200,000 to qualifying start-ups on their first three consecutive years of assessment. Countries like UK and Germany offer generous tax incentives to start-ups and angel investors. Advanced economies such as Australia provide tax incentives in the form of non-refundable carry forward offsets and modified capital gains treatment for investors in innovation companies. Exemption from angel tax in India should be extended to all investments made by Alternative Investment Funds-Category I (comprising of venture capital funds, infrastructure funds and social venture funds) and Category II (comprising of private equity funds and debt funds) in portfolio companies. While aimed to curb money laundering and check undisclosed income, in its tax collection spree, the Government is likely doing more harm than good by sending out notices in the zest to meet taxation targets for the fiscal. It is critical that tax laws quickly catches up with the reality of today - that start-ups are a perennial source of innovation and while angel funding needs to be regulated and transparent, the only way forward is to create a sustainable solution (with enough checks and balances) that does not unreasonably burden start-ups while ensuring that they do not become a medium for money laundering. Hopefully, Budget 2019 should put a lid on this raging controversy – India's start-up industry is watching with a bated breath.

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Anti-Profiteering under GST

CA G B Srikanth Acharya & CA Pooja M Jain

The Goods and Services Tax is by far one of the most comprehensive tax reforms in the country. It is a Single Tax on the supply of goods and services across India, right from the Manufacturer to the Consumer. Credits of Input Taxes paid at each stage will be available in the subsequent stage of sale, which makes GST essentially a tax only on the Value Addition at each stage.

Both businesses and consumers are supposed to derive benefits from GST implementation.

When GST was introduced in many other countries, they witnessed a marked increase in inflation and the prices of the commodities. There should have actually been reduction of prices due to the availability of input tax credit from the production to the final stage of consumption. This evidently must be happening because the supplier was not passing on the benefit of reduction in the rate of tax on the goods or services or both, or in the input tax credit to the consumer.

GST in India is intended to reduce the prices of goods and services reasonably, utilized or enjoyed by the final consumer. The fear that fair reduction in prices may not be seen in the hands of consumer like in the other countries and the fact that the businesses might try to misuse the law is the main reason for providing the Anti-profiteering measures to protect the consumers' interest in India.

It is to be noted that GST law does not define Anti-Profiteering. The dictionary meaning of anti-profiteering states: opposing, preventing, or punishing profiteering and profiteering means unfair profits, especially illegal.

Therefore, Anti-Profiteering is a mechanism which acts as a deterrent. Anti-Profiteering is similar to unjust enrichment which occurs when one person is enriched at the expense of another in circumstances that the law sees as unjust.

Anti-Profiteering Measure as provided in the CGST Act, 2018:

As per Section 171(1) of CGST Act, 2018; "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit should have been passed on to the recipient by way of commensurate reduction in prices."

The Central Government has constituted National Anti-Profiteering Authority to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

Above provision can be understood with the following simple examples:

1. Reduction in output tax rate:

   A manufacturer supplies commodity 'Z' which costs Rs. 100 in the erstwhile tax regime. Suppose, the output tax on the same included Excise Duty @ 12.5% and VAT @ 14.5%.

Particulars	Erstwhile Regime	GST Regime Tax
Cost of Commodity 'Z' to the manufacturer	100.00	100.00
Add: Excise Duty @ 12.5%	12.50	-
	112.50	100.00
Add: VAT @ 14.5%	16.31	-
Add: GST @ 18%	-	18.00
Total Price including Taxes charged to the customer	**128.81**	**118.00**
Taxes portion one the above	28.81	18.00

   Assuming that costs are remaining same, the benefit of such reduction in the rate of output tax [28.81-18=10.81] should be passed on to the consumer.

2. Benefit of Input Tax Credit:

   A trader purchases an X commodity at Rs. 110 (inclusive of tax Rs. 10). Suppose ITC on this commodity was not allowed to the trader in the erstwhile regime, and therefore when the trader sells the product, he would charge tax on **Rs. 110 (his cost) plus profit**

However, if ITC on the above product is available to the trader under GST regime, then the trader shall charge tax on **Rs. 100 plus his profit** (110-10 ITC available) which means that the benefit of increase in ITC should be passed on to the consumer.

Particulars	Erstwhile Regime	GST Regime Tax
Commodity 'X' purchased - cash outflow (Inclusive of tax Rs. 10)	110.00	110.00
Cost to the purchaser	**110.00**	**100.00**
Add: Profit @ 10%	11.00	10.00
Total Price excluding taxes	**121.00**	**110.00**
Add: GST @ 10%	12.10	11.00
Total Price including Taxes charged to the customer	**133.10**	**121.00**
Taxes payable to the department under Erstwhile Regime	12.10	-
Taxes payable to the department under GST Regime (Output Rs. 11 - Input Rs. 10)	-	1.00

The authority for Anti-profiteering is formed in order to ensure that traders are not realizing unfair profit by charging high price to consumers in the name of GST.

The formation of the various authorities is as follows:

Constitution of the authority and its powers:

1. **The National Anti-profiteering Authority** is a 5 member committee, consisting of a Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India; and 4 Technical Members who are or have been Commissioners of State tax or Central tax for at least 1 year or have held an equivalent post under existing laws.

   The authority has the power to determine the methodology and procedure for the determination of the facts as to whether the reduction of tax on the supply of goods or services or the benefit of input tax credit has been passed on to the recipient by the registered person by way of commensurate reduction in prices.

2. **Constitution of the Standing Committee and Screening Committees:**

   (1) The Council may constitute a Standing Committee on Anti-profiteering which shall consist of such officers of the State Government and Central Government as may be nominated by it.

   (2) A State level Screening Committee shall be constituted in each State by the State Governments which shall consist of

   (a) 1 officer of the State Government, to be nominated by the Commissioner, and

   (b) 1 officer of the Central Government, to be nominated by the Chief Commissioner.

Secretary to the Authority

The Additional Commissioner (working in the **Directorate General of Anti-profiteering**) shall be the Secretary to the Authority.

Duties of the Authority -

(i) ***to determine*** whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of appropriate reduction in prices;

(ii) ***to identify*** the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of proportionate reduction in prices;

(iii) *to order*,

   (a) reduction in prices;

   (b) refund to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of 18% *

   (c) imposition of penalty as specified in the Act; and

   (d) cancellation of registration under the Act.

(iv) to furnish a performance report to the Council by the 10^{th} day after the close of each quarter.

*A **Consumer Welfare Fund** has been set up wherein undue benefits made by businesses due to tax rate cut have to be deposited in cases where it could not be passed on to identified consumers.

Application to the Authority:

All applications from interested parties on issues of local and other than local nature are to be examined by the authority in the below mentioned manner:-

Overview of the Examination of application by the authority:

Issues of **local nature**

An interested party or the commissioner or any other person by way of a written application, **apply to the National Anti-profiteering Authority.**

On receipt of applications from the interested parties, it shall be first examined by **the State Level Screening Committee.**

Once the State Level Screening committee is **satisfied that the supplier has contravened the provisions,** it shall **forward the application along with its recommendation to the Standing Committee.**

Issues of **other than local nature**

An interested party or the commissioner or any other person by way of a written application, **apply to the National Anti-profiteering Authority.**

The standing committee shall **within a period of 2 months from the date of receipt of a written application** examine the accuracy and adequacy of the evidence provided in the application to **determine whether there is prima-facie evidence to support the claim of the applicant** that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices.

(a)

(a)

Once the **Standing Committee is satisfied** that the supplier has not passed on the benefit of reduction in the rate of tax or the benefit of input tax credit, it will **refer the matter to the Director General of Anti- profiteering (DGAP) for a detailed investigation.**

The DGAP will issue a notice to the concerned parties and such other persons as it deems fit for a fair enquiry, containing the following information:

1. The description of the goods or services in respect of which the proceedings have been initiated.
2. Summary of the statement of facts on which the allegations are based; and
3. The time limit allowed to the interested parties and other persons who may have information related to the proceedings for furnishing their reply.

The DGAP will conduct an investigation and collect the evidences to support that the benefit of reduction in the rate of tax or the benefit of input tax credit has not been passed by the supplier by way of commensurate reduction in prices.

The DGAP shall present the evidence provided by one interested party to the other interested parties, participating in the proceedings.

The DGAP should complete the investigation within a period of 3months from the receipt of reference from the standing committee and furnish the report of its findings along with relevant records to the Authority. → (b)

(b)

The Authority shall within a period of 3 months from the date of receipt of the report from DGAP determine whether a registered person has passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.

An opportunity of being heard shall be given to the interested parties by the Authority if any written request has been received from such parties.

Where the Authority determines that a registered person has not passed on the benefit of the reduction in the rate of tax on the supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, the Authority may order –

(a) Reduction in prices;
(b) Return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of 18%
(c) Imposition of penalty as specified under the Act; and
(d) cancellation of registration under the Act.

Decision to be taken by the majority

(1) A minimum of 3 members of the Authority shall constitute quorum at its meetings.
(2) If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman shall have the second or casting vote.

Compliance by the registered person

Any order passed by the Authority under these rules shall be immediately complied with by the registered person failing which action shall be initiated to recover the amount in accordance with the provisions of the IGST Act or the CGST Act or the UTGST Act or the SGST Act of the respective States, as the case may be.

Monitoring of the order

The Authority may require any authority of Central tax, State tax or Union territory tax to monitor the implementation of the order passed by it.

Sunset Clause

The Authority shall cease to exist after the expiry of two years from the date on which the Chairman enters upon his office unless the Council recommends otherwise.

Recent Happenings reported on leading newspapers

1. Nestle India on being investigated by the DGAP deposited Rs. 16.58 Cr in the consumer welfare fund taking into account cases where it could not pass on the tax rate cut benefits to consumers. The profiteering was found to the tune of Rs. 100 Cr.
2. Hindustan Unilever has been charged with profiteering by DGAP on undue profits made of more than Rs. 330 Cr.
3. Lifestyle International Pvt Ltd had received a notice on profiteering and DGAP was asked to initiate detailed investigation.
4. The consumers are encouraged to file complaints against the companies which are not passing the benefits through a helpline started by National Anti-profiteering Authority.
5. Notices/ letters are issued by the National Anti-profiteering Authority to several companies such as Nirma, colgate pamolive, Mankind Pharma, Johnson & Johnson, Hardcastle Restaurant, Patanjali Ayurved.
6. In case of Pyramid Infratech Pvt Ltd, Delhi HC stays order of National Anti-profiteering Authority wherein authority found case of profiteering. Company challenged the constitutional validity of the provision of Section 171 of CGST Act, 2017. Matter is now posted for February 19, 2018.

There is ambiguity in compliance with the Anti-profiteering provisions as there are no prescribed guidelines on records or documentation to be maintained and there is no proper methodology prescribed for computation and passing on the benefit to the customers on implementation of GST.

It is an accepted rule that, price of each product differs according to the demand and supply. Any reduction in rate of tax or benefit of input tax credit has to be analyzed by comparing the same between Pre-GST and Post-GST. However, after comparison or analyzing the same one has to conclude, whether such reduction in rate / benefit of ITC has resulted profiteering or not.

Author is of the view that, such profiteering cannot be arrived merely by comparing reduction in rate / ITC benefit, but one has to go through the cost as well as profit involved in supplying goods or services.

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Congratulations

CA Geetha A.B **CA Pampanna B.E** **CA Panna Raj S**

On being elected for
Southern India Regional Council of
The Institute of Chartered Accountants of India
for 2019-2021.

Congratulations

CA C.R. Dhavalagi, Past President, KSCAA on being nominated as member of Zonal Railway Users Consultative Committee (ZRUCC) for the term from 1.9.2018 to 31.8.2020 and on nominated as member of Consultative Committee of the Food Corporation of India for the State of Karnataka for a period of Two years.

Collaboration for Performance and Leadership

Madhumita Saha

Snippet: How to lead for high performance through collaboration

A Shared Vision - The Drive and Purpose Behind Collaboration

On July 10th 2018, twelve boys and their soccer coach were rescued from a maze of partially submerged caves in Thailand. They had been exploring the caves and were forced deep into this maze where they were stranded, when sudden rains began to cause flooding.

Rescuing the boys required collaboration on a global scale. It was only through the pooling of skills and resources, the process of trial and experimentation, improvisation and innovation that it was made possible. This is how people from around the world got together to contribute to the mission:

- While looking for the boys, foreign cave divers helped Navy SEALs who had little experience with cave diving. The boys were found ten days after they had been stranded, by two British divers.
- After they were found, four Thai divers and an Australian doctor stayed with them and nursed them back to health on a high-protein diet. It would take almost a week before they were ready to leave.
- Rescuers from all around the world helped lead the boys out with the help of guide ropes and strategically placed air tanks, while another team worked tirelessly to pump water out of the caves.
- Journalists and the media coverage helped garner global support.
- The government donated food and supplies. They also provided emotional support and assurance to the recues and the families of the boys.

It is important to recognize that a successful outcome was made possible by a shared goal. Rescuing the boys was the singular motivation that helped people readily cooperate and set aside their need for personal glory. When the end goal has meaning for all the individuals involved, collaboration happens smoothly and spontaneously to achieve the shared goal.

A Connected World - The Catalyst for Collaboration

We live in an ever changing world that lends itself to collaborative efforts. The internet has made information so readily available and easy to share that it makes more sense to pool our resources together for a common purpose, rather than safeguard them. Emerging technologies and platforms facilitate collaboration without the need for much coordination. Wikipedia for example, is an information source that is open to be edited and corrected by the public, without intervention from third parties. This sort of loosely coordinated group is able to work on much larger scales towards a shared objective.

The new generation of people in the workforce are increasingly technologically adept, socially connected, and more willing to try newer, creative solutions. Businesses are starting to realize that they cannot rely on old models in order to survive. Technology and the resulting social behavior is moving us towards working together even in organizations.

Leading Collaborative Efforts

While working in a collaborative mode, a leader is more of a facilitator. He or she needs to facilitate a collaborative environment – a collective state where individuals understand each other's personal & professional needs as well as contribution in terms of skills and knowledge. Collaboration is a collective, evolving process that relies heavily on trust and open communication. A leader needs to ensure that this is built and maintained along every step of the way.

Collaboration could happen between organizations, teams or even individuals making up a team. Here are some other things to keep in mind while leading a collaborative effort:

- Collaboration is all about bringing together diverse skills. A more varied team lends itself to innovation and success.

- Ideas can come from anywhere. They need to be shared and discussed openly before the team collectively decides which ones are to be executed.
- Because skill sets can be so diverse, leadership roles may have to be rotated through various stages of the project. This may happen organically, without them having to be assigned.
- Each member makes their own contribution that needs to the valued, this means that leaders need to know when to step aside and make space for others on the team.
- It is not possible for the leader to always be in control. Collaboration is a dynamic process that can take unexpected turns, it is important to trust this process and the people involved.
- A leader doesn't always have the answers as information is spread throughout the team. He or she needs to be ready to turn to others and learn along the way.
- Work needs to be transparent so that people have access to the information they need and so that new partnerships can be built.
- Planning and prepping are crucial steps, skipping them can lead to major setbacks later on.
- When individuals feel positive and motivated, the entire team and organization benefit from it.

The Benefits - Collaboration Breeds Innovation

Collaboration is all about creating a network as opposed to a hierarchical structure. When information is openly shared, innovation and creative solutions can surface. This is because the same problem is being looked at by individuals with different perspectives. Innovation then becomes sustainable when the collaborative environment is maintained.

Another great advantage of working in collaboration is the number of solutions that can arise. Sometimes, a solution can turn into a lesson on 'what not to do'. At that point, it is important to course correct, or try an entirely new approach if required. Looking back at the example of the boys who were rescued in Thailand, many ideas were put forward at the time. Some failed, like trying to find a back entrance to the cave or drilling holes from above. Other ideas however, proved to be crucial to the mission.

Innovation itself, is a collaborative problem solving process. Collaboration is effective if teams work together to use collaborative and creative problem solving methods to solve problems and arrive at decisions. Finally, leadership and the organization, benefits.

About the Author:

Madhumita Saha is President of VentureBean Consulting. VentureBean Consulting is a management consulting firm in Bangalore focused on growth consulting and leadership development.

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Workshop on Ind-AS


IMC
Chamber of Commerce and Industry

REPRESENTATION ON MECHANICAL ISSUE OF PROSECUTION NOTICES BY THE INCOME-TAX DEPARTMENT

To 11th January, 2019

Ajay Bhushan Pandey,
Secretary (Revenue),
Ministry of Finance, Government of India,
128-A North Block, New Delhi.

Respected Sir,

Sub: Representation on mechanical issue of prosecution notices by the Income-tax department

1. **<u>Clarifications/ Initiatives of Government for "Taxpayer friendly atmosphere"</u>**

It has been the motto of the present government headed by Hon'ble Prime Minister Shri Narendra Modi and Hon'ble Finance Minister Shri Arun Jaitley to provide taxpayers with "non-adversarial" and "taxpayer friendly atmosphere". In the light of the same, to propagate the agenda of the Government, the Central Board of Direct Taxes ('CBDT') has time and again been issuing directions to the tax authorities for making the functioning of the tax authorities "non-adversarial" and "tax-payer friendly". The said directions act as guidance for the tax authorities to function smoothly and create confidence among the tax payers. Certain circulars have been issued by CBDT aiming to reduce litigation. All such actions of CBDT have been appreciated by the Industry and Stake-holders.

2. **<u>Suggestions invited by CBDT for simplification/ clarifications</u>**

Further, to seek, active participation from taxpayers, CBDT has been inviting suggestions from stakeholders for simplification in tax laws, smoothening of return processing, issue of refunds, timely disposal of appeals etc. to which several organisations have been regularly providing their thoughts and suggestions to the CBDT. These initiatives are highly appreciated by the stake-holders and industry.

3. **<u>Guidance on launching of prosecution proceeding vide Letter dated 7th March 2017</u>**

It is noticed that the motto of the Government is being undermined, probably to achieve revenue targets, by certain actions of the CBDT, which is creating a lot of hardship and harassment to taxpayers. The CBDT chairman, vide letter dated 7th March 2017, has issued guidance to Principal Commissioner of Income-tax ('PCITs') on launching of prosecution proceedings (copy enclosed).

In the letter, the CBDT Chairman, observed that the work relating to filing of prosecution complaints and disposal of compounding applications "is not up-to the mark". CBDT Chairman has opined that prosecution proceedings can be successfully initiated in several cases and he has directed the officers to put in their best and expedite filing of prosecution complaints and disposal of compounding applications.

The said letter of CBDT Chairman was strongly objected to by various associations and several representations were sent to CBDT as well as Finance Secretary. A copy of the representation made by IMC and other associations before the Finance Secretary is enclosed, for your reference (in the said representation, the CBDT Chairman's letter was erroneously referred to as dated 7th March, 2018 instead of 7th March, 2017).

As per the information collated through RTI, we have been informed that several prosecution notices were issued by the department in 2018 throughout India, <u>for even the smallest of defaults, in a mechanical manner without undertaking any qualitative analysis. Many petitions have been filed before various magistrate courts, which are pending for disposal</u>.

4. **<u>Fresh notices issued by department for launching of prosecution</u>**

Despite the strong objections being raised by the representative bodies of the taxpayer/ industry associations and professional organisations, it seems that similar directions have been issued to the field officers by the higher-ups, based on which several prosecution notices have been issued by the tax department to mop up the tax collection to meet higher targets. The criteria for initiation of prosecution has been enlarged, and an illustrative list is as under:

- Non-filing of return of income or filing of return after the due date (belated return);
- Return of income filed, but self-assessment tax not paid;
- Disallowance accepted by the taxpayer and not contested in appeal before appellate authorities (including cases of very small amount of disallowance);
- Cases where penalty is levied, whether taxpayer has challenged the levy or not; and
- Failure to pay taxes deducted at source to the credit of Central Government (irrespective of amount or period of delay).

We observe that considering the above criteria, <u>thousands of show cause notices for initiation of prosecution have been issued all over the country, just to achieve the so-called targets given by the CBDT.</u> We had an occasion to see some of the notices issued, from which it is clear that the notices are issued without undertaking any qualitative analysis, and the same have been issued merely to create fear psychosis to mop up tax collections. By issue of such notices, we are moving towards tax terrorism, instead of promoting a tax friendly atmosphere.

We submit that prosecution should be launched in only rare cases of tax evasion, or cases of large scale deduction of TDS without payment. Mechanical wholesale issue of prosecution notices sends out the message that the Tax Department does not distinguish between major and minor offences, and regards even minor mistakes as a major offence at the same level as a large scale tax evasion.

Since, many prosecution proceedings have been launched by the department in a mechanical manner, a large number of petitions are pending for disposal with the Magistrate Courts, which do-not have any background of tax laws. We believe that the mechanical way in which prosecution proceedings have been initiated by the department, will not be entertained by the Magistrate Court. We believe that with these huge number of cases coming up for hearings before the courts, the income-tax department is not geared up to deal with the large number of cases. It is likely that a lot of taxpayers would file petitions before the High Court to get the notices quashed, which will have to be defended by the department.

We would like to draw your attention to the decision of the ***Madras High Court*** in the case of ***Sayarmull Surana [TS-725-HC-2018(MAD)],*** wherein the High Court set-aside the prosecution proceedings launched u/s 276CC by the department hurriedly, without appreciating the facts of the case of the taxpayer, who had challenged the assessment order before the appellate authorities. Since, in that case, the appellate authorities had granted significant relief to the taxpayer, the very basis on which prosecution proceedings were launched was not valid.

Further, it is to be noted that there could be several genuine reasons on the part of the taxpayers for delay in filing of return, delay in payment of self-assessment tax and delay in payment of TDS. Also, it is to be noted that the taxpayers may not wish to appeal against the disallowance made by tax authorities due to the quantum of disallowance or the taxpayer may want to buy peace and not litigate further, and such acceptance of disallowance cannot be a reason for initiation of prosecution. Further, mere levy of penalty, which is not contested before higher authorities, cannot be a ground for initiation of prosecution. In this regard, it is to be noted that in the following cases, it has been held that mere acceptance of disallowance/ addition proposed by tax officer cannot be a ground for levy of penalty:

- Sir Shadi Lal Sugar & General Mills Ltd. (168 ITR 705) (SC)
- Dilip N Shroff v Jt. CIT (291 ITR 519)(2007) (SC)
- CIT vs Dharamchand L. Shah (204 ITR 462) (Bom)
- Bhimjee Bhanjee & Co (146 ITR 145) (Bombay HC)
- CIT Vs. Manjunatha Cotton & Ginning Factory (2013) 92 DTR 111 (Karnataka HC)
- CIT vs Clive Mills Ltd. (138 ITR 182) (Cal)

This interpretation is equally applicable in case of prosecution, as there is no mens rea on the part of the tax payer.

5. Implications

If taxpayers who regularly pay taxes are treated in such a manner, taxpayers would lose faith in the CBDT and the Government. The roadshows and statements of Hon'ble Prime Minister and Finance Minister convey that they want to improve the culture and promote Ease of doing business and give tax friendly environment. Is it that certain over enthusiastic officers in the Board are trying to derail the objective of the Government?

If quick action is not taken to prevent the field officers from issuing show cause notices without proper analysis of facts and by setting certain threshold limits for issue of notices, this tax terrorism will create fear in the minds of investors coming in India, due to such high-handed approach of the government.

6. Prosecution notices issued to foreign company/directors

We would also like to bring to your notice that where prosecution notices are issued to foreign companies and foreign resident directors, they get very irked by this mechanical approach of the department and are scared to come to India or suggest new Investment in India. These notices project a wrong image of the Indian Government, as on the one hand, it is inviting foreign investors to invest in India by promising Ease of Doing Business and tax friendly environment and on the other hand, it is driving them away by initiating criminal proceedings on a mechanical basis, without undertaking any qualitative analysis of the offenses.

7. Tax evaders should be brought to book

We fully agree and support the fact that if there is a case of tax evasion, it should be brought to book and penal action should be taken against the tax evaders. However, the manner in which the matter is handled by the CBDT is totally different, as instead of concentrating on or monitoring tax evaders who are not in tax records, Tax Officers are targeting and trying to punish and penalise the taxpayers who are already in tax records. This approach is acting as a harassment/ discrimination of the honest taxpayers.

8. Request to keep larger interest of the country in mind by avoiding frivolous litigation or creating fear psychosis:

It is common knowledge that the taxpayer base in the country is shockingly small in relation to the overall population. The present Government has time and again disclosed these figures and also expressed shock that such a small community is bearing the burden of direct taxes of the entire nation.

For the tax payer base to grow, two things need to be kept in mind which are:

- Existing tax payers need to be trusted for their efforts; and
- Non tax payers need to be shown the benefits of becoming a member of the tax paying community

Prosecution for tax evasion of say, Rs.10,000 cannot be same as or similar to that for tax evasion of say Rs.1 crore. Hence prosecution cannot be taken up with a mechanical approach. No doubt, prosecuting defaulters is the government's prerogative, but with great powers comes great responsibility.

When the Hon'ble Prime Minister and Hon'ble Finance Minister talk of a Tax Payer friendly, non-adversarial tax regime, it is shocking and distressing to observe actual action on the other side, where CBDT gives directions totally contrary to the vision of Present Government of Tax payer friendly and "Non-adversarial" regime. **It is imperative that necessary directives may be issued by the Ministry directing the CBDT not to take any steps that would cause any harm to honest taxpayers and to ensure that the promise of non-adversarial regime is maintained**.

We humbly request your Honours to resolve the above issue at the earliest in order to avoid unnecessary hardship being caused to the taxpayers.

Thanking you,

Yours sincerely,

Raj Nair
President,
IMC Chamber of Commerce and Industry

Sunil Gabhawalla
President,
Bombay Chartered Accountants' Society

CA. Chintan M. Doshi
President,
Chartered Accountants Association, Ahmedabad

Rasesh Shah
President,
Chartered Accountants Association Surat

Raghavendra Shetty
President
Karnataka State Chartered Accountants' Association

R L Bajpai
President
Lucknow Chartered Accountants' Society

Encl: 1. Letter of CBDT chairman to PCIT's dated 7th March, 2017
2. Joint Representation filed by IMC, BCAS, CAAA, CAAS, KSCAA and LCAS dated 8th August, 2018.

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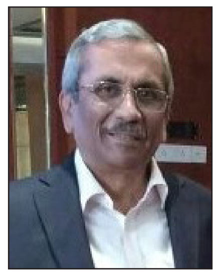

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