KSCAA

Karnataka State Chartered Accountants Association ®

NEWS BULLETIN

August 2020 I Vol. 7 I Issue 12 I ₹ 25/-

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English Monthly

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PROFESSIONAL RESILIENCE

Annual General Meeting

On Thursday, 27th August 2020 at 3:00 PM

at Maple Hall, Pai Vista

Banashankari 2nd Stage, Bengaluru

@karnatakacaassociation @kscaa_ca kscaa.com

From the President

Dear Professional friends,

I'm excited to write to you as the president of this association for the 13th time in year and would be only fortunate president to have done this. The month of August and subsequent few months for a Chartered Accountant is of test of his professional endurance, with frequent fun frolic festive times. This year has been an introspection year to all of us to go more deeper into what we believe and build professional stamina for the better day to come.

When I assumed the post of President last year, my ideas revolved around the area of welfare to my fellow professionals and empowerment to my younger colleagues, whose strata would have subsidised their confidence to face the world like many others. Alike any other assignment or engagements, there have been hits and misses in equal proportion, and we acknowledge both of them with utmost sincerity and humbleness. I'm Confident that the line of upcoming leadership would do a wonderful job and this only shows that the association is in safe and able hands.

This would be the last message of mine as the President of the association and I've a satisfaction to have carried the business of the association to my fullest strength. As elsewhere stated by me, in this message, things undone always stay with us, but that must take the joy of what has be genuinely done. The AGM of the association has been scheduled; in short time we may have a new president who would lead this association to a newer height.

News Roundup

Goods and Service Tax

The Government's stance remains firm on the rolling out of e-invoicing system from 1st October 2020. However due to Covid-19 pandemic the threshold of turnover limit on the applicability of this requirement is recently enhanced from Rs. 100 Crore turnover to Rs. 500 Crore turnover in FY. Further SEZ have been saved from the applicability of e-invoicing requirement.

As further relief in the compliances, the composition taxpayers have been given further extension in the filing of GSTR-4 return for the FY 2019-20 from 15-07-2020 to 31-08-2020.

Hon. Gujarat HC in the case VKC Footsteps India Pvt Ltd has recently read down the pernicious explanation (a) to Rule 89(5) of CGST Rules 2017 which purportedly disregarded the input tax credit related to input services in the computation of eligible refund of tax on account of Inverted duty structure. This explanation is held to be ultra vires plenary refund provision of section 54(3) of CGST Act 2017. It is welcome decision for all those taxpayers who fall under inverted duty structure with substantial input tax credits on account of input services in their kitty.

Corporate and Business Law

The Ministry of Corporate Affairs has published the Companies (Indian Accounting Standards) Amendment Rules 2020 on 24th July 2020. The amendments have been made in IND AS 103, IND AS 107, IND AS 109, IND AS 116, IND AS 1, IND AS 8, IND AS 10, IND AS 34 and IND AS 37. Some of these amendments have come in the wake of pandemic such as the amendment to IND AS 116. The ministry has amended the rules whereby entities would get relief from lease modification accounting due to COVID-19 related rent concessions. The amendments can be followed by lessees for annual reporting periods beginning on or after April 1, 2020. This amendment was keenly awaited by the Indian Companies who are waiting for quarterly results.

Among others, the ministry has also amended rules regarding IND AS 103. These are aimed at helping entities to determine whether a transaction needs to be accounted as a business combination or as an asset acquisition. Definition of "business" has been inserted in IND AS 103 and the acquiring entity needs to check whether the acquired assets and liabilities constitute a "business" as per this definition. If the assets acquired are not a business, the reporting entity shall account for the transaction or other event as an asset acquisition.

Further, the MCA vide a general circular dated 6th July again extended the last date of filing form NFRA-2 for financial year 2018-19 to 270 days from the deployment of the form in NFRA website.

Direct Tax

- In view of the constraints due to the COVID pandemic & to further ease compliances for taxpayers, CBDT has extended the due date for filing of Income Tax Returns for FY 2018-19(AY 2019-20) from 31st July 2020 to 30th September 2020, vide Notification in S.O. 2512(E) date 29th July 2020.
- Extension of due date for Tax Deducted at Source (TDS) and TCS related compliances by Central Board of Direct Taxes (CBDT).
- An MOU was signed between CBDT and Ministry of MSME on 20th July 2020 to facilitate seamless sharing of certain ITR related info by CBDT with MoMSME and enable it to check/classify enterprises in Micro, Small and Medium categories. This marks a new era of cooperation between CBDT and MoMSME.
- Refunds worth Rs. 71,229 crore have been issued by CBDT in more than 21.24 lakh cases up to 11th July 2020, to help taxpayers with liquidity in COVID days, following the Govt's decision to issue pending income tax refunds at the earliest.

Conclusion

At this juncture I remember what John Dryden's wrote *'Even victors are by victories undone'*. It contains a germ of hope for those who find themselves defeated, and it cautions those who appear to have carried away the prizes. I thought to share this to mean, we may perceive ourself as victorious and move confidently ahead. While the conspiring event may defy this victory for prolonged time, as things undone would eventually catch up with victors on what is undone. I during my Presidentship move with this hope that things undone will someday overshadow but that's not the premise we need to work in any part of our life. Rather victors have shelf life, this brings humbleness and gratitude to what is done and gained and submission to what is undone.

Stay Safe and Happy reading!

Yours Sincerely,

CA. Chandrashekara Shetty
President

CONVERGENCE
- Creating Impact Together

KSCAA
News Bulletin
August 2020
Vol. 7 Issue 12
No. of Pages : 32

CONTENTS

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Expert Speaker
Adv. CA. V. Raghuraman
On **Tuesday, 18th August 2020** | Time : **04.00 PM to 06.00 PM**

Webinar on Different Assessments under GST Law

Expert Speaker
Adv. CA. A Saiprasad
On **Friday, 21st August 2020** | Time : **11.00 AM to 01.00 PM**

Webinar on Gaps in GST Implementation vis-a-vis Expectations of Industry

Expert Speaker
CA. Mandar Telang, Mumbai
On **Tuesday, 25th August 2020** | Time : **04.00 PM to 06.00 PM**

Webinar on GST on Immovable Properties & Liquidated Damages

Expert Speaker
Adv. Sujit Ghosh, New Delhi
Advocate - Delhi High Court & Supreme Court of India
On **Saturday, 29th August 2020** | Time : **04.00 PM to 06.00 PM**

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CA. Chandrashekara Shetty
President

CA.Chandan Kumar Hegde
Secretary

Recall of Orders – Income Tax Appellate Tribunal

CA. S. Krishnaswamy

1. *An adverse order of ITAT can be recalled under two situations if there is an apparent mistake.*
2. *An exparte order without considering merits. (Rule of procedure Miscellaneous Petition)*

One of the important right a tax payer has in respect of any adverse order of Income Tax Appellate Tribunal, if there is a patent miscarriage of justice, is to file a Miscellaneous Petition or a Rectification application. It may cover any alleged breach of Rule of procedure in prosecuting the appeal or any other mistake in the order affecting the outcome. A number of judicial decisions on the subject interpret the ambit of such a recourse. It must be clear that the Hon'ble Tribunal cannot review its order but can only correct a permissible error of procedure or fact or law. Now let me examine the relevant provisions.

Section 254 (2) of the Income Tax Act, 1961 provides for rectification of orders by the Income Tax Appellate Tribunal (ITAT). The occasion for rectification may arise if a Ground has not been adjudicated or case law cited before Hon'ble Tribunal not considered or exparte order for non-appearance of counsel without considering merits of the case or critical facts mentioned in the order not correct or any apparent mistake in arriving at conclusion by the Hon'ble Tribunal.

The Income Tax Appellate Tribunal rules also defines a rectification application and Miscellaneous Petition. 'Rectification Application' means an application filed before the Tribunal under section 254(2) of the Act and the later, any other application.

Section 254 (2) reads-

"The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the assessing officer."

Rule 34A deals with procedure of application u/s 254(2) which states-

(1) An application under section 254(2) of the Act shall clearly and concisely state the mistake apparent from the record of which the rectification is sought.

(2) Every application made under sub-rule (1) shall be in triplicate and the procedure for filing of appeals in these rules will apply mutatis mutandis to such applications.

The Applicant shall also state whether any Miscellaneous Application under section 254(2) was filed earlier before the Tribunal against the same order and if so, the fate of such application. Copies of the orders passed by the Tribunal on such applications shall also be filed before the Tribunal in triplicate along with the Miscellaneous Application.

(3) The Bench which heard the matter giving rise to the application (unless the President, the Senior Vice-President, the Vice-President or the Senior Member present at the station otherwise directs) shall dispose it after giving both the parties to the application a reasonable opportunity of being heard:

(4) An order disposing of an application, under sub-rule (3), shall be in writing giving reasons in support of its decision."

Rule 24- Hearing of appeal ex parte for default by the appellant reads as follows-

"24. Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent.

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal."

The Appellate Tribunal suo moto may, at any time within "six months from the end of the month in which the order was passed", with a view to rectify any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or as the Assessing Officer.

- **Case Laws:**

o In the case of **T.S. Balaram vs. Volkart Brothers (1971) 2 SCC 526** Supreme Court stated that a mistake that is obvious and patent can be rectified or an error which does not include any long-drawn process of reasoning on points on which there can be two different opinions, can be rectified by the Tribunal.

o The Hon'ble Supreme Court in the case of **CIT vs Karam Chand Thapar and Br. P. Ltd**. (176 ITR 535) has held-

"It is equally well settled that the decision of the Tribunal has not to be scrutinized sentence by sentence merely to find out whether all facts have been set out in detail by the Tribunal or whether some incidental fact which appears on the record has not been noticed by the Tribunal in its judgment. If the court, on a fair reading of the judgment of the Tribunal, finds that it has taken into account all relevant material and has not taken into account any irrelevant material in basing its conclusions, the decision of the Tribunal is not liable to be interfered with, unless, of course, the conclusions arrived at by the Tribunal are perverse.

It is not necessary for the Tribunal to state in its judgement specifically or in express words that it has taken into account the cumulative effect of the circumstances or has considered the totality of the facts, as if that were a magic formula; if the judgment of the tribunal shows that it has, in fact, done so, there is no reason to interfere with the decision of the Tribunal."

o The Bombay High Court in the case of **CIT vs Ramesh Electric and Trading Co. (203 ITR 497)** held-

"….It is an accepted position that the Appellate Tribunal does not have any power to review its own orders under the provisions of the Act. The only power which the Tribunal possesses is to rectify any mistake in its own order which is apparent from the record…….. The power of rectification under section 254(2) can be exercised only when the mistake which is sought to be rectified s an obvious and patent mistake which is apparent from the record and not a mistake which required to be established by arguments and a long drawn process of reasoning on points on which there may conceivably be two opinion. Failure of the Tribunal to consider an argument advanced by either party for arriving at a conclusion is not an error apparent on the record, although it may be an error of judgments……."

o The Supreme Court in the case of **Hindustan Siel Power Products Ltd vs. CIT** (2007) 12 SCC 596 and another ground stated by the Delhi High Court in the case of **PCIT vs. N.R. Portfolio** is that "if the Court finds any speculation in assessee's conduct then the application can be rejected by the court. Other than this, it can be said that the principle of finality go hand in hand with the power of rectification provided in this section. The principle of finality here means that once an order is rectified, it attains finality. This further means that an order of rectification passed under sub-section (2) cannot be further rectified and no successive applications for rectification of the original order can be maintained, as it will defeat the whole object of section 254(2)."

o The Calcutta High Court in the case of **CIT vs Gokul Chand Agarwal (202 ITR 14)** held-"Section 254(2) of the Income Tax Act, 1961, empowers the Tribunal to amend its order passed under section 254(1) to rectify any mistake apparent from the record either suo moto or on an application. The jurisdiction of the Tribunal to amend its order thus depends on whether or not there is a mistake apparent from the record. If, in its order, there is no mistake which is patent and obvious on the basis of the record, the exercise of the jurisdiction by the Tribunal under section 254(2) will be illegal and improper. An oversight of a fact cannot constitute an apparent mistake rectifiable under section 254(2). This might, at the worst, lead to perversity of the order for which the remedy available to the assessee is not under section 254(2) but a reference proceeding under section 256. The normal rule is that the remedy by way of review is a creature of the statute and, unless clothed with such power by the statute, no authority can exercise the power. Review proceedings imply proceedings where a party, as of right, can apply for reconsideration of the matter, already decided upon, after a fresh hearing on the merits o the controversy between the parties. Such remedy is certainly not rovided by the Income Tax Act, 1961, in respect of proceedings before the Tribunal".

- The Hon'ble Madras High Court decision in **T.C.(A) No. 156 of 2006 dated 21.08.2007 in the case of CIT Vs. Tamil Nadu Small Industries Development Corporation Ltd.** wherein the Hon'ble High Court held-

  "The Tribunal has no power to review its order. When the Tribunal has already decided an issue by applying its mind against the assessee, the same cannot be rectified under Section 254 (2) of the Act. There was no necessity whatsoever on the part of the Tribunal to review its own order. Even after the examination of the judgments of the Tribunal, we could not find a single reason in the whole order as to how the Tribunal is justified and for what reasons. There is no apparent error on the face of the record and thereby the Tribunal sat as an appellate authority over its own order. It is completely impermissible and the Tribunal has traveled out of its jurisdiction to allow a Miscellaneous Petition in the name of reviewing its own order".

- "In the present case, in the guise of rectification, the Tribunal reviewed its earlier order and allowed the Miscellaneous Petition which is not in accordance with law. Section 254(2) of the Act does not contemplate rehearing of the appeal for a fresh disposal and doing so, would obliterate the distinction between the power to rectify mistakes and power to review the order made by the Tribunal. The scope and ambit of the application of Section 254(2) is limited and narrow. It is restricted to rectification of mistakes apparent from the record. Recalling the order obviously would mean passing of a fresh order. Recalling of the order is not permissible under Section 254(2) of the Act. Only glaring and any mistake apparent on the face of the record alone can be rectified and hence anything debatable cannot be a subject matter of rectification."

- In the case of **M/s. BPCL vs. ITAT and Others** Bombay High Court held on the matter whether Income Tax Appellate Tribunal (ITAT) in exercise of Rule 24 of the Income Tax Appellate Tribunal Rules, 1963 (Tribunal Rules) can dismiss the appeal for non-prosecution, and, second, interpreting Rule 24 of the Tribunal Rules and Section 254(1) and (2) of the Income Tax Act, 1961 in reference to application of Rule 24 that-

  "… in terms of Rule 24 of the Tribunal Rules, the Tribunal does not have the option of dismissing an appeal for default or on account of non-prosecution. The Tribunal in exercise of its inherent jurisdiction can either adjourn the hearing or dispose of the appeal on merits after hearing the other party, the Respondent. In the instant matter, an appeal was listed for hearing before the Tribunal however, by the time Petitioner could reach the Tribunal matter was already called and dismissed for non-prosecution. Matter could not also be mentioned as Tribunal has no practice of mentioning at any time of the day. The Tribunal while passing the order of dismissal even did not consider the merits of the appeal or heard the Respondents on merits. ITAT later also dismissed the application for recall of order of dismissal passed in the year 2007, vide its impugned order. On the issue of Tribunal not following the practice of mentioning matters before it, the High Court observed that to ensure that justice is done the Tribunal cannot as a matter of practice bar any Advocates/ representative from mentioning their matters before the Tribunal and therefore it must do away with such a practice. However, outcome of mentioning is for the Tribunal to decide in exercise of its discretion. Under Rule 24 of the Tribunal Rules, the Tribunal does not have the option of dismissing an appeal for default. In reference to second issue as to whether an application to set right the above error i.e. recalling of order passed in ignorance of Rule 24 would be an application to correct the same under Section 254(1) or (2) of the Act. It was held that where a specific provision has been provided in the Act to deal with a particular situation, it is not open to ignore the same and apply some other provision. Under Section 254(1) both the parties to appeal are given an opportunity to be heard before any order as Appellate Tribunal deems fit is passed. Sub clause (2) prescribes that if mistake apparent on record in the order passed is brought into notice within four years of its pronouncement, the same may be amended. As has been held by the Apex Court, the rectification of an order stands on the fundamental principle that since justice is above all, recall of an order is not barred on rectification application being made by one of the parties and hence the application for rectification will be governed by Section 254(2) of the Act. In the present case since application was made after four years, the same was rightly held as time barred. It was however also clarified that the order if passed in breach of Rule 24 of the Tribunal Rules, would be an irregular and not a void order and even if assumed that such order is a

void order, the same would continue to be binding till it is set aside by a competent Tribunal."

- In the case of **Perianna Chettiar v. Commr. of Income-tax (1960) 40 ITR 377 (Mad)** it was held that where an appeal before the Appellate Tribunal related to a distinct matter in controversy, it would not be open to the Tribunal to take up and decide the appeal in favour of the appellant on the basis of a ground not in controversy.
- In the case of **Ramaswami Iyengar v. CIT** which accepted the same interpretation the following statement of the principle laid down in **New India Life Assurance Co. v. CIT**, was adopted as correct-

  "The expression thereon has come in for considerable judicial comment and observation, and the authorities lay down that the power of the Tribunal is confined to dealing with the subject matter of the appeal and the subject mater of the appeal is constituted by the grounds of the appeal prepared by the appellant. This appellant unless leave is granted to him to do so by the Appellate Tribunal. The subject matter can certainly not be expanded by the respondent as already pointed out, if he had not either appealed or cross-objected."
- In **CIT v. Arunachala Chettiar**, the Supreme Court held that the jurisdiction conferred under the Act on the Tribunal and the High Court would be conditional of there being an order by the Appellate Tribunal, which could be said to by one under Ss. 33(4) of the Act and on a question of law arising out of such order.
- In **New Jehangir Vakil Mills Ltd. v. CIT** while discussing the limits of a reference to the High Court under S. 66(1) has observed-

  "……the only question of law which the assessee or the Commissioner can require the Tribunal refer to the High Court is 'any question of law arising out of the order of the Tribunal' so that if the question of law which the assessee or the Commissioner requires the Tribunal to so refer to the High Court does not arise out of its order the Tribunal is not bound to refer the same. What has, therefore, to be looked at in the first instance referred arises out of the order of the Tribunal. The Tribunal is not bound to refer the same. What is whether the question of law thus required to be referred arises out of the order of the Tribunal. The Tribunal no doubt has got before it the facts which are admitted and/or found by the Tribunal and which are necessary for drawing up a statement of the case and it is in the casts admitted and or found by it that would from the basis on which the statement of the case would be drawn and references of the High Court. If such facts were not there, whether in the order of the Tribunal or in the record before in it, there would certainly not be any foundations for the raising of any question of law either in the abstract or otherwise and it is only a question of law which would arise out of such facts which are admitted and/or found by the Tribunal that would be the substratum of the reference to the High Court. The facts admitted and/or found by the Tribunal would really be the foundation or the basis on which such questions of law could be raised and neither party would be entitled to require the Tribunal to refer to the High Court any question of law which could not thus arise out of the order of the Tribunal Section 66(2) which gives the power to the High Court to require the Tribunal to state the case and refer the question of law to it, also proceeds on the same basis and even where the High Court exercises the power under S. 66(2) it can only require the Tribunal to state the case on any question of law arising out of such order."
- In a recent decision of the Supreme Court in the case of **Petlad Turkey Red Dye Works Co. Ltd. v. CIT** it was observed-

  "If necessary facts which will lay the foundation of raising a question of law are not there, then there is no basis for reference of that question to the High Court because only on the basis of facts found by the Tribunal or admitted before it can a question of law arise. Thus only on the basis of facts admitted or found on the record can a statement of case be submitted. When the case stated comes to the High Court and the High Court finds it necessary to have a supplemental statement of the case in order to answer the question of law which is raised, then it can direct such statement to be submitted with such additions and alterations as it may direct but the statement must necessarily be based on facts which are already on the record and the High Court cannot ask for additional facts to be brought in because these would not be in regard to a question which arises from the order of the Tribunal but would be a statement base on something which was not before the Appellate Tribunal when it passed its appellate order."

- The Supreme Court in the case of **CIT vs. S.Chenniappa Mudaliar, (1969) 74 ITR 41**, taking into consideration the decision of the special bench of the High Court of Madras in **S. Chenniappa Mudaliar v. CIT [1964] 53 ITR 323 (Mad.)**, examined the position of law and held as under-

  "The Special Bench of the High Court noticed the previous history of rule 24 as also the terms in which it came to be framed after the passing of the Income-tax Act, 1961, which enables the Tribunal, in its discretion, either to dismiss the appeal for default or to hear it ex parte in case of non-appearance of the parties and further enables the Tribunal to set aside the dismissal on sufficient cause being shown for non-appearance. After referring to various decided cases and examining the relevant provisions of the Act, the Special Bench summed up the position thus [1964] 53 ITR 323, 334 (SB):

  "To sum up the position, the Appellate Tribunal is the appointed machinery under the Act for finally deciding questions of fact in relation to assessment of income-tax. Its composition, consisting as it does of qualified persons in law and accountancy, makes it peculiarly qualified to deal with all questions raised in a case, whether there be assistance from the party or his counsel or not. Section 33(4) obliges it to decide an appeal, after giving an opportunity to the parties to put forward their case. The giving of the opportunity only emphasises the character of the quasi- judicial function performed by the Appellate Tribunal. The fact that that opportunity is not availed of in a particular case, will not entitle the Tribunal not to decide the case. There can be no decision of the case on its merits if the matter is to be disposed of for default of appearance of the parties. Further, an adjudication on the merits of the case is essential to enable the High Court to perform its statutory duty and for the Supreme Court to hear an appeal filed under section 66-A. Section 33 (4) itself indicates by the use of the word 'thereon' that the decision should relate to the subject matter of the appeal. Rule 24, therefore, to be consistent with Section 33(4), could only empower the Tribunal to dispose of the appeal on its merits, whether there be an appearance of the party before it or not. This was indeed the rule when it was first promulgated in the year 1941. The rule in its present form, as amended in the year 1948, in so far as it enables the dismissal of an appeal before the Income tax Appellate Tribunal for default of appearance of the appellant, will, therefore, be ultra vires, as being in conflict with the provisions of Section 33(4) of the Act."

- It was held in the case of **Golden Times Services Pvt. Ltd. vs DCIT** Order pronounced on 13 January, 2020 that-

  "It was necessary for the ITAT to exercise its jurisdiction and afford an opportunity of rehearing the appeal that had been dismissed in the absence of the appeal. Even otherwise, we are of the view that it was the duty and obligation of the ITAT to dispose of the appeal on merits after giving both the parties an opportunity of being heard. The ITAT should have been conscious of the fact that the appellant was not afforded the opportunity to argue the case on merits and for this reason it had given the liberty to apply afresh, while dismissing the appeal for non-prosecution. There was thus no cogent reason for the tribunal not to entertain the application for recall. The ITAT has ignored the decision of the Supreme Court in CIT vs. S. Chenniappa Mudaliar in the correct perspective."

- The Hon'ble Delhi High Court exposition on the scope of rectification u/s 254(2) as reported in the case **of Ras Bihari Bansal vs Commissioner of Income Tax (2007) 293 ITR 365**-

  "Section 254 of the Income Tax Act, 1961, enables the concerned authority to rectify any "mistake apparent from the record". It is well settled that an oversight of a fact cannot constitute an apparent mistake rectifiable under this section. Similarly, failure of the Tribunal to consider an argument advanced by either party for arriving at a conclusion, is not an error apparent on the record, although it may be an error of judgment. The mere fact that the Tribunal had not allowed a deduction, even if the conclusion is wrong, will be no ground for moving an application under section 254(2) of the Act. Further, in the garb of an application for rectification, the assessee cannot be permitted to reopen and re-argue the whole matter, which is beyond the scope of the section."

- The Hon'ble Andhra Pradesh High Court in the case of **CIT and Anor vs. I.T.A.T and Anor (206 ITR 126)** held-

  "The appellate Tribunal, being a creature of the statute, has to confine itself in the exercise of its jurisdiction to the enabling or empowering terms of the statute. It has no inherent power. Even otherwise, in cases where

specific provision delineates the powers of the court or Tribunal, it cannot draw upon its assumed inherent jurisdiction and pass orders as it pleases. The power of rectification which is specifically conferred on the Tribunal has to be exercised in terms of that provision. It cannot be enlarged on any assumption that the Tribunal has got an inherent power of rectification or review or revision. It is axiomatic that such power of review or revision has to be specifically conferred, it cannot be inferred. Unless there is a mistake apparent from the record in the sense of patent, obvious and clear error or mistake, the Tribunal cannot recall its previous order. If the error or mistake is one which could be established only by long drawn arguments or by a process of investigation and research, it is not a mistake apparent from the record."

- In the case of **ACIT vs. Saurashtra Kutch Stock Exchange 2003 SCC On Line Guj 352** the Gujarat High Court widely discussed the Tribunal's power to rectify the mistake apparent from the record. Here the court stated that the power of rectification can be used by the Tribunal for removing any sort of error which does not disturb the finality of an order passed by the Tribunal under the subsection (1) of section 254. Further, the Court here mentioned that the mistake which needs rectification should be self-evident in nature and should not include any debatable question. And 'mistake apparent from record' cannot be confined to some strict reasoning and definition, as it attains a variable nature that can change with the facts of each case.
- In the case of **Smt. Baljeet Jolly vs. CIT (2001) 164 CTR (Del) 37** the Delhi High Court while explaining this section mentioned that 'Apparent' must be something which appears to be ex facie and is incapable of argument or debate.
- In the case of **Karan & Co. vs. ITAT (2001) 169 CTR (Del) 361** where the court stated that 'Mistake' is not only an arithmetical or clerical error. It is subjective and is something that a duly and judiciously instructed mind can find out from the record.
- In the case of **Commissioner of Income Tax vs. Ramesh Electric and Trading Co. (1993) 203 ITR 497 (Bom)** it was held that the Bombay High court that the Appellate Tribunal does not have any power to review its own Orders under provisions of Act as it can lead to redefining of the case and the only power Tribunal possesses is to rectify any mistake in its own order which is apparent from record. It is merely the power of amending its own order.
- In another case of **CIT vs Hindustan Coca Cola Beverages P Ltd (CIT 293 ITR page 226)** it was stated by the court that review is a larger concept and that a review can include rectification but a rectification cannot include a review. And that, the nature of power of rectification cannot result in a review or recall of an order.
- The High Court of Madras in the case of **Smt. Ritha Sabapathy vs. DCIT**, Tax Case No.169/2019 has held that the ITAT cannot dismiss an appeal on account of non-appearance of party without giving finding on merits and remanded the matter to the ITAT.
- The Supreme Court in the case of **Sree Ayyankar Spinning & Weaving Mills Ltd. v. CIT (2008) 301 ITR 434 (SC)**,while analysing Section 254 of the Act, prior to the amendment of 2016, while considering a different question, has observed-

  "Section 254 (2) of the Act is divided in two parts. In the first part, the ITAT may, at any time, within four years [as stipulated in the erstwhile provision], from the date of order rectify any mistake apparent from the record and amend an order passed by it under sub-section (1). Under the second part of Section 254 (2) of the Act, provision has been made for the amendment of the order passed by the Tribunal under sub-section (1), when the mistake is brought to its notice by the assessee or the assessing officer through an application. The first part of Section 254 (2) of the Act refers to suo moto exercise of the power of rectification by the ITAT whereas the second part refers to rectification and amendment on an application being made by the assessing officer or the assessee pointing out the mistake apparent from the record".

Conclusion:

A tax payer in case of an adverse ITAT order must first exhaust the remedies available for recalling an ITAT order under circumstances discussed instead of directly going to the High Court.

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Challenges under GST Law

CA. Annapurna D Kabra

The GST law has changed the tax incidence, tax computation, tax structure, Input tax credit utilization, Refund mechanism, etc. as compared to the Erstwhile Indirect tax structure. There are decisions pending before the courts which were challenged in the erstwhile indirect tax structure like overlapping of tax on various transactions, ineligibility of input Tax credit, disputes on classification, valuation etc. Even under the GST law lot of litigated issues are pending before the courts and certain decisions of the courts have led to chaos to the assessee for implementing such decisions in the course of his business.

Transitional credit

- Some of the business entities have missed it to claim benefit of transitional credit or could not file the transitional credit form due to technical glitches. They have approached to the High court to extend the time limit for filing transitional credit or allow to file it manually. Various High Courts (including Karnataka High Court) have granted relief to the taxpayers by directing the authorities to open the portal and/or receive manually filled forms and/or approach the Nodal officers appointed by the Government in this regard. Based on decision **of Brand Equity Treaties Ltd Vs. Union of India (2020) Delhi HC**, the applicant was permitted to revise Trans-1 Form on or before 30.6.2020 and transition the entire credit subject to department verifications. It was directed to open the online portal so that revised Trans-1 can be filed electronically or to accept the same manually. Even in the case of **Amba Industrial Corporation Vs Union of India & ANR,** 2020- TIOL-1046-HC- PC the respondents are directed to permit petitioner to upload TRANS-1 on or before 30.6.2020 and in case the Department Authority rejects the same then the applicant can avail the input tax credit in GSTR 3B of July 2020 on multiple occasions. Based on the above decisions on transitional credit, some of the applicants have already filed the applications for the claim of missed transitional credit manually. The issue is pending before the higher jurisdictional Courts and the decisions are awaited…

Clubbing Tax periods for filing Refund Applications

- There was clarification issued in 37/2018 in point 11 that in many scenarios, exports may not have been made in that period in which the inputs or input services were received, and input tax credit has been availed. Similarly, there may be cases where exports may have been made in a period, but no input tax credit has been availed in the said period. The above referred rule, taking into account such scenarios, defines relevant period in the context of the refund claim and does not link it to a tax period. In this regard, it is hereby clarified that the exporter, at his option, may file refund claim for one calendar month / quarter or by clubbing successive calendar months / quarters. The calendar month(s) / quarter(s) for which refund claim has been filed cannot spread across different financial years. Therefore, the applicant has to cumulatively file in the respective year for claiming the refund. If the above issue was not resolved, the exporter was forced to work on a rebate mode to extinguish/ utilize the ITC accumulated through months in which he does not have exports. As per Circular 135/05/2020-GST dated 31/3/2020, the restrictions on clubbing of tax periods across the financial year has been removed and therefore there is no bar in section 54(3) to claim refund by clubbing different months across successive financial years. Therefore, the applicant can file the refund application by clubbing different months across successive financial years. The GSTN has its own piece of teething conflicts and it is always great challenge for the businesses all over the country because of technical glitches and frequent amendments in the GST law. The above amendment is still not activated or customized in GSTN portal for filing the consolidated Refund applications across different financial years.

GST Appellate Tribunal

- The GST Appellate Tribunal has not yet been constituted nor notified by the Government u/s 109(1) of the Act. In the absence of Appellate Tribunal, the appellant is unable to file any appeal against the order of Joint

Commissioner of Commercial Taxes (Appeal) at this point in time. The constitution of Appellate Tribunal is not yet constituted due to order of Madras High Court in case of ***Revenue Bar Assn. v. Union of India***.

Interest

- As per section 50(1) of CGST Act 2017, every person who is liable to pay tax in accordance with the provisions of the Act or the rules made thereunder but fails to pay tax or any part thereof to the Government within the prescribed period shall for the period for which the rate or any part thereof remains unpaid pay on his own interest at such rate not exceeding 18 % as may be notified by the Government on the recommendations of the council. The GST Council in its 31st Meeting held at New Delhi gave in principle approval to the following amendments in the GST Acts that amendment of Section 50 of the CGST Act to provide that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit. In simple terms interest would be leviable only on the amount payable through electronic cash ledger. The above recommendation will be made effective only after the necessary amendment in the GST Act are carried out. This amendment is eagerly awaited to see whether this amendment has retrospective effect as it can save some of the assessee who has already paid interest on net basis and not on gross basis accordingly.

IGST on Ocean Freight

- The levy of IGST on ocean freight was challenged before Gujrat High Court on transportation of goods by vessel. The petitioner's submission was that Notification No. 8/2017-Integrated Tax (Rate) and Entry 10 of Notification No. 10/2017-Integrated Tax (rate) are *ultra vires* the IGST Act, 2017. The challenge was on following grounds as IGST has been paid on entire value of imports inclusive of ocean freight, it cannot be asked to pay tax on ocean freight all over again under a different notification and in case of CIF contracts, since both service providers and recipient are outside the Indian territory, no tax thereon can be collected even under reverse charge mechanism. There is chaos over applicability of IGST on ocean freight under reverse charge though many of the assessee are continuing to pay under reverse charge mechanism and claimed the input tax credit by setting off with other liabilities. Vide the case of *Mohit Minerals Private Limited Vs Union of India* 2020 VIL 36 Gujarat (HC) dated 23.1.2020 wherein it is held that the payment of IGST on ocean freight under reverse charge is held unconstitutional. Before AP High Court, the Petitioner has challenged the above notification and has claimed the refund of IGST paid on ocean freight charges. Therefore, there are different views on payment of IGST on ocean freight as whether it will be challenged before Supreme Court or whether the assessee should stop paying IGST on ocean freight under reverse charge.

Challenged Rule 36(4) Restricting Input Tax credit

- There is restriction imposed vide Rule 36(4) of the CGST Rules 2017. The Rule state that Input tax credit to be availed by a registered person In respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20 per cent (10% w e f 1.1.20). of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37. This Rule has been challenged in various courts. This Rule restricts the Input tax credit up to 20%/10 of value of Invoices in respect of Invoices/debit notes whose details have not been uploaded by the suppliers. The availment of input tax credit is restricted ov7er and above the amount reflected in GSTR 2A despite having valid tax Invoice. The Rule 36(4) is challenged on the ground that it finds the reference in section 43A of CGST Act which is yet to be notified and override section 41, 42 and 43 of the CGST Act 2017. Even it is challenged on the ground that introduction of Rule 36(4) is ultra vires to sections 38(1) and 42(3) of the CGST Act.

Intermediary Services

- There are different school of thoughts towards levy of tax on Intermediary services. One school of thought is that place of supply shall be the location of the intermediary. Since the supplier and the place of supply is within the state but in view of the fact that the recipient is outside the country, IGST becomes applicable. With reference to the provisions of Section 8(2), it restricts the supply of services under Section 12 i.e when the supplier and recipient are in India. It does not cover the situation when the supplier is in India and recipient is outside India, but the place of supply is in India. Therefore,

based on Section 7(5)(c) which states that Supply of goods or services or both in the taxable territory, not being an intra-State supply and not covered elsewhere in this section shall be considered as Inter- state supply and accordingly IGST can be levied. The other school of thought is that under section 8 of IGST Act 2017 when the location of supplier and the place of supply happens to be in the same state such supplies are deemed to be intra state supply and therefore CGST and SGST can be levied. The recent verdict of Gujarat High Court in the matter of Material Recycling Association of India Vs Union of India & Others (TS-586-HC-2020(Guj-NT) held that as per section 13(8)(b) of IGST Act 2017 if the supplier who is providing intermediary services to a person located outside India, the place where the services are deemed to have been supplied is the place where the supplier is located. Such transactions will be treated as intra state supply and the supplier is required to pay CGST and SGST as the location of supplier is the place of supply of Intermediary Services. Some business entities would have already paid IGST on such intermediary services in lieu of SGST/CGST as there was ambiguity towards the levy of tax on intermediary services.

Inverted Duty Structure

- Rule 89(5) of CGST Rules 2017 relating to refund of input tax credit on account of inverted duty structure has been challenged. Section 54(3)(ii) provides that refund of any unutilized input tax credit may be claimed by the registered person in case where credit has been accumulated on account of rate of tax on ***Inputs*** being higher than the rate of tax on output supplies. Therefore, allowing the refund of tax paid on inputs is challenged on the ground that it is unreasonable, irrational, discriminatory and there is no apparent justification for excluding the tax paid on input services from the purview of net input tax credit for computing the refund amount under Inverted Duty Structure. Vide Notification No. 21/2018- CT dated 18.04.2018, the CGST Rules were amended retrospectively to provide that taxpayers would not be entitled to claim refund of taxes paid on input services. The Gujrat High Court in case of ***VKC Footsteps India Private Limited Vs Union of India & Others 2020-VIL-340-Guj dated 24-7-2020*** held that the registered person is entitled to claim refund of taxes paid on inputs as well as input services. In case the refund of input tax credit availed on input services is restrained then it will lead to blockage of funds/ working capital and affect the cost competitiveness of small business entity especially in the current pandemic situations.

The global economic shut down due to Covid-19 has raised the concerns among the trade and industry. During this phase, there may possibly be reduction in tax revenues for both center and states. In the phase of country lockdown, the Government has made certain amendments under the GST law including the relaxations for extension of dates, waiving of interest, late fee and penalty in certain instances but simultaneously the challenges to GST are getting added with different judicial decisions, multiple advance rulings and awaited clarifications. Therefore, it is imperative to understand the implications of the challenges which is affecting almost every aspect of the operations in the business.

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Indirect Tax updates

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I. **Notifications and Circulars**

A. **Amendment to CGST Rules, 2017:**

a. Facility of filing the return (both GSTR-1 and GSTR-3B) through Electronic Verification Code (EVC) has been extended to such registered persons who is registered under the provisions of Companies Act, 2013 [Notification No. 48/2020 dt. 19.06.2020- effective from 27.05.2020]

b. Rule 67A inserted to facilitate filing of NIL returns (both GSTR-1 and GSTR-3B through SMS. [Notification No. 58/2020 dt. 01.07.2020]

c. Format of FORM GST INV-01 is substituted [Notification No. 60/2020 dt. 30.07.2020]

d. Consequent to amendment of provisions relating to composition scheme vide Finance Act, 2019 (which was notified effective from 1.1.2020), Rule 7 of the CGST Rules relating rate of tax on composition scheme has been amended as below:

Applicable to the assessee who is	Section under which composition levy is opted	Rate of Tax
Manufacturers, other than manufacturers of such goods as may be notified by the Government	Sec. 10(1) & (2)	1/2%
Suppliers making supply of food covered under entry 6(b) of Sch II		2%
Suppliers other than the above who are eligible to opt for composition scheme in terms of sec. 10(1) & (2)		1/2%
Registered persons not eligible under section 10(1) & 10(2), but eligible to opt to pay tax under sub-section (2A),of section 10	Sec. 10(2A)	3%

(above rate to be computed on the turnover in the State or Union territory)

[Notification No. 50/2020- Central Tax ,dt. 24-06-2020]

B. **E- invoicing :** All taxable persons whose aggregate turnover in a financial year exceeds Rs. 500 crores(five hundred crore rupees), except a unit SEZ, are required to issue e-invoice. The e-invoicing system would be effective from 1st October 2020. [Notification No. 13/2020 dt. 21.03.2020 as amended by Notification No. 61/2020 dt. 30.07.2020].

C. Due date for filing GSTR-4, for the year ending 31st March 2020, to be filed by a person who has opted for new composition scheme of 6% (2/2019-Central Tax (Rate), dated the 7th March, 2019), has been extended till 31st August 2020. [59/2020-Central Tax dated 13.07.2020]

D. **Waiver of late fee for delayed filing of GSTR-3B**

a) The late fee leviable under section 47 for delay in filing of GSTR-3B, shall stand waived for the tax period as specified in below subject to the condition mentioned for each corresponding entry

No.	Class of registered persons	Tax period	Condition (date within which the GSTR-3B shall be furnished to avail this facility)	Interest rates
1.	Taxpayers having an aggregate turnover of more than Rs 5 crores in the preceding financial year	February, 2020, March, 2020 and April, 2020	24th of June, 2020	Nil for delay of first 15 days
				9% PA till 24.06.2020
2.	Taxpayers having an aggregate turnover of up to rupees 5 crores in the preceding financial year, whose principal place of business is in the States of Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana or Andhra Pradesh or the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands and Lakshadweep	February, 2020	30th June 2020	NIL till 30.06.2020 and 9% PA thereafter till 30.09.2020
		March, 2020	3rd July 2020	NIL till 03.07.2020 and 9% PA thereafter till 30.09.2020
		April, 2020	6th July 2020	NIL till 06.07.2020 and 9% PA thereafter till 30.09.2020
		May 2020	12th September 2020	NIL till 12.09.2020 and 9% PA thereafter till 30.09.2020
		June 2020	23rd September 2020	NIL till 23.09.2020 and 9% PA thereafter till 30.09.2020
		July 2020	27th September 2020	NIL till 27.09.2020 and 9% PA thereafter till 30.09.2020
		August 2020	1st October 2020*	
	Taxpayers having an aggregate turnover of up to rupees 5 crores in the preceding financial year, whose principal place of business is in the States of Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi	February, 2020	30th June 2020	NIL till 30.06.2020 and 9% PA thereafter till 30.09.2020
		March, 2020	5th July 2020	NIL till 05.07.2020 and 9% PA thereafter till 30.09.2020
		April, 2020	9th July 2020	NIL till 09.07.2020 and 9% PA thereafter till 30.09.2020
		May 2020	15th September 2020	NIL till 15.09.2020 and 9% PA thereafter till 30.09.2020
		June 2020	25th September 2020	NIL till 25.09.2020 and 9% PA thereafter till 30.09.2020
		July 2020	29th September 2020	NIL till 25.09.2020 and 9% PA thereafter till 30.09.2020
		August 2020	3rd October 2020*	

* Due date for furnishing returns

b) Further, the late fee for failure to furnish GSTR-3B for the months from July 2017 till January 2020 shall be limited to Rs. 250 per tax period where the returns are furnished within 30th September 2020. Further, the late fee shall be NIL for a tax period having NIL returns. [Notification No.52/2017 dt. 24.06.2020]

c) However, if returns are not filed within the dates mentioned in the above dates, but are filed within 30th September 2020, the late fee is limited to Rs. 250. (In case of Nil returns entire late fee gets waived).

[Notification No.57/2017 dt. 24.06.2020 & Circular No.141/11/2020-GST dt. 24.06.2020]

E. **Extension of time limit to issuance of refund orders under section 54:**

in cases where a notice has been issued for rejection of refund claim, in full or in part and where the time limit for issuance of order in terms of the provisions of sub-section (5), read with sub-section (7) of section 54 of the said Act falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020, in such cases the time limit for issuance of the said order shall be extended to fifteen days after the receipt of reply to the notice from the registered person or the 30th day of June, 2020, whichever is later. [Notification NO. 46/2020 –Central Tax dt. 09.06.2020 with effect from 20.03.2020]

This date of 29 /30th June 2020 is further extended till 30th /31st August 2020 vide Notification NO. 56/2020 – Central Tax dt. 27.06.2020

F. **Extension of due date for compliance under various provisions of GST.**

In terms of Section 168A, inserted vide Taxation and Other Laws (Relaxation Of Certain Provisions) Ordinance, 2020 read with Notification No. 35/2020 dt. 03.04.2020, wherever, any time limit for compliance or completion of any action is prescribed under the act (except certain provisions mentioned in the said notification), which falls during the period from 20.03.2020 to 29.06.2020, and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action, shall be extended up to the 30th day of June, 2020.

The said notification has been further amended to extend the said time completion dates till 30th August 2020 and new the due for compliance would be 31st August 2020 instead of 30th June 2020.

[Notification NO. 55/2020 –Central Tax dt. 27.06.2020]

G. Sections 118, 125, 129 and 130 of Finance Act, 2020 are notified to be effective 30th June 2020. The amendment are consequent to re-organization of earlier state of Jammu & Kashmir. Further section 130 supra extends the time limit for issue of removal of difficulty orders upto a period of upto 5 years from date of commencement of CGST Act, 2017. Earlier this power was available upto 3 years.

H. **Removal of difficulty order relating to revocation of cancellation of registration**:

Section 29(2) provides for cancellation of registration by proper officer in certain situations as described in clauses(a) to (e) of said section. Section 30 provides for revocation of cancellation for which the application shall be filed within 30 days from the date of service of the cancellation order. further, an appeal could be filed against the cancellation order, under section 107 for which 3 months from the date of communication of the order is available.

It is to be noted that Section 169 provides for manner of service of notice under the provisions of CGST Act. The manner of service of notice or order includes communication through email or reporting in common portal.

Since large number of registered persons could not seek proper remedy (either seeking revocation of cancellation or filing an appeal), the Central Government has issued removal of difficulty order No. 1/2020 dt. 25.06.2020 clarifying that where cancellation orders under section 29 are passed upto 12th June 2020 and communicated either by sending the communication through email or by making available on common portal, then the effective date for filing the application for revocation under section 30(1) shall be later of the following shall be considered:

a) Date of service of the said cancellation order ;or

b) 31st day of August, 2020

I. **Refund of ITC on account of exports** :

Consequent to introduction of Rule 36(4) of CGST Rules, 2017, Board vide circular No. 135/05/2020–GST dated the 31st March, 2020 it was clarified the refund of accumulated ITC shall be restricted to the ITC reflected in the FORM GSTR-2A of the applicant. Based on the above, representations were received that the field formations are denying the credit of ITC on imports, ISD invoices and tax paid on reverse charge basis. In this connection, it is clarified that the treatment of refund of such ITC relating to imports, ISD invoices and the inward supplies liable to RCM will continue to be same as it was before the issuance of Circular.

[Circular No. 139/09/2020-GST dt. 10th June 2020]

J. **Clarification in respect of levy of GST on Director's remuneration**

On the issue of levy of GST on Directors remuneration, it is clarified that the remuneration paid to independent directors, or those directors, by whatever name called, who are not employees of the said company, is taxable in hands of the company, on reverse charge basis.

However, where a director is employee of the company and Director's remuneration which are declared as 'Salaries' in the books of a company and subjected to TDS under Section 192 of the IT Act, the said remuneration is not taxable being consideration for services by an employee to the employer in the course of or in relation to his employment in terms of Schedule III of the CGST Act, 2017.

[Circular No:140/10/2020-GST dt 10th June 2020]

K. **Extension of time limits under Central Excise, Customs and Service Tax provisions**:

On account of COVID-19, Due date for compliance with various provisions under Central Excise, Customs and Service Tax were extended till 30th June 2020 vide Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020. The said due date has been further extended till 30th September 2020 vide notification dated 27.06.2020 issued under the said ordinance.

II. **Important decisions:**

1. **Constitutional validity of Intermediary services**

Material Recycling Association of India Vs Union of India 2020-TIOL-1274-HC-AHM-GST

Facts: Petitioner is an association comprising of recycling industry engaged in manufacture of metals and casting etc. They also provide business promotion and marketing services for principals located outside India.

Question: Petitioner challenged the constitutional validity of section 13(8)(b) of the IGST Act and to hold the same as ultra vires the Articles 14, 19, 265 and 286 of the Constitution of India.

Contention: Petitioner submits that members of the petitioner association receives only the commission upon receipt of sale proceeds by its foreign client in convertible foreign exchange and thus the transaction entered into by the members is one of export of service from India; that, therefore, IGST cannot be levied on the members who are engaged in the transaction of export of services as the same is covered u/s 16(1) of the IGST Act, 2017 which provides for 'zero-rated supply'.

Held: Based on the following observations, the Court held that it cannot be said that the provision of section 13(8)(b) read with section 2(13) of the IGST Act are ultra vires or unconstitutional:

- Parliament has exclusive power under Article 246A to frame laws for inter State supply of goods or services.
- The basic underlying change brought in by the GST regime is to shift the base of levy of tax.
- Upon a conjoint reading of section 2(6) and 2(13) of IGST Act, 2017 which defines 'export of service' and 'intermediary service' respectively, then the person who is intermediary cannot be considered as exporter of services because he is only a broker who arranges and facilitates the supply of goods and services or both.
- It therefore, appears that the basic logic or inception of section 13(8)(b) of the IGST Act, 2017 considering the place of supply in case of intermediary to be the location of supplier of service is in order to levy CGST and SGST and such intermediary service, therefore, would be out of the purview of IGST.
- There is no distinction between the intermediary services provided by a person in India or outside India. Only because the invoices are raised on the person outside India with regard to the commission and foreign exchange is received in India, it would not qualify to be export of services, more particularly when the legislature has thought it fit to consider the place of supply of services as place of person who provides such service in India.
- There is a stipulation by the Act legislated by the Parliament to consider the location of the service provider of the intermediary to be place of supply. Similar situation was existing in service tax regime w.e.f 1st October 2014 and as such same situation is continued in GST regime also.
- This being the consistent stand of the respondents to tax the service provided by intermediary in India, the same cannot be treated as 'export of services' under IGST Act, 2017 and, therefore, rightly included in section 13(8)(b) of the IGST Act to consider the location of supplier of service as place of supply so as to attract CGST and SGST.

- Contention of the petitioner that it would amount to double taxation is also not tenable in eyes of law because the services provided by the petitioner as intermediary would not be taxable in the hands of recipient of such service, but on the contrary a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and, therefore, it would not be a case of double taxation.
- Further, there is an exemption from payment of IGST for service provided by an intermediary when location of both supplier and recipient of goods is outside the taxable territory i.e. India vide Notification no. 20/2019-IT(R).

2. **Validity of excluding input services from the scope of refund on account of inverted rate structure:**

   VKC Footsteps India Pvt Ltd Vs Union of India 2020-TIOL-1273-HC-AHM-GST

   Facts: Petitioner is engaged in the business of manufacture and supply of footwear which attracts GST @5% and the majority of the inputs and input services procured by them attract GST @12% or 18%. Inspite of utilization of credit for payment of GST on outward supply, there is accumulation of unutilized credit in electronic credit ledger. Respondents are allowing refund of accumulated credit of tax paid on inputs such as synthetic leather, PU polyol etc. but refund of accumulated credit of tax paid on procurement of 'input services' such as job work service, goods transport agency service etc. is being denied on the ground that Rule 89(5) of the CGST Rules does not allow refund of input tax credit relatable to Input services.

   Question: Constitutional validity of Rule 89(5) of the CGST Rules which defines "Net Input Tax Credit". The Net input tax has been defined to exclude input services and consequently, no refund could be claimed on the accumulated input services.

   Held: On the basis of the following observations, allowing the petitioner the Court directed the respondent to allow the claim of the refund made by the petitioners considering the unutilized input tax credit of "input services" as part of the "net input tax credit" (Net ITC) for the purpose of calculation of the refund of the claim as per rule 89(5) of the Rules for claiming refund under sub-section 3 of section 54 of the Act:

- Sub-section 3 of Section 54 of the CGST Act, 2017 entitles any registered person to claim refund of "any" unutilized input tax credit.
- Section 7 of the CGST Act provides that "scope of supply" includes all forms of supply of goods or services.".
- The word "Input Tax credit" is defined in section 2(63) of the Act meaning the credit of Input tax. 'Input tax' is defined in section 2(62) as the central tax, state tax, integrated tax or union territory tax charged on any supply of goods or services or both made to a registered person. "Input" is defined in section 2(59) means any goods other than capital goods. "Input service" as per section 2(60) means any service used or intended to be used by a supplier.
- Thus "input" and "input service" are both part of the "input tax" and "input tax credit", therefore, as per the provisions of sub-section 3 of section 54 of the Act, 2017, the legislature has provided that registered person may claim refund of "any unutilized input tax".
- From the conjoint reading of the provisions of Act and Rules, it appears that by prescribing the formula in sub-rule 5 of Rule 89 of the CGST Rules, 2017, to exclude refund of tax paid on "input services" as part of the refund of unutilised input tax credit is contrary to the provisions of sub-section 3 of section 54 of the Act which provides for claim of refund of "any unutilised input tax credit".
- Therefore, by way of rule 89(5) of the Rules, such claim of the refund cannot be restricted only to "input" excluding the "input services" from the purview of "input tax credit".
- Moreover, clause (ii) of proviso to sub-section 3 of section 54 also refers to both supply of goods or services and not only supply of goods as per amended rule 89(5) of the CGST Rules, 2017.
- Keeping in mind the scheme and the object of the Act, 2017, the intent of the government, explanation (a) to rule 89(5) which denies refund of "unutilized input tax" for the purpose of refund account of inverted duty structure, is ultra vires the provisions of section 54(3) of the Act.

3. **Presence of advocate during search operations**

Subhash Joshi VS Director General of GST Intelligence [2020] 117 TAXMANN.COM 730 (MADHYA PRADESH)

Facts: Petitioner has challenged the notice dated 20th June, 2020 whereby the premises of the petitioner has been sealed under the provisions of the CGST Act, 2017. Petitioner submits that though the action relating to search and seizure under section 67 of the GST Act has been taken, but the requisite procedure has not been followed. Petitioner apprehends that the search and seizure may not be carried out in a fair manner and the confession of the petitioner may be recorded under pressure, therefore, a direction be issued for carrying out the search in the presence of an Advocate; that the respondents want to carry out the search by keeping their own pocket witnesses.

Held:

- In terms of the sub-section 10 of Sec.67 of the CGST Act, 2017, the provisions of search and seizure as contained in Cr.P.C are applicable.
- Inasmuch as in terms of sub-section (4) of Sec.100 Cr.P.C, presence of two or more independent and respectable inhabitants of the locality is necessary as witness to the search.
- Petitioner has failed to point out any statutory provision or any such legal right in favour of the petitioner to buttress their contention that that the search should be carried out in the presence of the Advocate, therefore, such a request cannot be accepted. [Relied on Poolpandi Vs Superintendent, Central Excise (1992) 3 SCC 259 and Sudhir Kumar Aggarwal Vs Directorate General of GST Intelligence 2019 SCC OnLine Del 11101].
- The search is yet to take place in the present case and the counsel for respondents has duly assured this Court that the aforesaid provision will be complied with.
- Therefore, no direction in this regard at this stage is required.

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Draft Assessment Order, DRP Proceedings and Their Nuances

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Introduction of section 144C in the scheme of the Income-tax Act, 1961(the Act) was an enabler of Dispute Resolution Mechanism under Indian domestic tax law. Since inception, tax assessments were completed upon passing of an "assessment order" with the accompanying demand and penalty notices, as may deem fit. However, pursuant to constituting Dispute Resolution Panel (DRP), the Assessing Officer (AO), in the case of (*i) any non-resident not being a company, or any foreign company and (ii) other person having transfer pricing adjustment proposed by Transfer Pricing Officer (TPO)* [cumulatively referred to as 'Eligible Assessee'], had to mandatorily issue a Draft Assessment Order (DAO) if he proposes to make a variation in the income or loss returned by the assessee. Post this, the Eligible Assessee will have the following options:

- Filing objections against the said DAO before the DRP; or
- Intimate the AO that it would proceed to file an appeal before the Commissioner of Income Tax (Appeals) and request the AO to pass the Final Assessment Order (FAO).

Once Eligible Assessee opts to file objections before DRP, the DRP will proceed to issue Directions after making such further enquiry as it thinks fit and enable the AO to complete the assessment in passing of the FAO.

With the above being said, the very issue of passing a DAO by the AO and the subsequent procedural aspects in the course of the assessment cycle has been a fairly disputed subject. This article is an attempt to encompass the issues involved and the litigated aspects on this subject.

1. Time Limit for Passing DAO[1]

Although there is no explicit mention of the timelines for issuing the DAO, there are two principal school of thoughts on this issue, which hold their own arguments. The first school of thought holds that the DAO should be issued within the prescribed timelines as per Section 153(1) of the Act, which mandates DAO to be issued with 21 months[2] from the end of the assessment year in which the income was first assessable. The other school of thought holds that the said timeline under Section 153(1) of the Act is for the FAO since Section 153 of the Act dictates the timelines for "completion" of assessment. In this scenario, an assessment would be complete upon passing of the FAO and therefore, the said timelines govern the FAO.

2. Is DAO required to be issued at every instance?

There are innumerous judicial precedents that have held that the AO shall comply with the procedure laid out under section 144C of the Act irrespective of whether it is fresh assessment or remand proceedings initiated post higher authority directions. In other words, in cases wherein the Income Tax Appellate Tribunal (ITAT) or higher authorities/ courts have remanded the matter of dispute back to the AO, the AO is duty bound to issue a DAO in the second or subsequent round of proceedings. A failure on the AO's part could render the entire matter being quashed. In case of ***Turner International India Pvt Ltd***[3], the Delhi High Court confirmed the same. Similar views have been expressed by the Delhi High Court in case of ***Control India Risk Pvt Ltd***[4] and the Bombay High Court in ***Dimension Data Asia Specific Pte Ltd***[5]. Recently, the Hon'ble Karnataka High Court in case *of* ***Wipro GE Healthcare Pvt Ltd*** held that, remand back proceeding results into reconsideration of the matter, regardless of its scope, hence following procedure laid down under section 144C of the Act by the AO is mandatory.

While on this context, a food for thought is that there are certain judicial rulings which have held that the AO need not mandatorily issue a DAO in the second round of proceeding, if the said remand back involves giving effect to a straight forward instruction of the ITAT or higher authorities/ which does not alter the taxable income.

1 Religare Capital Markets Limited(TS-1004-ITAT-2019(DEL)-TP)
Volvo India Pvt Ltd(TS-391-ITAT-2019(Bang)-TP)
The Himalayan Drug Co(TS-566-ITAT-2017(Bang)-TP)

2 In case of AY 2018-19, 18 months from end of the assessment year and 12 months from the end of the assessment year for AY 2019-20

3 [TS-400-HC2017(DEL)-TP]

4 Writ Petition No. 5722/2017 & C.M. No. 23860/2017

5 [TS-719-HC-2018(BOM)-TP]

3. **Legality of deviations from DRP Directions?**

Upon passing the DAO and post completion of DRP proceedings, AO shall in accordance with section 144C(10) of the Act incorporate the Directions of the DRP as is in the FAO. Any deviation or failure on the part of AO will render the entire assessment procedure as void.

The binding principle arising from the provision of section 144C(10) of the Act has to be read in consensus with Article 141 of the Constitution. There are no provisions under the Act which the AO could take recourse in order to justify any deviation the FAO. The DRP is certainly a superior authority compared to the AO despite the settled principle that DRP proceedings are an extension of the assessment proceedings. Therefore, the AO shall follow the Directions of the DRP and has no legal shelter to express dissent. Further, any order passed by the AO in contravention of Directions of the DRP, cannot be treated as FAO and by virtue of this, such order is barred by limitation under section 153 of the Act.

It is to be noted that there are various judicial precedents on the subject of whether the AO can transgress the directions of the DRP and make any deviations in the FAO. In case of ***Software Paradigms Infotech (P.) Ltd. v. Assistant Commissioner of Income Tax, Circle-1 (2), Mysore***[6]**,** the Hon'ble Bangalore ITAT held that, "*The AO/TPO passed impugned final order of assessment under section 143(3) read with section 92CA without giving effect to or carrying out binding directions of DRP as required under section 144C(10) within time specified under section 144C(13), its conduct was a clear case of defiance and disregard to binding directions of higher authorities*".

In case of ***Global One India (P.) Ltd. v. Deputy Commissioner of Income Tax, Circle-12(1), New Delhi***[7]***, the*** Hon'ble Delhi ITAT held that, "*When the AO has deliberately chosen not to follow a binding provisions u/s. 144C of the Act while passing the FAO, the Assessment Order, itself becomes null and void.*"

4. **DAO vs FAO**[8]

Issue of demand notice and penalty notice along with the DAO is always a disputed matter. In the recent ruling of ***Kohler Power India Private Limited***[9], the Pune bench of the ITAT held that a DAO passed by the AO along with a notice of demand without providing any direction to taxpayer to either accept the addition or file objections before the DRP is in contravention to the provisions of section 144C of the Act and such a defect is not curable under section 292B of the Act.

Recently, in case of ***Skoda Auto India Pvt Ltd*** [10], the Pune ITAT held that issuance of demand notice under section 156 of the Act and penalty notice under section 271(1)(c) of the Act with the DAO, which are generally issued with the FAO, which were at no point even withdrawn by the AO, partakes the character of FAO and held that *"The failure of AO to adhere to the mandatory requirement of section 144C* of the Act *in not first passing the DAO invalidates the FAO and subsequent the proceedings arising there from"*.

5. **Indirect Enhancement of variation by DRP violates principle of natural justice?**

Provision of section 144C(8) of the Act enables the DRP to issue Directions which may confirm, reduce or enhance the variations proposed in the DAO. However, such Directions can be given only after providing an opportunity of being heard to the Assessee in accordance with section 144C(11) of the Act. However, in the real world, there could be/ have been scenarios wherein the tax payers have encountered situations wherein DRP Directions may have fueled an enhancement in the quantum of adjustment that could surface only post receiving the FAO. For instance, in case of Transfer Pricing adjustments arising due to comparable companies, adoption of filters, etc., the DRP may accept the objections of the Eligible Assessee on inclusion/exclusion of comparable companies but may provide certain self-conceived Directions. In such cases, post factoring the relief obtained, the final effect on the arm's length price could be adverse as compared to the situation prior to the DRP Directions. This therefore, could be viewed as an indirect enhancement of the adjustment to which no opportunity of being heard may have been granted by the DRP.

In our opinion, even though DRP has the power to enhance the variation (directly/indirectly) as proposed in the DAO, such variation shall be done only after providing a reasonable opportunity of being heard to Eligible Assessee. Any deviation could be viewed as a violation of the principles of Natural Justice and may be challenged before higher authorities.

6 [2018] 89 taxmann.com 339 (Bangalore - Trib.)
7 [2019] 112 taxmann.com 185 (Delhi - Trib.)
8 Pricewaterhouse Coopers Private Limited(TS-298-ITAT-2020 (Kol)-TP)
9 (TS-824-ITAT-2019(PUN)-TP)
10 [TS-534-ITAT-2019(PUN)-TP]

(Contd. on page 24)

Financial Reporting and Assurance

CA. Vinayak Pai V

1. **UPDATES:** *Monthly Roundup*[1]

AS/Ind AS	• ICAI **Education Material** – Ind AS 38, ***Intangible Assets***.
	• ICAI **Technical Guide** – *Accounting for Expenditure on* ***Corporate Social Responsibility Activities***.
	• Guidance Note on Accounting for Expenditure on CSR Activities – Withdrawn**.**
	• Implementation of **Ind AS (NBFCs** and ARCs) – RBI Notification on *Unrealized Gain/Loss on a Derivative Transaction undertaken for Hedging.*
	• **Companies (Indian Accounting Standards) Amendment Rules**, **2020** - MCA Notification dated July 24, 2020 o **Ind AS 103** ▪ *Definition of a Business, Optional Test to Identify Concentration of Fair Value, Elements of Business, and Assessing Whether an Acquired Process is Substantive.* o **Ind AS 107** ▪ *Uncertainty arising from Interest Rate Benchmark Reform.* o **Ind AS 109** ▪ *Temporary Exception from applying Specific Hedge Accounting Requirements.* o **Ind AS 116** ▪ *Covid-19 Related Rent Concession for Lessees.* o **Ind AS 1, 8 and 10** ▪ *Definition and aspects related to "Materiality".* o **Ind AS 37** ▪ *Restructuring.*
IFRS	• **Amendment to IAS 1**, *Presentation of Financial Statements* o ***Classification of Liabilities as Current or Non-Current*** ▪ **Effective date deferred** by a year to January 1, 2023.
Assurance	• ICAI Announcement – Applicability of the revised edition of **Code of Ethics** o **Provisions deferred** till further notification – a) Responding to NOCLAR, b) Fees – Relative Size, and c) Taxation Services to Audit Clients.
	• ICAI **Guidance Note** on The **C**ompanies (**A**uditor's **R**eport) **O**rder, 2020.
	• **IAASB** Staff **Audit Practice Alert** Publication o *Review Engagements on Interim Financial Information in the Current Evolving Environment due to Covid-19.*
	• **PCAOB** Document o *Conversations With* ***Audit Committee*** *Chairs:* ***Covid-19 and the Audit.***

[1] *Updates for the month of July 2020.*

Company Law/ SEBI	• SEBI Circular No. SEBI/HO/CFD/CMD1/CIR/P/2020/140 dated July 29, 2020 – o **Extension of time** for **submission** of **financial results** for the **quarter**/half year/financial year **ended 30th June 2020.**
	• MCA General Circular No. 26/2020 dated July 6, 2020 ▪ **Extension** of last date of Filing of **Form NFRA-2.**
NFRA	• **Orders** under **Section 132 (4)** of the Companies Act o 3 orders in respect of Show Cause Notices issued to CAs' – Dated 22nd, 23rd and 28th July, 2020.
RBI	• Notification o **Extension of timeline** for finalization of **Audited Accounts** by applicable **NBFCs**.
US GAAP	• FASB **Exposure Draft** o Proposed Chapter 4, ***Elements of Financial Statements*** to Concept Statement No. 8, *Conceptual Framework for Financial Reporting.*

2. **AUDIT RELATED –** *Useful Extracts*

a) *NFRA's order dated 28th July, 2020 u/s 132(4) of CA, 2013*

'It has to be noted that SA 230[2] clearly lays down that the Audit File should be capable of speaking for itself without the need for any other aids to interpretation.

What has been claimed to have been done by way of audit procedures, or what has been claimed to have been gathered as audit evidence, should be attested/ supported by the audit file.

No claim that is not so supported can be taken into consideration. Given this position in the SAs, there is virtually no scope for purely oral submissions or discussions. All oral representations have also to be reduced to writing so as to form part of the record, and to eliminate the scope for disputes.

It is only such record, backed by pre-existing evidence from the Audit File, that can be accepted for the AQRR[3].'

b) *Implementation Guide on Reporting Standards (Revised SA 700, 705 and 706)*

'It is necessary that an auditor's report should follow a particular from and style. Consistency in auditor's reports (as required under SA 700, Forming an Opinion and Reporting on Financial Statements) promotes credibility in the global marketplace. It helps to promote the user's understanding, and to identify unusual circumstances when they occur. It needs to be ensured that the formats of auditor's report as laid out under various illustrations to SA 700 (R) are fully adhered to[4].'

3. **CASE STUDY:** *Reporting On A Key Audit Matter (KAM)* **– ECL on Trade Receivables**

Background: *Trade receivables constitute about 20% of total assets of Company X which measures Expected Credit Losses (ECL) on trade receivables based on a provision matrix. The same is based on significant management judgement and estimates i.e. historical default rate/payment trend of customers; ageing analysis; relevant current customer specific conditions; and other relevant factors that include forward-looking information (such as future collectability and subsequent settlement). Some customers have a higher than average DSO, which increases the attendant credit risk. Further, the outstanding amounts could be impacted by the economic conditions consequent to Covid-19.*

Assessment as a KAM: The statutory auditors considered assessment of ECL for receivables as a KAM on account of the **significance of balance of trade receivables** and because of the **significant management judgement involved in its estimation** particularly **in the context of Covid-19**.

Audit procedures applied to obtain sufficient appropriate audit evidence: The following audit procedures were applied, inter alia, by the auditors to obtain sufficient appropriate audit evidence:

[2] *SA 230, Audit Documentation*

[3] *AQRR – Audit Quality Review Report*

[4] *Question 9, Chapter 3 of the Implementation Guide*

- The auditors **assessed** the **appropriateness of accounting policy** for ECL as per Ind AS 109.
- The auditors **obtained an understanding** of and **assessed the design, implementation and operating effectiveness** of **key controls** relating to collection monitoring process, credit control process (including customer credit approvals) and estimation of ECL.
- The auditors **tested controls** relating to **classification** of the receivable balances included in the **receivables ageing report**. For a sample selected, they tested classification in the ageing report to source documents such as invoice issued and contract with the customers.
- For **samples selected**, the auditors **circularized independent confirmations** and where confirmations were not received, performed alternate testing procedures that included testing, on a sample basis, subsequent collections.
- The auditors **assessed the methodology** used by management **to estimate** the **ECL provision** and its compliance with Ind AS 109.
- The **auditors assessed the reasonableness** of the **ECL estimate** by **obtaining an understanding** of the **key assumptions** used in estimating the ECL such as discount rate, historical default rates, recovery rates, payment trend, current economic conditions and forward-looking information, etc.
- The auditors **assessed** the **adequacy of disclosures** relating to trade receivables and related credit risk (Ind AS 107).

4. **FINANCIAL STATEMENT EXTRACTS:** *COVID-19* **– Impact**

Extracts from published financial statements (related to Disclosure of **COVID-19 impact** in the Notes to the Financial Statements for FY2020) of a listed company operating in the hospitality sector is provided herein below.

The Company expects all its hotels to become operational in a phased manner after the lockdown is lifted and the confidence of travellers is restored. The Company ***expects the demand for its services to pick up albeit at a slower pace*** *once lockdown is lifted and* ***recovery in business to be driven by*** *domestic leisure tourism, staycations, domestic business travel and limited international travel.*

The Company has ***assessed the potential impact of Covid-19*** *on its capital and financial resources, profitability, liquidity position, ability to service debt and other financing arrangements, supply chain and demand for its services.* ***Various steps have been initiated*** *to raise finances from banks and institutions for working capital needs and long term fund requirements and the Company is in a comfortable liquidity position to meet its commitments. The Company has judiciously invoked the Force Majeure clauses for reliefs during the lockdown period and does not foresee any disruption in raw material supplies.*

The Company has also ***assessed the potential impact of Covid-19 on the carrying value*** *of property, plant and equipment, right-of-use assets, intangible assets, investments, trade receivables, inventories, and other current assets appearing in the financial statements of the Company.* ***In developing the assumptions and estimates relating to the future uncertainties*** *in the economic conditions because of this pandemic, the Company as at the date of approval of these Financial Statements has* ***used internal and external sources of information*** *and based on current estimates, expects to recover the carrying amount of these assets. The impact of the global health pandemic may be different from that estimated as at the date of approval of these financial statements and the Company will continue to closely monitor any material changes to future economic conditions.*

5. **BACK TO BASICS:** *Subsequent Measurement of Financial Assets* **(Ind AS)**

The salient aspects of accounting for the **subsequent measurement of financial assets** under Ind AS are discussed herein below.

The subsequent measurement of a financial asset (FA) and accounting for gains and losses under the Ind AS framework is guided by Ind AS 109, *Financial Instruments.* It may be noted that the classification of a FA (Amortized cost, Fair Value – P&L/OCI) is the precursor to other steps.

Financial assets at amortized cost

The FA is subsequently measured at amortized cost using the effective interest method. The amortized cost is reduced by impairment losses, if any. Interest income, foreign exchange gains and losses and impairment are recognized in the Statement of Profit and Loss. Any gain or loss on derecognition is recognized in the Statement of P&L.

Financial assets at FVTPL

The FA is subsequently measured at fair value. Gains/losses, interest or dividend income is required to be recognized in the Statement of P&L.

Debt Investments at FVOCI

The FA is subsequently measured at fair value. Interest income under the effective interest method, foreign exchange gains and losses and impairment, if any, are recognized in the Statement of Profit and loss. On derecognition, gains and losses accumulated in OCI are reclassified to the Statement of P&L.

Equity Investments at FVOCI

The FA is subsequently measured at fair value. Dividends are recognized as income in the P&L unless the dividend clearly represents a recovery of part of the cost of the investment. Other net gains and losses are recognized in OCI and are not reclassified to the Statement of P&L.

6. **TRIVIA**[5]

Luca Pacioli, referred to as the Father of Accounting wrote the first book on Double Entry Accounting in 1494. Some of the words of advice he had, included: *"one should not go to sleep at night until the debits equalled the credits".*

[5]*Sourced from the internet*

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Draft Assessment Order, DRP Proceedings and Their Nuances

(Contd. from page 20)

6. **Revision of FAO under section 263 of the Act.**

As per the provisions of section 263 of the Act, the Commissioner of Income Tax (CIT) or the Principal Commissioner of Income Tax (PCIT) can suo-moto revise any order passed by the AO, if such order passed by AO is erroneous and prejudicial to the interests of the Revenue. Now the question arises as to whether a FAO passed in accordance with the Directions of the DRP, can be revised under section 263 of the Act by PCIT or CIT.

Although, there is no settled position as far as revision of FAO under section 263 of the Act is concerned, taxpayers may take a stand that the intent of introducing of DRP mechanism was to fast track the litigation process and explicit mention in the statutory provision enabling the DRP to make further enquiries, or cause further enquiries or to enhance variations proposed in the DAO itself is sufficient cause for not permitting revision under section 263 of the Act. Moreover, one can also argue that the CIT being an officer of similar rank to that of DRP panel members, cannot revise the FAO.

Contrary to the above, the Hon'ble Karnataka High Court in case of ***Devas Multimedia (P.) Ltd,***[11] held that there is no bar on the PCIT to invoke section 263 of the Act against the FAO passed pursuant to DRP Directions, PCITs power to revise the FAO was upheld.

Conclusion

The entire concept of DAO came into existence post constitution of the DRP in 2009. However, in today's tax age, DRP's existence, which was originally intended to provide a faster and appropriate remedy to tax payers, seems to have lost its way due to the manner of disposal of cases by the DRP wherein merits and facts are completely disregarded. With this said, the government could consider restructuring the DRP and its constitution which could bring about a landscape change in the concept of DAO also bearing the restriction on the Revenue in filing an appeal before the ITAT against the DRP Directions. Further, there are few noteworthy points like whether a DAO is required under when proceedings under Section 148 of the Act are initiated. Only time would answer this.

11 [WP No. 11618 of 2016, dated 27-9-2019] (Kar.)

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Challenges for Chartered Accountants in the Privacy Realm

Adv. M G Kodandaram
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(Contd. from previous issue)

Privacy by design

The Bill mandates that the Data Fiduciaries are required to formulate a 'Privacy by Design [clause 22 of PDPB] policy that ensures the managerial, organizational, business practices and technical systems designed in a manner to anticipate, identify, and avoid harm to the Data Principal so that the mandatory obligations towards protection of personal data of the Principal are in place. The technology and strategy used for this purpose should be in accordance with commercially accepted or certified standards, for which regulations are yet to be notified. One of the objectives of the PDP Bill is to have international standard of technological and administrative framework, so as to institute a uniform approach towards meeting the compliance requirements of the Indian Data Processing industry within India and outside, to help entities remain competitive in the new global business and service sector. As on date the Indian Information Technology act prescribes sector-specific standards like ISO/IEC 27001 and ISO/IEC 27002 for data protection and this needs to be either upgraded for meeting the requirements of privacy law or new unique standards need to be laid down for this purpose. Further the Bill has provisions to allow legitimate interests of businesses including any innovation without compromising privacy throughout the processing, from the point of collection to deletion of personal data. The processing of data should be in a transparent manner and in the interest of the Data Principal at every stage of processing. All the Data Fiduciary should submit its Privacy by Design Policy to the Authority for certification by 'Data Protection Authority' (DPA for short) and display such certified document in their websites.

Significant Data Fiduciary

Under clause 26 of the Bill provisions are made to notify a Fiduciary or a class of Data Fiduciary as a 'Significant Data Fiduciary' after considering the factors such as, (a) volume of personal data processed; (b) sensitivity of personal data processed; (c) turnover of the Data Fiduciary; (d) risk of harm by processing by the Data Fiduciary; (e) use of new technologies for processing; and (f) any other factor causing harm from such processing. All such Data Fiduciaries should get themselves registered in the prescribed manner with the Data Protection Authority (DPA). The large establishments / entities or specific class of Fiduciaries processing personal data may fall under this classification and we have to keenly await further developments in this regard. All Significant Data Fiduciaries, who intend to undertake any processing of information involving use of sensitive personal data such as genetic data or biometric data etc., which carry a risk of significant harm to Data Principals, could do so, only after a data protection impact assessment as prescribed. The Significant Data Fiduciary should maintain accurate and up-to-date records, in such form and manner as may be specified by regulations [clause 28]. The Significant Data Fiduciaries shall have their policies and the conduct of its processing of personal data audited annually by an independent data auditor.

Every Significant Data Fiduciary shall appoint a Data Protection Officer [DPO] possessing qualification and experience as may be specified by regulations for carrying out functions such as (a) providing information and advice to the Data Fiduciary on matters relating to fulfilling its obligations under this Act; (b) monitoring personal data processing activities of the Data Fiduciary to ensure that such processing does not violate the provisions of this Act; (c) providing advice to the Data Fiduciary on carrying out the data protection impact assessments and to advice on the development of internal mechanisms to satisfy the privacy principles. The Data Protection Officer should assist and co-operate with the Authority on matters of compliance of the Data Fiduciary and act also as the point of contact for the Data Principal for the purpose of grievances redressal.

Anonymisation and de-identification of personal data

As deliberated above, only the personal data with an element of identification of an individual are covered under the ambit of PDP Bill. It is pertinent to note that the provisions of PDP Bill will not be applicable to the data that have an identity of a Company or such entities or to the general business data,

which does not include personal information with identity of such person. Further any personal data, when converted to form an Anonymized data, are also not covered under the ambit of PDP Bill. The Anonymization of a personal data, means *'such irreversible process of transforming or converting personal data to a form in which a Data Principal cannot be identified, which meets the standards of irreversibility specified by the Authority'[refer clause 3(2)].* In simple words, the Data Anonymisation refers to the removal of identifiers that must be a standardised process approved by the data protection Authorities. This means that the data still exists, but the link between the data and the Data Principal is converted or transformed in such a way that the Data Principal cannot be identified from such data and such transformed data cannot be attributed back to the person by any means by any one. The Personal data which has undergone the process of Anonymisation, are called as "anonymised data"*[*refer clause 3(3)].

For allowing any processes in a personal data with the employees, the personal information identifiers in such data may be removed using certain digital tools and after completion of the assigned task, such data could be converted back into their original form. As per clause 3 (*16*) of the Bill, "de-identification" means the process by which a data fiduciary or data processor may remove or mask identifiers from personal data or replace them with such other fictitious name or code that is unique to an individual and does not, on its own, directly identify the Data Principal. The processes by which a Data Fiduciary or Data Processor may reverse the process of de-identification to obtain the original personal data, are termed as "re-identification" *[refer clause 3(34)].* These processes do not amount to anonymisation of data and therefore are very much covered under the ambit of PDP Bill.

The clause 24 of the Bill prescribes that every Data Fiduciary and the Data Processor shall, having regard to the nature, scope and purpose of processing personal data, the risks associated with such processing, and the likelihood and severity of the harm that may result from such processing, implement necessary security safeguards, including use of methods such as de-identification and encryption. It is important to mention here that as per clause 50, obtaining the permission of the DPA is essential before adopting such practices to safeguard the privacy of the Principal. The codes could also be specified codes prescribed by the authorities to promote good practices of data protection and facilitate compliance with the obligations under this Act. Therefore the code of practice on methods of de-identification and anonymisation should be obtained from the authorities in such instances. The above processes are explained in simple terms to enable one to understand the concept of Anonymisation and de-identification of personal data better.

Example: Mr. P, the Principal, after issue of notice by the Fiduciary and providing the required consent, has communicated the following information to the Data Fiduciary or the Data Processor duly authorized by the Fiduciary.

Name	E mail address	Aadhar no.	Salaray Month-wise	Interest Received on fixed deposits monthwise	Rent received Monthwise	Date of birth	80 G deductions	Pan number	Bank account number
1	2	3	4	5	6	7	8	9	10

In the above information, the data at column nos. 1, 2, 3, 9 and 10 are personal data as well as personal identifiers as using this information the concerned P could be identified. The data in column 1,2,3,9 are called direct identifiers as the person can be identified immediately and 10 as indirect identifier as one has to obtain information from bank to identify Mr. P. The other data at column 4, 5, 6, 7, 8 are personal data of the Principal and if they are with any one or more of the identifier data of column nos. 1, 2, 3, 9 or 10, the Principal could be identified. This will amount to breach of privacy and is punishable under the bill.

If the above data is converted by replacing the identifiers by some codes so that whenever required the original data could be re-identified, the said process is called as de-indentified data, which is very much covered for protection under the scope of the bill.

Name	E mail address	Aadhar no.	Salaray Month-wise	Interest Received on fixed deposits monthwise	Rent received Monthwise	Date of birth	80 G deductions	Pan number	Bank account number
1	2	3	4	5	6	7	8	9	10
Replace by code	Replace by code	Replace by code						Replace by code	Replace by code

These procedures in which identifying fields in a data record are replaced by artificial identifiers (pseudonyms/ masked data) are called as de-identified data. The purpose is to make it harder to identify individuals from the data record. These practices are more useful and suitable for extensive analytics and processing of the data with less scope for privacy data leakage. Whenever required for permitted applications these data could be attached with identifiers and used.

The above data, at any stage, is used after either deleting the columns no 1, 2, 3,9 or 10 or replacing column no 1, 2, 3,9 or 10 with irrelevant information, in such a way it is not possible to obtain the original identity of the principal by anyone including the Fiduciary, such data are called as anonymised data. Such data does not attract the provisions of this bill even if there is any loss of such anonymised data / information, as the Individual / Principal cannot be identified by use of such data. Anonymised data is always unrecognisable, even to the Principal who is the data owner. These methods could be adopted by the parties concerned after due standardisation and with concurrence of the DPA.

The Bill proposes for setting up of a Data Protection Authority (DPA) who may, (a) take steps to protect interests of individuals; (b) prevent misuse of personal data; and (c) ensure compliance of concerned with the Bill. Whenever there is personal data breach, it creates the scope for an offence as per the proposed Bill. The offences under the Bill include, (i) processing or transferring personal data in violation of the stated law; and (ii) failure to conduct a data audit which are punishable with a fine of Rs 15 crore or 4% of the annual turnover of the Fiduciary, whichever is higher. The failure to conduct data audit are punishable with a fine of five crore rupees or 2% of the annual turnover of the Fiduciary, whichever is higher. The Officers in the DPA are vested with the powers of a quasi-judicial authority, including calling of persons concerned for inquiry into Fiduciaries, assess compliance, and determine penalties on the Fiduciary or compensation to the Principal by following the principles of natural justice. The Data Protection Officer [DPO] of a significant Data Fiduciary should keep contacts with the DPA to report any noticed violations, to file timely reports and returns and to seek advices on best practices.

A final word

As many countries around the globe initiated the enactment and the implementation of the personal data governance realms, this Bill will have a humungous role in shaping the regulation governing today's increasingly data-driven geopolitical environment. It expects to usher in fundamental changes in the way data is gathered, processed, stored and deleted by different parties who are using or access to such invaluable data. Some concepts in the Bill bear an eerie resemblance to other statutes around the world. The following of this Indian law will help to provide goods openings to all entities in the international expansions.

The provisions relating to obtaining the consent of the Principal may have to be followed in a thorough manner so that the stringent compliance of the stated law is met with. The entities classified as Data Fiduciaries or Significant Data Fiduciary should determine the purpose and means of processing personal data in a fair manner as stipulated in the law. All CAs entities have to undertake a great deal in improving the existing architecture to modify business processes to meet the requirement of the proposed law and the requirements of international scenario. There is need of proper encryption of personal data along with **technical security safeguards, including de-identification, preventing an individual's identity to be inadvertently revealed so as to prevent** instances of data breach. These measures also help the entities to grow internationally.

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The Warren Buffet Way

CA. V. Pattabhi Ram

The God of investing, Warren Buffet, has TWO very clearly defined philosophy, which he says will work for anyone. It worked both in the highs and lows of the markets in 2008 and perhaps in 2020.

His first philosophy is that we must invest only in those stocks where the risk of total loss is minimized and where upside rewards are substantial. And his second philosophy is about putting most of his eggs in one basket. While the first sits squarely with the human philosophy of "Safety first, Forget the returns," the second is counterproductive as it runs against the investment philosophy of diversification. In the last three decades, Buffet has never held more than 10 stocks in his portfolio.

Warren Buffet believed in FOUR principles in his investment game.

PRINCIPLE NO 1: TURN OFF THE STOCK MARKETS

The first principle is to stop predicting which way the market is headed. It is the equivalent of saying, "forget the market." His logic is that sometimes the market is wildly excited, and at other times it is unreasonably depressed. To win, you must be of a stable mind and not swing with market swings. "If you have done your homework and understood your business and are confident you know more about your business, than the market does, turn off the market. And if you believe that the market is smarter than you are, give it your money by investing in index funds." Wise words, indeed.

There is a pithy example to back this. If you own shares for the long haul, what happens on a day-to-day basis doesn't make any sense. "We don't need a daily quote on our 100 percent position in X Company Ltd to validate our well being; why then should we need a daily quote on our 7 percent interest in say Y Company Ltd?"

PRINCIPLE NO.2: DON'T WORRY ABOUT THE ECONOMY

Buffet's second principle is that we should forget the economy. This should make fundamental analysts angry because the first principle of fundamental analysis is Economic Analysis!

Buffet argues that debating whether the economy is poised for growth or recession, whether interest rates are moving up or down, or whether there is inflation or not is nonsense. For no one can predict the movements in the economy. If you select stocks that will benefit from a particular economic environment, you invite speculation. Instead, Buffet prefers a business that makes a profit regardless of the economy.

PRINCIPLE NO.3: BUY A BUSINESS, NOT A STOCK

When Buffet buys a stock, he asks the same questions, which he would ask if he were purchasing that business. Here are his TWELVE tenets on this subject.

Tenet 1: Is the business understandable?

An investor must know how the company makes its money. He must understand how it generates sales, incurs expenses, and produces profits. Only then can he estimate the company's future.

Tenet 2: Consistent operational history

Before investing, ensure that the company been in business long enough to prove its ability to earn significant and consistent profits. Do not invest in companies, which make profits in fits and starts.

Tenet 3: Favorable long-term prospects

The best business to own, says Buffet, is a franchise. A franchise business sells a product or service, which has no close substitute. The worst business to own is a commodity business. A commodity business sells products or services that are indistinguishable from competitors. The only distinction in a commodity business is the price. The trouble is that competitors may drop prices even below the cost of business to temporarily attract customers. If you compete with them on those lines, your business is doomed.

Most businesses fall in between. A weak franchise is better than a strong commodity business because a weak franchise has some pricing power that allows it to earn above-average returns on capital employed. A strong commodity business will earn above-average returns only if it is the lowest-cost supplier.

Tenet 4: Is management rational?

The management must be intelligent. One test is how it reinvests its surplus cash earnings. A rational manager will invest excess cash only in those projects that earn a return, which is higher than the cost of capital. If such projects are not available, he will return the money to shareholders through increased dividends.

Tenet 5: Is management candid with its shareholders?

Does the CEO report the progress of business unambiguously? Does management confess its failures as openly as it trumpets its success?

Tenet 6: Does management resist the institutional imperative?

Often, managers copy what other managers are doing, no matter how stupid their actions are. A measure of a manager's competence is how independently he can act.

Tenet 7: Focus on return on equity, and not earnings per share

Most investors judge a company's performance by its earnings per share (EPS). But that's wrong. Since a company's capital base increases through retained earnings, the EPS is meaningless. A better measure is the ratio of operating profits to shareholders' equity.

Tenet 8: Calculate owner earnings

In arriving at a value of the business, the source of cash earnings is significant. Companies with high fixed assets to profits need a larger share of retained earnings to remain viable than companies with lower 'fixed assets to profits.' This is because some of the gains have to be kept apart to maintain and upgrade those assets. Buffet says, "Owner Earnings" is crucial. Also known as free cash flow, this is cash flow less regular capital expenditure required to maintain unit volume.

Tenet 9: Look for companies with high-profit margins

High-profit margins reflect both a strong business and the management's intention to control costs. Over the years, companies with high-cost operations invariably add to their costs, while companies with below average-costs almost always find ways of cutting expenses.

Tenet 10: For every dollar retained, the company should create one dollar of market value

From a company's ten-year net income, subtract all dividends paid to shareholders. What is left is the company's market value. If the change in market value is less than the sum of retained earnings, the company will go backward. Suppose the business has been able to earn above-average returns on retained capital. In that case, the market value will exceed the company's retained earnings, thus creating more than one dollar of market value for every dollar retained.

Tenet 11: Value of the business

The value of a business is the present value of the estimated cash flows expected to occur over the business's life, discounted at the long-term interest rate. If the company has a predictable growth pattern, the discount rate can be reduced by this growth rate.

Tenet 12: Purchase at a discount

Buffet believes in buying a business only when its price is at an excellent discount to its value. It is only at this stage that Buffet looks at the stock market price!

While the arithmetic of computing the value of a business is natural, problems arise if you wrongly estimate a company's future cash flow. There are two ways to tackle this. One, increase your chances of correctly predicting future cash flows by sticking to businesses that are both simple and stable. Two, in each purchase, there must be a margin of safety between the company's purchase price and its determined value.

PRINCIPLE NO 4: MANAGE A PORTFOLIO OF BUSINESSES

A good investor must not invest in one business only but in a portfolio of businesses. Each of those businesses must meet the tenets laid down in Principle 3. The idea of managing a portfolio of businesses is the old song of not putting all your eggs in one basket. Diversification provides a particular element of safety.

These investment strategies are eternal and right at all times.

This article was first published many years ago. It is still valid and is a testimony of the greatness of the man called Warren Buffet.

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patbram@gmail.com

TAXPAYERS' CHARTER

THE INCOME TAX DEPARTMENT

is committed to

1. **provide fair, courteous, and reasonable treatment**
   The Department shall provide prompt, courteous, and professional assistance in all dealings with the taxpayer.
2. **treat taxpayer as honest**
   The Department shall treat every taxpayer as honest unless there is a reason to believe otherwise.
3. **provide mechanism for appeal and review**
   The Department shall provide fair and impartial appeal and review mechanism.
4. **provide complete and accurate information**
   The Department shall provide accurate information for fulfilling compliance obligations under the law.
5. **provide timely decisions**
   The Department shall take decision in every income-tax proceeding within the time prescribed under law.
6. **collect the correct amount of tax**
   The Department shall collect only the amount due as per the law.
7. **respect privacy of taxpayer**
   The Department will follow due process of law and be no more intrusive than necessary in any inquiry, examination, or enforcement action.
8. **maintain confidentiality**
   The Department shall not disclose any information provided by taxpayer to the department unless authorized by law.
9. **hold its authorities accountable**
   The Department shall hold its authorities accountable for their actions.
10. **enable representative of choice**
    The Department shall allow every taxpayer to choose an authorized representative of his choice.
11. **provide mechanism to lodge complaint**
    The Department shall provide mechanism for lodging a complaint and prompt disposal thereof.
12. **provide a fair & just system**
    The Department shall provide a fair and impartial system and resolve the tax issues in a time-bound manner
13. **publish service standards and report periodically**
    The Department shall publish standards for service delivery in a periodic manner.
14. **reduce cost of compliance**
    The Department shall duly take into account the cost of compliance when administering tax legislation.

and expects taxpayers to

1. **be honest and compliant**
   Taxpayer is expected to honestly disclose full information and fulfil his compliance obligations.
2. **be informed**
   Taxpayer is expected to be aware of his compliance obligations under tax law and seek help of department if needed.
3. **keep accurate records**
   Taxpayer is expected to keep accurate records required as per law.
4. **know what the representative does on his behalf**
   Taxpayer is expected to know what information and submissions are made by his authorised representative.
5. **respond in time**
   Taxpayer is expected to make submissions as per tax law in timely manner.
6. **pay in time**
   Taxpayer is expected to pay amount due as per law in a timely manner.

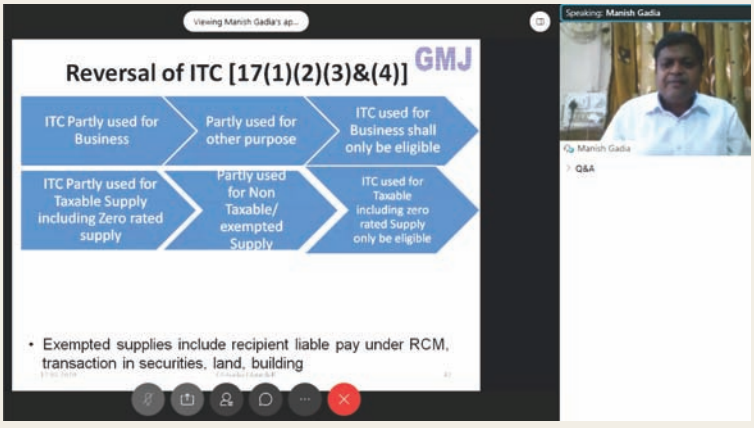
Taxpayers can approach the Taxpayers' Charter Cell under Principal Chief Commissioner of Income tax in each Zone for compliance to this charter. For more Information, visit http://incometaxindia.gov.in

Team KSCAA felicitated Dr. V. C. Charantimath, MLA Bagalkote, on the occasion of becoming Chairman of Bagalkot Town Development Authority

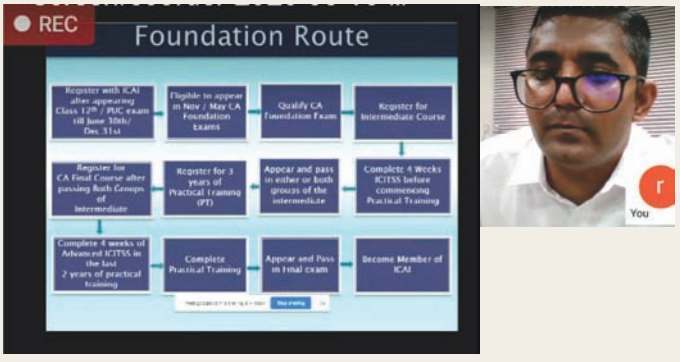
Webinar on Income tax and regulatory issues around secondments and deputations by CA Sandeep Jhunjhunwala on 30th July 2020

Webinar on Interpretation of Statutes with Relevance to GST Law by CA Jatin Christopher on 8th Aug 2020

Webinar on GST – Critical Issues in Input Tax Credit by CA. Manish Gadia, Mumbai on 13th Aug 2020



Student Enrichment Webinar on 'CA as Career' by CA Shivaprakash Virakatmath on 10th Aug 2020. Joint Program by KSCAA with St. Claret College, Bangalore



"Registered" News Bulletin for India vide No.KA/BGGPO/2542/2018-20
RNI Regn. No. KARENG/2013/51293
Licensed to post without prepayment License No. WPP-309
Total No. of Pages Printed : 32
Date of Publishing & Posting 15th of the month, Place of Posting at Bangalore PSO, Mysore Road, Bangalore 560026

KSCAA NEWS BULLETIN English Monthly Printed, Published & Edited by **CA. Chandrashekara Shetty**, President on behalf of **Karnataka State Chartered Accountants Association,**
No 67, 1st Floor, 2nd Stage, West of Chord Road, Mahalaxmipuram, Below Rajaji Nagar Metro Station, Bengaluru – 560 086. **Ph : 2955 2155, e-mail : info@kscaa.com, Website : www.kscaa.com**
Printed at **Jwalamukhi Mudranalaya Pvt. Ltd.,** 44/1, K.R.Road, Basavanagudi, Bengaluru- 560 004, Ph : 080-2660 1064, e-mail: jwalmuki@gmail.com.
Published at No 67, 1st Floor, 2nd Stage, West of Chord Road, Mahalaxmipuram, Below Rajaji Nagar Metro Station, Bengaluru – 560 086. Editor : **CA. Chandrashekara Shetty**