KSCAA

Karnataka State Chartered Accountants Association ®

NEWS BULLETIN

February 2021
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Karnataka State Chartered Accountants Association
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English Monthly
for Private Circulation only

- Amazon-Future-Reliance Deal
- IPR in India
- E - Invoice System
- SA 610
- Powers of ITAT
- Financial Reporting & Assurance

From the President

Dear Professional Friends,

The air has new fresh of hope with things getting back to normal after displacing our normal routine albeit with new rules and perceptions to the world. The sheer hope of getting back to normal is refreshing and soothing. Government of India must be crediting to have driven the words largest systematic Vaccine Drive with ease, the preparedness and the volume of vaccine which was covered initially is unheard off. Even being developing nation, we must also acknowledge the effort of Government of India to support other countries, this speaks volume of humanitarian concerns of this great nation.

The budget has placed relatively high government spending, to lubricate the wheels of growth & spending. The budget has been well balanced to push and keep the domestic demand high, what unwinds to us in terms of inflation and other things are very interesting to wait and watch. It's been three months and the professionals have been the victim of repeated due dates. I presume members would overcome with high spirits and meet the challenge in time this time as well.

KSCAA's 33rd Annual Conference is to be held on 5th and 6th of March 2021. Considering the pandemic situation, the conference is to be held virtually with national and international best speakers. The wisdom of the technical committee was to move through the idea of broad based learning than on any specific technical subjects, applying the same logic all the topics are broadly categorized and registration has started for the conference. The conference is themed "Parivartan", symbolic to mean the change which we wish the professional fraternity to bring in spite of sea changes.

KSCAA was allotted a KIADB land at Harohalli, the registration of lease cum sale deed took place on 7th of January 2021 at Sub-registrar office, Kanakapura. The land need to be put to use within 3 years from the date of lease cum sale deed and association is looking at alternatives and options to monetize the asset. The recently concluded results of ICAI are encouraging for an association to see and young CA's coming out in flying colours and I personally wish all of them a bright professionally satisfying life ahead.

News Roundup

Direct Tax

The Budget 2021 witnessed about 100 changes to the Income-tax Act, 1961. Ease of doing is sought to be achieved through simplification in the income tax litigation cycle. Almost all provisions relating to litigation has been touched upon including Vivad se Vishwas Scheme (due date extended to 28.02.2021), assessments, reassessments, search, AAR, Settlement Commission, proposed Dispute Resolution body and reduction of various timelines thereunder.

While the professionals are adopting to the norm of the day being faceless assessment and appeals, implementation of faceless penalty scheme and proposed faceless ITAT will be keenly watched. The radical digital adoption / push appears to be the reason behind most of the proposals in the Finance Bill.

Indirect Tax

Changes and Amendments were the buzz words this month as Budget was presented on 1st February, 2021. Lot of changes has been proposed in the budget, some good, some not so good, however as CA's who are partners in nation building, we must help our clients to implement the changes in their business, the proposal to provide for a sunset clause for exemptions under customs law is a welcome move, GST Collections on a month-on-month basis is pointing towards a healthy direction. Agriculture and Industrial Development Cess has been introduced with the objective of improving the agriculture sector. Amendments have been proposed relating to E-Way Bills, supply, input tax credits. Hope these proposals serve the intended purposes.

Corporate Law

Companies that have availed the benefits under the Company Fresh Start Scheme (CFSS) are required to file Form CFSS – 2020, the said form is an application seeking immunity in relation to belated documents filed. The application is to be filed within 6 months from the closure of the CFSS. The form has been made available for filing as e-Form w.e.f. January 16, 2021.

MCA has initiated the decriminalization of the LLP Act, 2008 with 12 offences proposed to be moved to in-house adjudication and one offence recommended to be removed. The report also suggests the following further changes:

- ✓ Issuance of secured NCDs to bodies corporate and trusts regulated by SEBI and RBI.
- ✓ Introduction of the concept of Small LLPs
- ✓ Reduced or differential additional fees under Section 69;
- ✓ Insertion of a new explanation to Section 62 by which the LLPs will be restricted from merging with the companies.

MCA had provided relaxation in additional fees for filing of e-form AOC-4, AOC-4 (CFS), AOC-4 XBRL and AOC-4 Non-XBRL in respect of the financial year ended 31.03.2020 till 15.02.2021.

Conclusion

The recent debate of budgets curtailing the audit in GST and Income Tax reminds me of a sentence from The Great Gatsby, "Life Starts All Over Again When It Gets Crisp in the Fall"

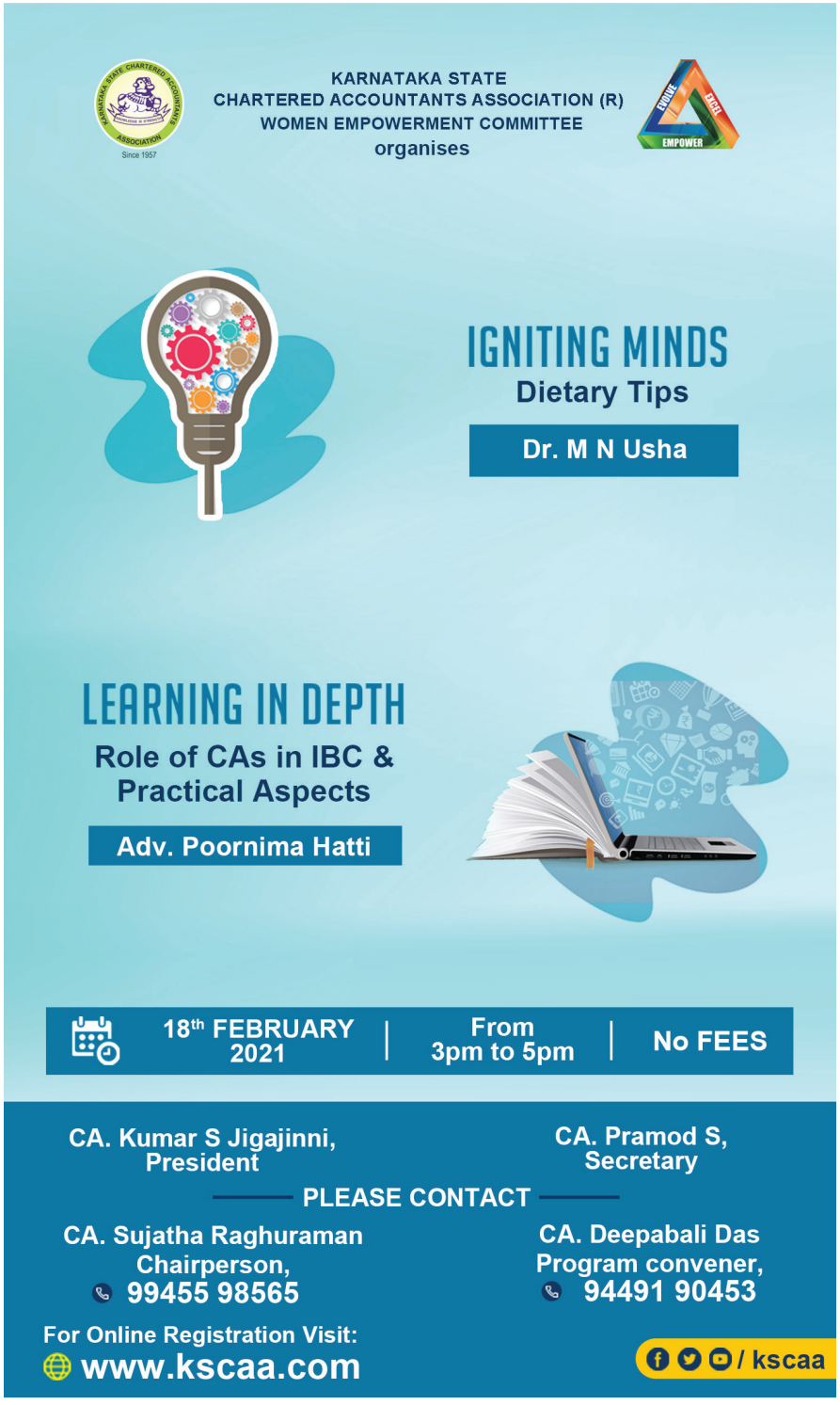
Happy Reading!

Yours' faithfully,
CA. Kumar S Jigajinni,
President

KSCAA
NEWS BULLETIN

February 2021
Vol. 8 Issue 06
No. of Pages : 44

CONTENTS



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Powers Of Income Tax Appellate Tribunal

■ CA. S Krishnaswamy

1. *To grant stay of disputed demand*
2. *To raise additional grounds*
3. *To seek rectification*
4. *To condone the delay*
5. *To grant adjournment*
6. *Power of enhancement-not possible*

A taxpayer has a right of second appeal to the Income Tax Appellate Tribunal if aggrieved against the first round of appeal; similar right vest with the Department. Section 263 of the Income Tax Act, 1961 refers to the powers of the Hon'ble Income Tax Appellate Tribunal. The procedure is laid down in Income Tax Appellate Tribunal Rules, 1963. I will deal with the powers of Income Tax Appellate Tribunal in disposing of an appeal-

1. Grant of stay of demand:

This is an inherent right vested in appellate authority. This right has been set down in Section 254. An amendment has been brought to Section 254 w.e.f 01-04-2020. The Memorandum explaining the amendment through Finance Bill 2020 as follows-

"It is proposed to provide that ITAT may grant stay under the first proviso subject to the condition that the assessee deposits not less than twenty per cent of the amount of tax, interest, fee, penalty, or any other sum payable under the provisions of this Act, or furnish security of equal amount in respect thereof.

It is also proposed to substitute second proviso to provide that no extension of stay shall be granted by ITAT, where such appeal is not so disposed off within the said period of stay as specified in the order of stay. However, on an application made by the assessee, a further stay can be granted, if the delay in not disposing of the appeal is not attributable to the assessee and the assessee has deposited not less than twenty per cent of the amount of tax, interest, fee, penalty, or any other sum payable under the provisions of this Act, or furnish security of equal amount in respect thereof. The total stay granted by ITAT cannot exceed 365 days."

The legal validity of this amendment will be a matter of litigation. It is possible to argue as the right of an appellate forum cannot be taken away by legislation.

- **Stay applications should be dealt on high priority:**

  It was held in cases of **PCIT vs. Nokia Solutions & Networks India (P) Ltd. Date of Judgement-21.10.2019 (Del)** that where there is stay of recovery of demand of tax, the Tribunal should deal with the appeals pending before it on a higher priority. The Tribunal should consider forming a separate list of such cases which should be heard on priority after arranging the cases on the basis of their seniority as well as the quantum involved in the stay.

- **Stay application-ITAT cannot adjudicate merits of the case:**

  In the case of **Maharashtra State Road Transport Corporation vs CST - Date of judgement - 13.11.2017 (Bom)**, Tribunal dismissed not only the stay application, but while deciding the stay application, even the appeal was dismissed by the Appellate Tribunal on the ground that the same did not have merit. It was held that the approach of the Appellate Tribunal is completely erroneous. What was heard before the Appellate Tribunal was the application for stay. There was no occasion for the Appellate Tribunal to go into the merits and decide the appeal itself by holding that it was devoid of any merits.

- **Seeking stay before the lower authorities is directory and not mandatory:**

  In view of the decision in **Broswel Pharmaceutical Inc vs. ITO 83 TTJ 126 (All)** it is not mandatory on the part of the assessee to move application

before the Revenue Authorities for granting of stay of outstanding demand. Accordingly, there is no merit in the argument of the department that the stay application should be rejected outright since the assessee has not moved any petition before the Revenue Authorities seeking stay of the demand. Seeking stay before the lower authorities is directory and not mandatory as held in the case of **M/s. DHL Express (India) Pvt. Ltd. (2011) 140 TTJ 38 (ITAT Mumbai)**

- **Tribunal can not only stay the recovery proceedings but can also stay the proceedings before the Assessing Officer:**

  In the case of **ITO vs. Khalid Mehdi Khan (minor) (1977) 110 ITR 79 (AP)** it was held that the Tribunal can not only stay the recovery proceedings but can also stay the proceedings before the Assessing Officer. Therefore, in a case where order under section 263 is passed and if the appeal is pending before Tribunal and in the meantime, if the Assessing Officer starts the assessment proceedings then in such circumstances, the assessee can file stay petition before the Tribunal and the Tribunal can stay the proceedings before the Assessing Officer.

2. **Raising of additional grounds at the time of hearing:**

   A taxpayer is permitted to raise additional grounds of appeal either not taken in the appeal memorandum or before the CIT Appeals or even before the Assessing authority as per Rule 11 of the Income Tax Appellate Rules, 1963.

   - **Additional grounds permitted:**

     In the case of **National Thermal Power Co. Ltd v. CIT (1998) 299 ITR 383,** it was observed by the Apex Court that there may be several factors justifying raising of a **new plea** in an appeal and each case should be considered on its own facts Referring to an earlier decision in **Jute Corporation vs CIT,** it was observed that the Tribunal must be satisfied that the ground raised is *bonafide* and that same could not have been raised earlier for good reasons. The appellate authority should exercise discretion in permitting an assesse in raising additional ground in accordance with law and reasons. It was further observed that under Section 254 of the Income Tax Act, 1961 the Tribunal after giving both the parties to the appeal an opportunity of being heard, can pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms.

   - **Admission of additional grounds will not turn enhancing the assessment automatically:**

     It was held in the case of **M/s. Maruti Udyog Ltd vs. Income-Tax Appellate Tribunal 2001 IVAD Delhi 831, 2001 (59) DRJ 177** that -

     "14. As was observed by the Apex Court in **Lakshmiratan Engineering's** case (supra), the expression "appeal" and "memorandum of appeal" are used to denote two different things. It is not proper to make appeal equivalent to memorandum of appeal. While the appeal is judicial examination, memorandum of appeal contains grounds on which judicial determination is invited. It is to be noted that Rule 11 of the Tribunal Rules is contextually similar to Order 41 Rule 2 of the Code of Civil Procedure, 1908 (in short, CPC). Normally, grounds are to be set out in the memorandum of appeal before the Tribunal. The parties are not prohibited from taking additional grounds at the time of hearing subject, of course by having leave of the Tribunal to do so. Merely because Tribunal has admitted additional grounds, it does not automatically follow that it has the effect of enhancing the assessment. Acceptability of a ground urged originally or permitted to be urged by way of additional grounds is a matter for determination by the Tribunal at the time of final hearing. Merely accepting the prayer to urge additional grounds does not mean that stand contained in the ground(s) has been accepted to be correct. Tribunal after analysing the factual and legal position has come to hold that the grounds were fit to be admitted. It has been observed by the Tribunal that while allowing additional grounds parties can be afforded reasonable opportunity to put across their points of view. it is noted that the stand of the Revenue before it that even if there was scope for enhancement it would come after revenue's point is accepted and thus may or may not result in enhancement. It is elementary that final determination of issues involved in the appeal is done while deciding the appeal. At that stage the acceptability of stand set out in the memorandum of appeal and / or permitted to be urged as additional grounds(s) is adjudicated. The plea that grounds originally taken or permitted to be urged as additional ground(s) has the automatic effect of enhancement of assessment or reversal of basis of assessment is thoroughly misconceived and without legal foundation. Above being the position we find no merit in this writ petition. It is accordingly dismissed."

     The Tribunal has the discretion to allow or not allow a new ground to be raised.

3. **Power of enhancement-not possible:**

   The power of the Appellate Tribunal is limited to the

subject-matter of the appeal. It is not open to the Tribunal to adjudicate or give a finding on a question which is not in dispute and which does not form the subject-matter, of the appeal and enhance an assessment on an appeal by the assessee.

In **State of Kerala v Vijaya Stores,** the Supreme Court has held that the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross objection by the department.

The decision in the case of **MCORP Global (P) Ltd.,** was followed by the Division Bench of the High Court of Gujarat in **Fidelity Shares and Security Ltd., vs. DCIT (2017) 390 ITR 0267 (Guj)**, wherein it was held that the Tribunal has no power under the Income Tax Act to enhance the assessment in appeal in view of the statutory provisions. Further it was held that the benefit, which was sought to be taken away by the Department, was not permissible in law and this is the infirmity in the judgment of the Tribunal as the Tribunal has no power to enhance the assessment in appeal.

It was held in the case of **PCIT vs Jeans Knit P Ltd (2021) 430 ITR 476 (Karn)** that –

"From a close scrutiny of the orders passed by the CIT (A) and the ITAT, it was evident that the findings were based on meticulous appreciation of evidence on record. Even before the Tribunal, the Revenue was not able to rebut any of the findings recorded by the CIT (A) by adducing any evidence to the contrary. The concurrent findings of fact did not suffer from any perversity warranting interference by the Court in exercise of powers u/s 260A. The CIT (A) on the basis of material available on record had negated the contention raised on behalf of the Revenue that the assessee had adopted a colourable device for tax evasion and the order passed by the CIT (A) had been upheld by the ITAT. Admittedly, the assessee had filed the revised claim under Section 10B during the course of the assessment proceedings and the revision resulted in enhancement of the claim. Therefore, the ITAT was correct in holding that the CIT (A) rightly directed the Assessing Officer to verify the claim of the assessee in this regard"

4. The right to condone the delay in filing an appeal:

An appeal before the Hon'ble ITAT has to be filed within 60 days from the receipt of the order. If for any legitimate reason there is delay in filing of appal the Hon'ble ITAT has power to condone the delay.

- **Appeal should be condoned-reasonable cause:**

It was held in the case of **CIT v. ISRO Satellite Centre in ITA No.532/2008 (judgment dated 28.10.2011)** that in Income Tax matters delay in filing of the **appeal should be condoned irrespective of the length of delay if there is a reasonable cause.**

The Hon'ble Apex Court in the case of **Collector, Land Acquisition v. Mst.Katiji & Others, reported in 167 ITR 471** had held that there should be a liberal and practical approach in exercising discretionary powers in condonation of delay. Further, it was held by the Hon'ble Apex Court that the appellant does not get any benefit from filing belated appeal. Therefore, it concluded by the Hon'ble Apex Court even if the delay is condoned, at best what can happen on condonation of delay is that the appeal will be decided on merits.

It was held in the case of **Natural Remedies Pvt Ltd vs ACIT (2021) 85 ITR (KarnTrib)** while condoning the delay that there was reasonable and sufficient cause for filing the appeal belatedly. The delay in filing the appeal was occasioned by reasonable and sufficient cause. Hence, the delay in filing the appeal was to be condoned.

5. The Power of rectification:

Power of rectification is set out in sub section (2) of Section 254 of the Income Tax Act 1961 which reads as under-

"(2) The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed, 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:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard :

Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees."

- **Rectification-possible:**

In the case of **T.S. Balaram vs. Volkart Brothers (1971) 2 SCC 526** the Supreme Court stated that under this section 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.

- **Rectification should be self-evident in nature and should not include any debatable question:**

In the case of **ACIT vs. Saurashtra Kutch Stock Exchange (2003) SCC On Line Guj 352** the Gujarat High Court held 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 sub section (1) of Section 254. Further, the Court 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. The other very important point stated by the court, in this case, was that non-consideration of a judgment passed by a High Court will always constitute a 'mistake apparent from record' and it is regardless of when the judgment was passed. This judgment of Gujarat HC was later affirmed by the Supreme Court when the Department went into appeal against the said decision.

The scope of power of rectification of an order passed under Section 254(1) of the Income Tax Act does not include the power to review or recall the order that is sought to be rectified

In the case of **C.I.T. vs. Hindustan Coca Cola Beverages P Ltd CIT 293 ITR page 226** it was held that the 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.**

In the case of **CIT vs. Ramesh Electric and Trading Co. (1993) 203 ITR 497 (Bom)** it was held by 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.

6. The Power of the Third Member:

The High Court of Madras, in the case of I**TO vs VP, ITAT (1985) 155 ITR 0310,** considered the scope of Section 255(4) of the Income Tax Act, 1961, wherein it has been held that the power of the Third member is confined to giving of a decision on the points on which the Members of the Tribunal had differed and which had been formulated by them as the question for the decision of the Third member and held as follows.

The Allahabad High Court, in the case of **Jan Mohammed vs. CIT (1953) 023 ITR 0015,** considered the scope of provision of Section 255(4), it was held that the third member can decide only the point that had been referred to him and he cannot formulate the new points himself.

7. Duty to follow the decision of co-ordinate bench:

The Bombay High Court, in the case of **Hatkesh Co-operative Housing Society Limited vs ACIT vide ITA No.328, 372, 407, 636, 961 and 1079 of 2014, order pronounced on 22-08-2016** held that refusal of the Tribunal to follow the decision of the co-ordinate bench, without any reason, would result in breach of principles of judicial discipline. Further, the Court directed that when the Tribunal chooses to ignore such a decision, it is under an obligation to make a request before the President of the Tribunal to constitute a larger bench to decide the difference of view on the issue.

8. Power to entertain an appeal against intimation u/s 143(1):

In the case of **CIT vs. Malabar Building Products Ltd 2001 248 ITR 72 (Ker)** it was held that where an appeal was filed against "prima facie adjustments" in an order of intimation under section 143(1), the Tribunal was not justified in recording its decisions on merits, since such adjustments are debatable and, therefore, adjustment made by the AO was not justified.

9. Power to grant adjournments:

According to Rule 32 of the ITAT Rules 1963, The Tribunal may, on such terms as it thinks fit, and at any stage, adjourn the hearing of the appeal.

10. Conclusion:

The ITAT is the final forum for deciding on facts and hence care must be taken to state the facts comprehensively. Only if the decision is prima facie perverse then only High Court could be approached even when the facts are not judicially appreciated.

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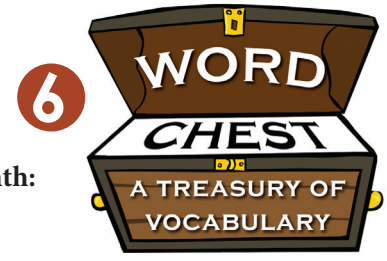


Word of the Month:

Obdurate

What is this?

Used to describe a person who refuses to change their mind, or someone or something that is difficult to deal with or change.

Use instead of: Obstinate, Stubborn

How can I use it?

- ✓ The president remains ***obdurate*** on immigration.
- ✓ Several ***obdurate*** facts / differece remain, preventing a compromise solution.

Write up on 'e-invoice' System under GST

■ CA. G B Srikanth Acharya

1. What is an 'e-invoice'?

'E-invoice' standardizes the format in which electronic data of an invoice will be shared with others to ensure there is interoperability of the data. The adoption of standards will in no way impact the way users would see the physical (printed) invoice or electronic (ex: PDF version) invoice. All these software's would adopt the new 'e-invoice' standard wherein they would re-align their data access and retrieval in the standard format.

However, users of the software would not find any change since they would continue to see the physical or electronic (PDF / Excel) output of the invoices in the same manner as it existed before incorporation of 'e-invoice' standard in the software. Thus the taxpayer would continue to use Accounting System / ERP or Excel based tools or any such tools for creating the electronic invoice as being used today.

The taxpayer can enter the invoice details in bulk generation tool available on 'e-invoice' portal which in turn will create JSON file for uploading on the 'e-invoice' system.

2. 'e-invoicing' System under GST

The move will help in curbing Goods and Services Tax (GST) evasion through issue of fake invoices. Besides, it would make the return filing process simpler for businesses as invoice data would already be captured by a centralized portal. The proposed 'e-invoice' is part of the exercise to check GST evasion. With successful implementation of GST, the Government is now focusing on anti-evasion measures to shore up revenue and increase compliance.

Coverage

Types of Transactions	B2B, Exports	B2C
Invoice Type	**'e- Invoicing'**	**Invoice Shall contain Dynamic QR Code**
Master Notification	13/2020 dated : 21-03-2020	14/2020 dated : 21/03/2020

Types of Transactions	**B2B, Exports**		**B2C**
Turnover Criteria	**For Aggregate Turnover > 500 Crs**	**For Aggregate Turnover > 100 Crs but upto 500 Crs**	**For Aggregate Turnover > 500 Crs**
Applicability Date	w.e.f. 01-10-2020	w.e.f. 01-01-2021	w.e.f. 01-12-2020
Penalty for Non-Compliance	Section 122 of CGST Act, 2017 as per FAQs		Section 125 of CGST Act, 2017
Relaxations Provided	Special procedure to obtain an Invoice Reference Number (IRN) for tax invoice not prepared in accordance with the provisions of 'e-invoicing' for the period 01-10-2020 to 31-10-2020 by uploading specified particulars in FORM GST INV-01 on the Common Goods and Services Tax Electronic Portal, within thirty days from the date of such invoice, failing which the same shall not be treated as an invoice.	No Relaxations	Penalty waived for the period 01-12-2020 to 31-03-2021, subject to the conditions that said registered person complies with the provision relating to dynamic QR Code from 01-04-2021.
Period for Aggregate Turnover Calculation	Aggregate Turnover in any Preceding Financial Year from 2017-18 onwards		

Note:

1. Dynamic QR Code has no relevance or applicability to 'e-invoicing', as envisaged under Rule 48(4)

of GST Act, 2017. The said rule applies to B2B Supplies and export supplies by notified class of taxpayers.

2. Aggregate Turnover is as per definition given u/s 2(6) of CGST Act, 2017
3. Non Applicability of 'e-invoice' to;
   - i. Insurer
   - ii. Banking Company
   - iii. Financial Institution
   - iv. NBFC
   - v. GTA Service
   - vi. Passenger Transport Service
   - vii. Admission to multiplex for films
   - viii. SEZ Unit (Notification No.61/2020 r/w 13/2020- Central Tax)

Notification No. 14/2020 - Central Tax dated 21st March, 2020 also specified that a Dynamic QR Code made available to buyer through digital display (with payment cross-reference) shall be deemed to be having QR Code.

4. e-invoice status for Taxpayer:

The tax payer can come to know his eligibility for generation of IRN by going to the e-invoice portal and selecting 'e-invoice status of Tax Payer' under "search" option. On entry of the GSTIN, the system will indicate whether this GSTIN is enabled/notified for the IRN generation.

5. What is Rule 48(4)

As per Rule 48(4) of CGST Rules, 2017- "*the invoice shall be prepared by such class of registered persons as may be notified by the government, by including such particulars contained in FORM GST INV-01 after obtaining an Invoice Reference Number by uploading information contained therein on the Common GST Portal.*"

6. Types of Documents to be reported:

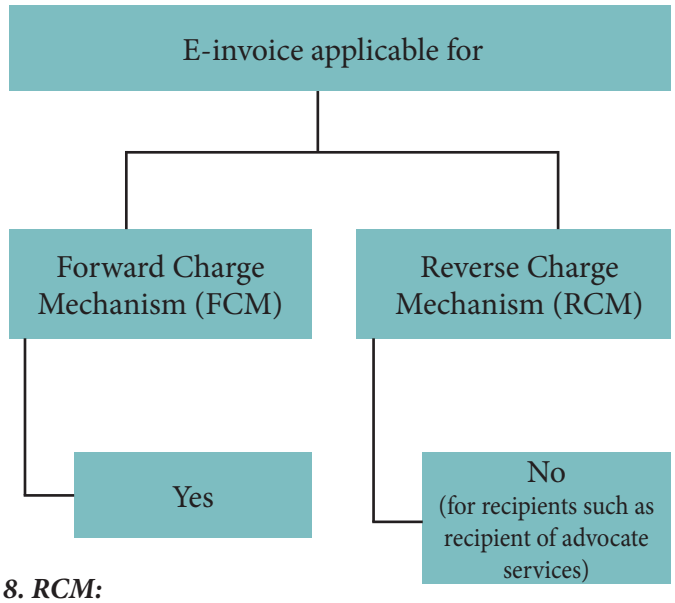
The taxpayers need to report the following documents to the 'e-invoice' system:

- Invoice by Supplier
- Credit Note by Supplier
- Debit Note by Supplier

Documents NOT to be reported under e-invoice system:

- Bill of Supply
- Delivery/ Job Work

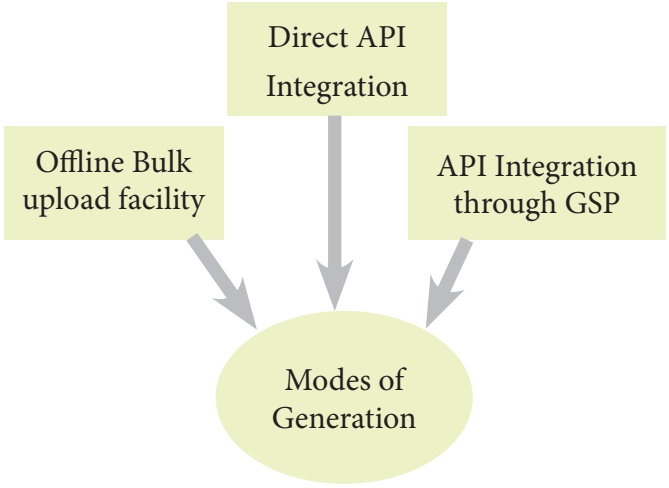
7. 'e-invoicing' - FCM and RCM:



8. RCM:

'e-invoice' system has a reverse charge mechanism reporting as well. However, it is for supplier and NOT recipient.

9. 'e-invoicing': Modes of Generation:



10. Generating Bulk IRN:

This is a simple method for the generation of multiple Invoice Reference Numbers (IRN) in one go. Here, the taxpayer has to prepare the file and request for multiple IRN and upload it into the common portal.

For generating a bulk IRN the user needs to have the bulk converter tool, which helps the user to convert the multiple invoices excel file into a single JSON file. The Excel to JSON file converter has been provided on the portal. The taxpayer will be required to upload the JSON to the e-invoice system, which in turn will generate bulk Invoice Reference Number (IRN) and digitally sign the

'e-invoice' with the QR code. The QR Code will contain vital parameters of the e-invoice and return the same to the taxpayer who generated the document in the first place.

11. Cancel IRN:

'e-invoice' cannot be edited or corrected for any mistake, incorrect or wrong entry in the invoice. Only option is cancellation of 'e-invoice' and generation of a new one with correct details. But the same can be cancelled only within 24 hours from the time of generation.

12. Reconciliation of e-invoice data on GSTR-1 and the e-way bill portals:

A taxpayer will need to undertake a reconciliation between his 'e-invoice' data, e-way bill data, and his GSTR-1 return. Even though the 'e-invoice' data is passed on to the e-way bill and GST portals, the government still recommends that the taxpayer carry out reconciliation of the data between these 3 portals to fix any discrepancies which could lead to the taxpayer being penalized. A reconciliation may be done with the support of tools or utilities.

13. Various reconciliation and reports are to be prepared. For example:

- E-way bill vs GSTR-1
- IRN vs Invoice
- IRN vs e-way bill
- IRN vs GSTR-1
- IRN vs GSTR-2A (inbound invoices)

Conclusion

Though there are many compliance issues, Government has introduced this for having a record of the complete trail of B2B invoices which in turn will reduce the number of fraudulent invoices submitted with a view to claim input tax credit. With the use of e-invoicing, the Government will be able to conduct system level matching of input credit and output tax - this means a significant reduction in losses due to tax fraud and an overall increase in productivity in tax administration.

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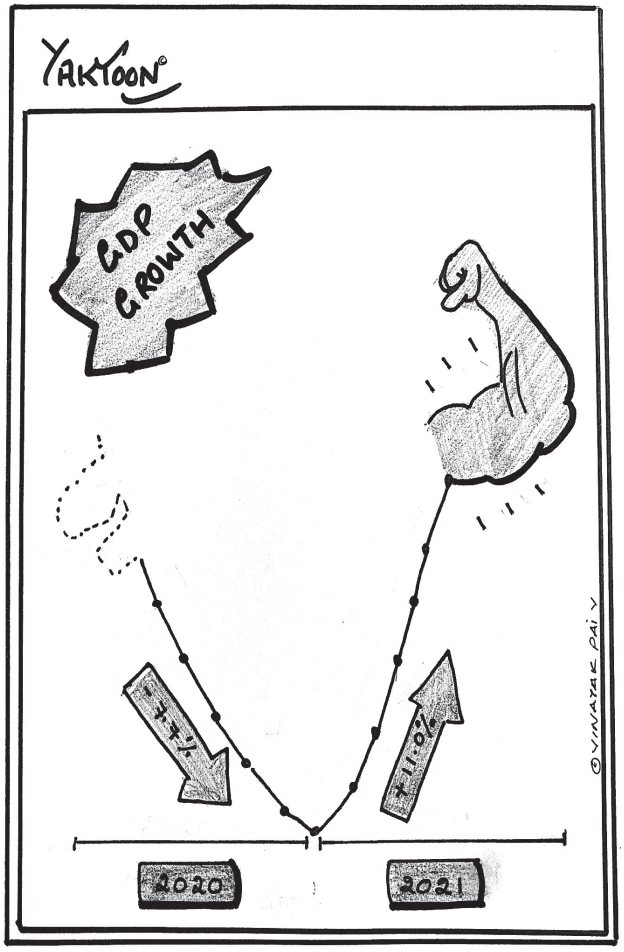

Indirect Tax Updates

■ CA. Raghavendra C R & CA. Bhanu Murthy J S

Important decisions under GST, VAT and Service Tax

1. Skill Lotto Solutions (P.) Ltd Vs. Union of India, [2020] 122 taxmann.com 49 (SC)

Levy of GST on the lottery was challengedbefore the Court. The Court held that:

a. Inclusion of 'actionable claim' in definition of 'goods' in terms of the Section 2(52) of CGST is not contrary to legal meaning of goods and is neither illegal nor unconstitutional.

b. Taxing the lottery, betting and gambling and not taxing other actionable claims cannot be termed as discriminatory.

Further, the Court held that while determining taxable value of supply, prize money is not to be excluded for purpose of levy of GST.

2. CCE & ST Vs S K Samanta And Company Pvt Ltd. 2021-TIOL-88-SC-CX-LB

The Department had filed appeals against orders of the CESTAT with a delay of 668 days, 727 days and 668 days, respectively with condonation of delay. It was submitted that the delay occurred on account of the fact that the appeals were mistakenly filed before the Calcutta High Court.

The Larger Bench of Supreme Court held that even if the period of time which was spent in pursuing the appeals before the High Court is excluded, there is still a substantial and unexplained delay. It was observed that the nature of the controversy involved in the appeals leaves no manner of doubt, that the appeals were maintainable before this Court and this Court alone. Therefore, Supreme Court observed that the Court is not inclined to condone such a gross delay on the part of the Revenue in accessing its remedies before the court. Certainty in fiscal matters, it is of importance to the assessee just as the interests of the Revenue have to be duly protected. The concerns of the Revenue have to be duly met by showing alacrity in pursuing remedies which are available in law.

Accordingly, Supreme Court dismissed the Appeals filed by Department on the ground of delay.

3. Concorde Housing Corporation Pvt Ltd Vs State of Karnataka, 2020-TIOL-2250-HC-KAR-VAT

The petitioner was a Partnership Firm and was converted into Joint Stock Company on 24.06. 2008. Consequent to conversion of Partnership Firm to Joint Stock Company, petitioner had claimed deduction of payments made to sub-contractor.The claim was rejected by the lower authority as well as by the Tribunal.

The High Court held that where the erstwhile firm is converted to company by operation of law under Part IX of Companies Act, 1956, there is no requirement for any explicit provisions of law under KVAT Act, 2003 to state that all assets and liabilities of the erstwhile firm shall vest with company. Further, the High Court has held the Tribunal has erred in law in holding that the petitioner which is a Joint Stock Company cannot be permitted to carry forward unabsorbed sub-contractor payment accumulated during its status as partnership firm.

4. CST Vs Silverline Estates, 2021-TIOL-222-HC-KAR-ST

The assessee (respondent), engaged in construction of sale of apartments, during the period prior to 1.7.2010, had collected certain deposits from customers, towards probable service tax liability, as there was no clarity on the levy of service tax. These amounts were kept in an escrow account, with an agreement that the amounts so collected would be repaid to customers, in case there arises no liability of service tax.

The service tax department, treating the above as an amount collected as service tax initiated proceedings to recover the same along with interest under section 73A of Finance Act, 1994 and also imposed penalty. The CESTAT allowed the appeal of the assessee and held that as deposits are collected and kept in escrow account no amounts are collected as service tax and further held that also as there was no determination of liability by the department, no recovery could be initiated.

The department challenged the said order before the High Court on the question as whether determination of service tax by the Central Excise Officer, is necessary before making a demand under Section 73A(3) of the Finance Act, 1994.

The High Court held that from the provisions of Section 73A(5) it is evident that the assessment must precede the demand and hence any recovery without assessment or determination of liability cannot be sustained.

5. Dhruv Krishan Maggu vs UOI [2021] 123 taxmann.com 192 (Delhi)

The assessee (petitioner) challenged the provisions of Sections 69 and 132 of the CGST Act, 2017 as arbitrary, unreasonable and being beyond the legislative competence of the Parliament are ultra vires the Constitution. The said provisions were challenged on the ground that Entry 93 of List 1 of the Seventh Schedule, confers jurisdiction upon the Parliament to make criminal laws only with respect to matters in List 1 of the Seventh Schedule and not under CGST Act, 2017.

The High Court made the following observations:

- The power of arrest conferred by Section 69 of the Act is not a general power of arrest, but is restricted to certain offences which are specified under section 69 of the Act namely some of the offences covered under section 132 of the Act and the offences so specified are all offences relating to goods and service tax.
- Consequently, the expression 'with respect to' goods and services tax used in Article 246A, being a constitutional provision, must be given its widest amplitude and would include the power to enact criminal law with regard to goods and services tax.
- The pith and substance of the CGST Act is on a topic, upon which the Parliament has power to legislate as the power to arrest and prosecute are ancillary and/ or incidental to the power to levy and collect Goods and Services Tax.
- Even if it is assumed that power to make offence in relation to evasion of goods and service tax is not to be found under Article 246A, then, the same can be traced to Entry 1 of List III. The term 'Criminal Law' used in the aforesaid entry is significantly wide and includes all criminal laws except the exclusions i.e., laws made with respect to matters in List II.
- Accordingly, it was held that Sections 69 and 132 of the Act are constitutional and fall within the legislative competence of Parliament.

6. Prathamesh Dream Properties (P.) Ltd. vs Commissioner of CGST & Central Excise [2021] 123 taxmann.com 202 (Bombay)

The Petitioner-assessee had filed an appeal before the Tribunal against an order of the Adjudicating Authority. However, the appeal of the assessee was not entertained due to non-rectification of defects in the appeal. In the meanwhile, assessee filed a declaration under 'SVLDRS Scheme' under 'pending litigation' category.

The respondent Designated Committee treated assessee's declaration as one under 'arrears' category as the appeal of assessee was not admitted as on 30-06-2019.

The High Court held that all that is provided for and is required by Sabka Vishwas Scheme is that an appeal must be filed and that appeal should be pending as on 30-6-2019 and it was immaterial whether appeal had been provided a regular number or given a diary number. Accordingly, the respondent Designated Committee was directed to take a fresh decision treating declaration of assessee as one under 'pending litigation' category.

7. Akash Garg vs State of MP 2020-TIOL-2013-HC-MP-GST

The issue under consideration was whether issuance of Show Cause Notice (SCN) via e-mail is a valid mode of service of notice under the CGST Act, 2017?

The department-respondent while raising the demand of tax, the copy of SCN / Orders was communicated to the petitioner on his e-mail address. Department contended that the Show Cause Notice was communicated to petitioner on his E-mail address and despite receiving the same the petitioner failed to file any response.

The High Court considering the provisions of Section 142 of the CGST Act, 2017, held that the only mode prescribed for communicating the Show Cause Notice / Order is by way of uploading the same on website of the revenue. When a particular procedure is prescribed to perform a particular act then all other procedures / modes except the one prescribed are excluded. By holding so, the impugned Show Cause Notice was quashed.

8. Steel Kraft Industries Vs State of Gujarat, 2021-TIOL-147-HC-AHM-GST

Background: M/s Dolphin Metals Ltd., in which the Proprietor of the assessee unit was a director, had certain dues under Gujarat VAT Act. In respondent GST department, tried recovering the same by attaching bank accounts another entity by Bhagat Marketing Private Limited, in which also the proprietor of the assessee was a director. The bank declined to attach the bank accounts on the ground that the name and PAN of the account holder differed from that of the Dolphin Metals to whom the notices were addressed. In this background, the respondent GST department blocked input tax credit in terms of Rule 86A of CGST Rules, 2017 of the assessee.

In this background, the Court Rule 86A can be invoked only if the conditions stipulated therein are fulfilled. In other words, it is only if the Commissioner or an Officer authorized by him has reasons to believe that the credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible for the reasons stated in Rule 86A(1)(a) to (d) that the authority would get the jurisdiction to exercise the power under Rule 86A of the Rules. The Court held that in the above circumstances, powers under Rule 86A cannot be invoked.

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SA 610 (Revised) – Using the Work of Internal Auditors

■ CA. Aditya Kumar S

Introduction: The statutory auditor of a company is expected to report on the true and fair view of the financial statements, but also certain other matters covered under Section 143 of the Companies Act 2013 and also on the internal financial control over financial reporting. The statutory audit is conducted in compliance with Standards of Auditing issued by the Institute of Chartered Accountants of India. The Standards of Auditing permit the statutory auditor to use the work of an internal auditor in the course of discharge of duties. Standards of Auditing (SA) 610 issued by Institute of Chartered Accountants of India prescribes what steps are to be taken by the statutory auditor, in the course of choosing to use of the internal auditor.

Scope of SA 610: The Standard deals with the external auditor's responsibilities, if the external auditor intends to use the work of internal auditor either as using the work of the internal audit function in obtaining audit evidence and directing the internal auditor to do certain function under their direction, supervisions and review. However, if the external auditor decides not to use the work of an internal auditor or the responsibilities of the internal audit function, this SA itself would not be applicable. SA does not mention that the external auditor has to rely upon the work of internal auditor, it only indicates what needs to be done, if the external auditor chooses to rely and use the work of an internal auditor. Ultimately, it is the external auditor who will be responsible for expressing opinion on the financial statements and in CARO. SA 315 *"Identifying and Assessing the Risks of Material Misstatement Through Understanding the Entity and its Environment"* also details of an entity's internal audit function needs to be evaluated. SA 315 requires auditors to refer and understand the IA function through their terms of engagement. IA may also be playing the role in ensuring the entity's operating effectiveness in internal control over financial reporting, which also needs to be critically reviewed from the requirements of the reporting by the external auditor.

Status of Internal Audit function in an organisation: Internal audit is a function of an entity that performs assurance and consulting activities designed to evaluate and improve the effectiveness of entity's governance, risk management and internal control processes. Internal Audit function is either performed by the employees of the company as a function with clear reporting responsibilities or an external professional can be hired as well. The choice of having an in-house internal audit or an external professional depends on the availability of resources, expertise required, areas to be audited, and other factors. It should be ensured that in either case, the internal audit function should be independent, the scope be defined, objectives clearly established, and reporting responsibilities are agreed upon.

Know the Internal Audit [IA] Function:

a. In an organization, the internal audit function could include activities relating to Governance, Risk Management, or those relating to Internal Control of both financial, non-financial and compliance activities. The nature of work performed gains more importance than the title of the function (substance over form). Secondly, say a control function is being performed by a manager, this should not be construed or equivalent to internal audit function. This is just one of the operational activities being performed.

b. The IA function should have enough skill. Certification from professional bodies will help the auditor to know whether they have enough expertise, knowledge, domain experience in conducting the internal audit. Affiliation to a professional body will indicate that there would be regular technical update programs which the members would have to attend to upgrade their skill, which lends credibility to the work being done. Second important aspect is whether there are enough human resource and technical support to do the IA function, especially in an organization which is geographically spread and has multiple segments of business. Discussions with the IA on the organisation structure, reporting responsibilities, the scope of work, would help the external auditor to assess whether the IA is competent enough. It is

also important to view the technical competence and organizational status separately, since even a highly competent IA work may be diluted if the organizational status is as such that they do not align with the objectivity of the IA.

c. It is important to understand how the IA would go about their audit procedures from the point of engagement, risk assessment, audit planning and execution procedures and reporting process. This will give insight as to whether the IA has certain amount of quality in the professional service that is expected to be delivered and whether this would basically even satisfy the quality control standards of audit. Considering that most of audits are also being done in a remote manner, it would be better for the statutory auditor to know the IT infrastructure of the IA including their IT policies and tools that they would like to use (say for data analytics) and whether they are robust enough to handle the engagement. It is important for the statutory auditor to have comfort over the work IA function and the procedures underlying.

d. Depending on the complexity of the business, the statutory auditor should also evaluate whether any technical expert (other than in the field of accountancy and auditing) say engineering, technology, would also be required to do the audit. The IA function of many companies also have domain experts from different fields to help them to understand the operations in the right perspective and advise the management accordingly.

e. While evaluating the overall organisational status, to also observe whether there is a possibility of conflict of interest or any management override of controls, which would impair the independence and objective of internal audit. Management could also unduly influence the IA function, by having unreasonably timelines, not giving access to all the resources, having a very low budget for the IA cost, or placing other restrictions on IA function. This and other factors put together could indicate the restrictions within which the IA would function and would also throw light on the quality of the work performed and thereby to evaluate whether the IA function and the reports could be relied upon or not.

Factors that affect not to use the work of an Internal Auditor: External auditor has to evaluate whether are there any factor which could ultimately prove to be detrimental to the audit objective and not meeting the reporting requirements. Some of these factors could be:

a. Low level of competency (including by qualification) and skill set of the internal auditor;

b. Does not have independent reporting responsibility

c. Lacks objectivity

d. Limitation on scope on crucial or key activities

e. Lack of planned approach of doing an audit.

Would IA function reduce the audit procedures of the external auditor?

There is no dilution in the responsibility of the external auditor. There are additional procedures which are within the purview of the external auditor including assessing risks of material misstatement, evaluating going concern assumptions, accounting estimates, presentation and disclosures of financial statements, review of other information, etc., which may not be within the scope of the IA function. Further, these audit requirements may not be met by IA function. Hence, the external auditor can use the work of IA but also supplement with other procedures to ensure it meets the reporting requirements. In case of significant risks identified under SA 315, the use of IA work would only be restricted, considering the scope and objectivity of the engagement. In short, the IA work cannot completely replace the external audit procedures and thereby argue that audit risks are completely eliminated. It is all a combination of the following aspects:

a. The assessed risk of material misstatement

b. Quality of audit evidence and audit procedures being performed.

c. Organisational status and competency of IA

d. Reporting responsibilities of external auditor

Coordination between external and internal auditor: For smooth functioning, the external auditor and the IA need to have a good coordination amongst their tasks. Following aspects may be considered:

a. Have a joint meeting to understand the scope and objectives, timelines, areas to be covered;

b. Have an understanding on the expectations of the stakeholders, reporting responsibilities, etc.,

c. Areas covered under the audit

d. Documentation requirements

e. Materiality levels

f. Risk Assessment including considering risk of fraud, money laundering, non-compliances.

g. Expectations in the report

h. Where there are higher levels of judgement involved by the IA, the external auditor may have to reperform on a test basis specific transactions / area to gain more comfort on the audit results (this should not be construed as external auditor auditing the internal audit work). This exercise would more to independently validate the audit results of the IA in certain specific focus areas.

i. Keep the Those Charged with Governance informed about the audit procedures. SA 260 (Revised) requires the external auditor to communicate to those charged with governance on the audit strategies, which also involves using the work of internal auditor.

Can external auditor ask internal auditor to do specific tasks?

The external auditor can ask internal auditor for direct assistance provided there is no threat to objectivity and the level of competence of the IA. Areas that the external auditor cannot seek direct assistance in the following cases:

a. Where there are significant judgments involved especially those relating to material misstatement, appropriateness of using going concern assumption, extent of testing done and concluded, other areas relating to presentation and disclosures in the financial statements.

b. Those specific areas where the IA has required to be reporting to the management or those charged with governance and which may not be relevant for the external audit objectives.

If the external auditor chooses to direct the internal auditor for specific tasks, it shall have a written agreement from an authorised representative of the entity clearly indicating that the client will have no intervention in the work being directed and the IA agreeing to ensure that the results of the specific tasks, as identified by the external auditor, are kept confidential and it does not dilute their objectivity. Secondly, the external auditor should critically evaluate the audit procedures performed, quality of audit evidence obtained and ensure there are no regulatory or statutory bar in using the report of the IA. For example, a company may have overseas branches or business units, and there could be local professionals who would have been hired as IA function; and say the local regulation mentions that the law prohibits using the report of IA by any other external auditor.

Other aspects: It is also important to note that CARO 2020 requires statutory auditors to report on whether the company has an internal audit system commensurate with the size and nature of its business and whether the reports of the internal auditors were considered for the period under audit., hence SA 610 gathers more importance in terms of compliance and reporting aspects.

Suggested Audit Documentation requirements

a. IA organizational status, competency, skill set and audit methodology of IA;

b. Nature and extent of work of IA

c. Whether there is any threat to objectivity

d. Basis of decisions

e. Review of IA report and summarising the outcome

f. Written agreement from an authorised representative if the external auditor chooses and is permitted to direct the IA for specific tasks

g. The working papers of IA who provided direct assistance on the audit engagement.

h. Copy of IA report.

Conclusion: The external auditor should critically evaluate the IA function, especially on their independence, scope and objective of work. Secondly, communicate with those charged with governance on plans to direct the IA for specific tasks and use of their reports. Thirdly, IA audit procedures and report are not a replacement to external auditor's procedures.

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KSCAA REPRESENTATION:

1. Representation on Concerns of Chartered Accountants dated 28th January, 2021 to Hon'ble Minister of Finance and Minister of Corporate Affairs - Smt. Nirmala Sitharaman, Government of India.

For full text of above representation, please visit: www.kscaa.com

Financial Reporting And Assurance - Referencer

■ **CA Vinayak Pai V**

This month's feature covers Key Monthly Updates in the accounting and auditing space and a Back to Basics section on sources of authority and applicability of Accounting Standards for Non-Corporate Entities.

1. UPDATES: *Monthly Roundup*[1]

AS/Ind AS	• ICAI **Exposure Draft** o Amendments to **Ind AS 117,** *Insurance Contracts.*
	• ICAI **Educational Material** o **Ind AS 23**, *Borrowing Costs.*
Assurance	• ICAI **Exposure Drafts** on **Forensic Accounting and Investigation Standards** (FAIS) o FAIS No. 250, *Communication with Stakeholders* o FAIS No. 360, *Reporting Results* o FAIS No. 370, *Testifying before a Competent Authority* o FAIS No. 510, *Applying Data Analysis* o FAIS No. 520, *Evidence Discovery in Digital Domain* o FAIS No. 530, *Loans and Borrowings* o FAIS No. 540, *Related and Connected Parties.*
	• ICAI Report on **Audit Quality Review***2019-20.*
	• ICAI Clarification on **Statutory Auditor of a Company** giving **feedback to Credit Rating Agencies** about Auditee Client.
	• **ICAI Handbook** on **Audit of CSR Activities**.
	• ICAI **Standard on Assurance Engagements (SAE) 3410,** *Assurance Engagements on Greenhouse Gas Statements.*
Company Law/ SEBI	• MCA General Circular No. 04/2021 dated 28th January, 2021 o No additional fees shall be levied up to **15th February, 2021** for the **filing of e-forms *AOC-4, AOC-4 (CFS)***, *AOC-4 XBRL and AOC-4 Non-XBRL* for FY ended 31.03.2020.
	• MCA Notification G.S.R. 40(E) dated 22nd January, 2021 o Companies (**Corporate Social Responsibility** Policy) **Amendment Rules**, 2021.
	• **CARO, 2020** applicability **deferred** to 1st April, 2021. (MCA Order S.O.4588 (E) dated 17th December, 2020.)
ICAI Advisories	• ICAI Advisory to follow the **ICAI Valuation Standards 2018** while conducting any type of Valuation Engagement.
RBI	• Notifications o **Risk Based Internal Audit (RBIA) Framework** – Strengthening Governance Arrangements.
IFRS	• IASB's **Request for Information** o **Post-implementation Review** : **IFRS 10**, *Consolidated Financial Statements*; **IFRS 11**, *Joint Arrangements;* and **IFRS 12**, *Disclosure of Interests in Other Entities.*

	• IFRS Interpretations Committee's **Tentative Agenda Decisions:** o **Attributing Benefit to Periods** of Service (**IAS 19**). o Classification of **Debt with Covenants** as Current or Non-Current (**IAS 1**). o Configuration or Customisation Costs in a **Cloud Computing Arrangement** (**IAS 38**). o **Hedging Variability in Cash Flows** due to Real Interest Rates (**IFRS9**).
	• IFRS Foundation **Educational Material** o **Going Concern** – *A Focus on Disclosure.*
	• IASB's **Exposure Draft** o ***IFRS 14,*** *Regulatory Assets and Regulatory Liabilities.*
USGAAP	• FASB **Exposure Draft** o Business Combinations (Topic 805) • *Accounting for Contract Assets and Contract Liabilities from Contracts with Customers.*

[1]*Updates for the months of December 2020 and January2021.*

2. **BACK TO BASICS:** *Accounting Standards and Non-Corporate Entities*

- **Introduction**

Non-corporates such as sole proprietorships, partnership firms, Trusts, Societies, etc are entities to which Accounting Standards issued by ICAI may not be mandatorily applicable under laws under which such entities are formed/ governed. However, ICAI members signing audit reports are required to check application of accounting standards in conducting such audits.

Non-Corporate Entities, for the purposes of applicability of Accounting Standards (AS 1 to AS 29) are classified into Level 1, Level 2 and Level 3 entities.

In this section, the applicability of Accounting Standards (AS) issued by ICAI to Non-Corporate Entities and the sources of such applicability are discussed.

- **Sources**

One may refer to the below mentioned (Table A) key accounting and auditing literature that require Accounting Standards issued by ICAI to be applied / complied with in the context of audit of financial statements of Non-Corporate Entities.

Table A:

Preface to the Statements of Accounting Standards.
Clarification regarding Authority Attached to Documents Issued by the Institute.
The **Framework** for the Preparation and Presentation of Financial Statements.
SA 200, Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Standards on Auditing.
Implementation Guide on Reporting Standards (Revised SA 700, Revised SA 705 and Revised SA 706).
Approach to Tax Audit u/s 44AB of the Income Tax Act, 1961.

- **Applicability of Accounting Standards with respect to General Purpose Financial Statements**

Accounting standards (AS) are designed to apply to general purpose financial statements and other financial reporting that are subject to the attest function of members of ICAI. [*Preface to the Statement of Accounting Standards.]*

- **Do Accounting Standards apply to Non-Corporate Entities?**

Accounting Standards apply to both corporate and Non-Corporate Entities (e.g. co-operative or other form) that are engaged in commercial, industrial or business activities (irrespective of whether profit oriented or established for charitable or religious purposes) that are subject to attest function of members of ICAI. [Paragraph 3.3, *Preface to the Statements of Accounting Standards.]*

ICAIs '***Clarification regarding Authority Attached to Documents Issued by the Institute***' states that the **Accounting Standards** and Statements on Standard Auditing Practices (now 'Engagement and Quality Control Standards') **establish standards which have to be complied** with to ensure that financial statements are prepared in accordance with generally accepted accounting standards and that auditors carry out their audits in accordance with the generally accepted auditing practices. They become mandatory on the dates specified either in the respective document or by notification issued by the Council'.

The *Preface to the Statements of Accounting Standards* **issued by ICAI states that AS will not apply to enterprises that only carry**

on activities that are not of commercial, industrial or business nature: a related example provided in the Preface is that of an activity of collecting donations and giving them to flood affected people.

Exclusion of an enterprise from applicability of AS is permissible only if no part of the activity of such enterprise is commercial, industrial or business in nature.

- **What is general purpose financial statements in above context?**

General purpose financial statements includes:

- Balance sheet;
- Statement of profit and loss;
- Cash flow statement (where applicable); and
- Statements and explanatory notes which form part thereof, issued for the use of various stakeholders, governments and their agencies and the public. [Paragraph 3.4, *Preface to the Statements of Accounting Standards*.]

- **Is compliance with AS mandatory for audits of Non Corporate Entities?**

As per Paragraph 6.1 of the *Preface to the Statement of Accounting Standards, "The Accounting Standards will be mandatory from their respective date(s) mentioned in the Accounting Standard(s). The mandatory status of an Accounting Standard implies that while discharging their attest functions,* ***it will be the duty of the members of the Institute to examine whether the Accounting Standard is complied with in the presentation of financial statements covered by their audit.*** *In the* ***event of any deviation*** *from the Accounting Standard, it will be their* ***duty to make adequate disclosures in their audit reports*** *so that users of financial statements may be aware of such deviation".*

Paragraph 6.3 of the Preface states that "*Financial Statements cannot be described as complying with the Accounting Standards unless they comply with all the requirements of each applicable Standard".*

- **Whose responsibility it is to comply with AS while preparing the financial statements of Non-Corporate Entities?**

Ensuring compliance with AS in the preparation of financial statements is the responsibility of the management of the enterprise. [6.2, *Preface.*]

- **Auditing Standards / guidance in the context of Accounting Standards for Non-Corporate Entities?**

a. Relevant extracts from the *Implementation Guide on Reporting Standards (Revised SA 700, Revised SA 705 and Revised SA 706)* are provided herein below.

'The word "audit", when applied to financial statements, means that the balance sheet, statements of profit and loss and cash flows and statement of changes in equity, where applicable, and the related accounting policies and notes which are covered by an auditor's report given by an independent auditor, expressing his professional opinion as to the fairness or otherwise of the entity's financial statements and the fact that in his view, the said financial statements are or are not (a) free from material misstatement and (b) that they are fairly presented.

The goal is to determine whether these financial statements have been prepared in conformity with the generally accepted accounting principles (GAAPs). *While audits of financial statements in India are performed by chartered accountants, the key users of auditors' reports include trade creditors, management, investors, bankers, financial analysts and government agencies.*

b) SA 200, *Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Standards on Auditing* states that the overall objectives of the auditor in conduct of audit of financial statements include obtaining reasonable assurance about whether the financial statements as a whole are free from material misstatement, whether due to fraud or error, thereby enabling the auditor to express an opinion on **whether the financial statements** are prepared, in all material respects, **in accordance with an applicable financial reporting framework.**

Applicable financial reporting framework is the one adopted by management in the preparation and presentation of financial statements that is acceptable in view of the nature of the entity and the objective of the financial statements, or that is required by law or regulation.

c) Paragraph 46 of The *Framework for the Preparation and Presentation of Financial Statements* **[Issued July 2000] states** *'financial statements are frequently described as showing a true and fair view of the financial position, performance and cash flows of an enterprise. Although this Framework does not deal directly with such concepts,* ***the application*** *of the principal qualitative characteristics and of* ***appropriate accounting standards normally results in financial statements that convey what is generally understood as a true and fair view of such information.'***

d) The ICAI document *'Approach to Tax Audit Under Section 44AB of the Income Tax Act, 1961'* contains General Instructions that include:

Where the auditor issues Form No. 3CB, as the audit of financial statements is being done under section 44AB of the Income Tax Act, 1961, the auditor should in relation to audit of the financial statements ***ensure compliance of Accounting Standards issued by ICAI****, Standards on Auditing and* ***the Framework for presentation of Financial Statements issued by ICAI****.*

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Amazon-Future-Reliance Deal - A Case Study

– Part III of 3 parts (Concluding part)

■ CA. Chandrasekaran Ramadurai

Executive Summary:

The recent discussions on the Amazon-Reliance-Future acquisition throws the rights, limits and the modalities of exercising shareholder rights. This has also thrown open specific issues on the supremacy of:

- *the provisions of the Companies Act, 2013 which govern the Company Administration with regard to decisions taken by the shareholders either through the Board or at the General Meetings or*
- *The Dispute Resolution Mechanism as contemplated under* ***Section 442 of the Companies Act, 2013 or***
- *the Provisions of the Arbitration & Conciliation Act, 1996 as amended or*
- *the Share PurchaseAgreement entered into between the Promoters and an investor shall overtake the provisions of the Companies Act, 2013 with regard to*
  - ***Chapter XV, Compromise, Arrangements & Settlements*** *that calls for approval by shareholders at specially convened General Meetings*
- *Can a minority shareholder hold the majority decisions difficult to implement through a parallel Share Purchase Agreement with the Promoter?*

We have discussed in the earlier 2 parts the implications on the case from the view point of SEBI Regulations, the Companies Act, 2013 and the Indian Contract Act, 1872.

Now comes the dispute resolution

1. The Share Purchase Agreement (SPA) provides for arbitration to settle the disputes between Amazon and the promoters of Future Retail.
2. The seat of arbitration is fixed at Singapore.
3. Once the Composite scheme of arrangement between Future Retail and Reliance Retail was signed and the process to obtain the necessary approvals (regulatory and under the Companies Act) is set in motion, Amazon invoked the arbitration clause in the SPA and on October 25, emergency arbitrator VK Rajah issued an emergency arbitration order (EA order) in favour of Amazon. The order restrains Future Group entities from proceeding withthe share seal deal or any such agreement with Reliance and other restricted parties mentioned in the non-compete clause signed between Amazon and Future Coupons.
4. Now the EA order is being contested in the Delhi High Court on merits whether they are executable in India.
5. India is a signatory to New York Convention - **United Nations Conference on International Commercial Arbitration, New York, 20 May–10 June 1958**
6. PART II **ENFORCEMENT OF CERTAIN FOREIGN AWARDS** CHAPTER I- New York Convention Awards provide under Section 44, the circumstances and conditions subject to which Foreign Arbitral awards can be executed in India.
7. Section 44 Definition.—In this Chapter, unless the context otherwise requires, "Foreign Award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—
   a) in pursuance of an agreement in writing for arbitration to which the convention set forth

in the First Schedule applies, and

b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said convention applies.

8. Thus under Section 44 of the Arbitration & Conciliation Act, 1996 for a 'Foreign Award' to be executed in India the following have to be complied with;
   a) The Emergency award is to be from a territory that has signed the convention. Singapore which is a signatory to the New York convention is one that has issued the Emergency Award.
   b) The definition of Foreign Award in order that it becomes executable in India expects that the dispute between Amazon and promoters of Future Retail is due to a legal relationship and that dispute is considered as commercial under currently existing law in India in force. This is a matter for Courts to decide.
9. Whether an Emergency Award is a Foreign Award under the New York Convention and so covered under Section 44 of the Arbitration Act, 1996 -
   a) Volume 19. Kluwer Law International, 2017, p. 814: "[…] institutional rules typically provide that the relief granted by the emergency arbitrator lapses once the arbitral tribunal is constituted. **Therefore, any such relief cannot be construed to be final and would not be enforceable under the New York Convention."**[1]

Conclusion:

1. Matter is sub-judice before the Delhi High Court
2. The promoters are contesting Amazon's argument by stating that there is no violation of the conditions of the Share Purchase Agreement but only the relative assets and liabilities of the Future Retail are being sold to reliance Industries. If so, why should the transaction go through the **Chapter V covering Compromise and Arrangements and not through the provisions of Section 180(1) (a)** of the Companies Act, 2013 which allows with shareholder approval, the Board of Directors the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings?
3. Amazon's SPA giving them time to a long period of 10 years to decide on their Call option to buy or not the promoter shares may be viewed as a ploy to get a very diluted valuation for the shares since it is an attempt to bind the promoters to the SPA without a corresponding financial commitment on Amazon to buy the promoter shares. There is no valuation indicated in the SPA.
4. The contractual terms are open to legal and judicial interpretation due to:
   a) The SPA could be a contingent contract.
   b) The consideration is not defined or paid under the Amazon – Promoters of Future Retail SPA.
   c) Whether the dispute is due to legal relationship is a matter for judicial interpretation.
   d) Whether the Emergency Award is a Foreign Arbitral award covered under Section 44 of the Arbitration & Conciliation Act, 1996?
   e) If Amazon is keen on entering the e-commerce space in India directly, then why did it not offer a deal value and get into the similar composite scheme of amalgamation or arrangement in October 2019 instead of just signing an SPA with the promoter group? Is this knowing well that Future Retail is into huge debts and there is liquidity crunch and if Amazon could buy some more time, they could get a low valuation and buy out an existing brand with a huge distribution network for a song?
   f) This doubt comes when FDI in e-commerce since 2018 is through the automatic route up to 100%[2].
5. ***The deal throws some doubts on Future as also on Amazon from the above questions. We will need to wait for the Delhi High Court judgement on which of the transactions shall have precedence over the other.***

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[1] https://www.soutocorrea.com.br/en/artigos/english-the-enforceability-of-emergency-arbitrators-decisions-under-the-new-york-convention/#:~:text=Kluwer%20Law%20International%2C%202017%2C%20p,under%20the%20New%20York%20Convention.%E2%80%9D

[2] https://dipp.gov.in/sites/default/files/pn2_2018.pdf

It's a happy and proud moment for all the members of KSCAA. By registering the lease cum sale deed, KSCAA realised the dream of 14 years old purchase of Harohalli site.

On 7th Jan 2021, we registered the lease cum sale deed of the site. We received the registered documents from Sub-registrar, Kanakapura.

Our sincere thanks to all past presidents, EC members & mentors who worked relentlessly in pursuing this dream.

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Friday, 5th March, 2021

FIRST TECHNICAL SESSION

4:00 PM Succession Planning

Speaker

CA. Vinod Jain
Past Central Council Member
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SECOND TECHNICAL SESSION

5:15 PM Changing Role of SMPs in Startup Ecosystem

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CA. Eshank Shah
Mumbai

Panelists

MR. Raghavendra Prasad T S
Co-Founder
Qikwell Technologies India Pvt. Ltd.

CA. Pradyumna Nag
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6:15 PM SPECIAL SESSION

Eminent Speaker

Saturday, 6th March, 2021

THIRD TECHNICAL SESSION

4:00 PM Strategies in Personal Financial Planning

Speaker

CA. Nilesh Shah
Managing Director
Kotak Mahindra
Asset Management Co. Ltd.

FOURTH TECHNICAL SESSION

5:15 PM Taxation Laws : Emerging Trends & Challenges

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Justice Dr. Anita Sumanth
Madras High Court

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New Delhi

SPECIAL SESSION

6:15 PM $5 Trillion Economy : Thoughts & Reflections

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UNION BUDGET – 2021
ANALYSIS OF GST PROPOSALS

■ **CA. Raghavendra T N**

As India Inc. adapts to the new normal, the Finance Bill, 2021 introduced in the Lok Sabha on 1st February 2021 by the Hon. Finance Minister displayed colours of restraint, resilience and self-reliance - 'Atmanirbhar Bharat', a formula that the Government has long been working on and one that might just be the vaccine India Inc. needs right now. The Finance Minister seems to have taken the opportunity to introduce this budget in the backdrop of an unprecedented global pandemic to re-inforce investor confidence through a slew of housekeeping and rationalization measures to remove difficulties of taxpayers. This included proposals for an overhaul of the tax assessment and dispute resolution process, mitigation of compliance burden for small taxpayers and clarifying the legislative intent on some widely litigated tax issues.

On GST front, the Hon. Finance Minister proposed very few but significant amendments. Very true to saying 'the devil is in the details', though the proposed amendments are short in numbers but have wider ramifications. The analysis of GST proposals are as below:

Sl. No.	Particulars	Proposed Amendment	Analysis and viewpoints
1.	**Levy on clubs, societies etc.,**	Clause 99 of the Bill seeks to amend Section 7 of the Central Goods and Services Tax Act, 2017, with retrospective effect from the 1st July 2017, by inserting a new clause (aa) in sub-section (1) thereof, so as to ensure levy of tax on activities or transactions involving supply of goods or services by any person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration. It is also proposed to insert an Explanation therein, to clarify that the person or its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one person to another. Clause 113 of the Bill seeks to omit paragraph 7 of Schedule II to the Central Goods and Services Tax Act, with retrospective effect from the 1st day of July 2017, consequent to the amendments made in section 7.	Section 7 of CGST Act amended, to deem activities or transactions by any person to its members, as Supply, with appropriate explanation to overcome decision of the Hon'ble Supreme Court in the case of **State of West Bengal v. Calcutta Club Limited** wherein the levy of Service Tax / VAT on supply of goods and services to members by club were held to be non-taxable on the doctrine of mutuality. The amendment is proposed to be inserted retrospectively w.e.f. 1st July 2017. With the proposed amendment to Section 7 of the CGST Act, paragraph 7 of Schedule II considering supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment, or other valuable consideration as a supply of goods has been omitted retrospectively w.e.f. 1st July 2017.

2.	**ITC available to recipient after supplier uploads details in GSTR-1**	Clause 100 of the Bill seeks to amend Section 16 of the Central Goods and Services Tax Act by inserting a new clause (aa) in sub-section (2) thereof, so as to provide that input tax credit on invoice or debit note may be availed only when the details of such invoice or debit note has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note.	Section 16(2)(aa) inserted to provide an additional condition to avail input tax credit only when the supplier has furnished statement of outward supplies in Form GSTR-1 and available to be viewed in Form GSTR-2A / 2B by recipient. Thus, the condition requires the buyer to check rigorously whether the details of the invoice or debit note of which he wish to avail the ITC is duly reflecting in his GSTR 2A or not and avail only ITC appearing in GSTR-2A/2B. Further, Rule 36(4) prescribing provisional credit currently at 5% which is challenged before various High Courts may become redundant after the insertion. It's a step towards greater compliance, but it may pose lot of challenges for SMEs.
3.	**GST Audit by professionals omitted**	Clause 101 of the Bill seeks to omit sub-section (5) of Section 35 of the Central Goods and Services Tax Act so as to remove the mandatory requirement of getting annual accounts audited and the reconciliation statement submitted by specified professional. Clause 102 of the Bill seeks to substitute a new section for Section 44 of the Central Goods and Services Tax Act so as to remove the mandatory requirement of furnishing a reconciliation statement duly audited by specified professional and to provide for filing of the annual return on self-certification basis. It further empowers the Commissioner to exempt a class of taxpayers from the requirement of filing the annual return.	Section 35(5) which provided for certification of reconciliation statement in Form GSTR-9C by an independent professional is being omitted. Section 44 suitably amended to provide for filing self-certified reconciliation statement along with annual return in Form GSTR-9 by the taxpayer. In my considered view, GST audit by professionals should be continued for two main reasons – (1) Preventive maintenance, avoids litigations & improved compliance for taxpayers, and (2) Timely collection of tax dues & reduced litigations for the revenue.
4.	**Interest payable on net cash liability**	Clause 103 of the Bill seeks to amend Section 50 of the Central Goods and Services Tax Act to substitute the proviso to sub-section (1) so as to charge interest on net cash liability retrospectively with effect from the 1st July, 2017.	Section 50 amended to provide levy of interest on net cash liability retrospectively w.e.f. 1st July, 2017. This provision would bring respite to many taxpayers in pending cases where the GST department had proceeded to recover interest on gross liability. The taxpayers who had paid interest on gross liability in the past should apply for refund once this amendment is given effect.

5.	**Amendments in provisions relating to detention / confiscation of goods in transit**	Clause 104 of the Bill seeks to amend Section 74 of the Central Goods and Services Tax Act so as to make seizure and confiscation of goods and conveyances in transit a separate proceeding from the recovery of tax. Clause 107 of the Bill seeks to insert a new proviso in sub-section (6) of Section 107 of the Central Goods and Services Tax Act so as to provide that no appeal shall be filed against an order made under sub-section (3) of Section 129, unless a sum equal to twenty-five percent of the penalty has been paid by the appellant. Clause 108 of the Bill seeks to amend Section 129 of the Central Goods and Services Tax Act so as to delink the proceedings under that section relating to detention, seizure and release of goods and conveyances in transit, from the proceedings under section 130 relating to confiscation of goods or conveyances and levy of penalty. Clause 109 of the Bill seeks to amend Section 130 of the Central Goods and Services Tax Act, so as to delink the proceedings under that section relating to confiscation of goods or conveyances and levy of penalty from the proceedings under Section 129 relating to detention, seizure and release of goods and conveyances in transit.	Section 129 and 130 proceedings have been given a distinct standing and its linkage to Section 73 / 74 has been deleted. This means that the conclusion of proceedings for a tax period under Section 73 / 74 would not bring respite to proceedings under Section 129 / 130 in respect of transactions recorded by the taxpayer for such tax period and made part of proceedings under Section 73 / 74. Thus, action and penal consequences under Section 129 and 130 would continue and need to be concluded separately. Section 129 has been amended to remove collection of tax and provide for imposition of only penalty. The penalty has been enhanced as under: *Where the owner comes forward for payment of such penalty* • 200% of tax payable • 2% of value of goods or Rs. 25,000 whichever is less *Where the owner does not comes forward for payment of such penalty* • 50% of the value of the goods or 200% of the tax payable on such goods, whichever is higher, • in case of exempted goods, amount equal to 5% of the value of goods or Rs. 25,000, whichever is less Further, provision allowing release of goods on furnishing of security in place of payment of such amount has been abolished. Thus, the amount for release shall now be required to be made by debiting electronic cash ledger. The taxpayer is required to deposit a sum equal to 25% of the penalty in order to file an appeal against the order under Section 129(3). Section 130 has also been amended to delink the penalty leviable therein from Section 129.
6.	**Liability shown in GSTR-1 liable for recovery as 'self-assessed tax' without SCN**	Clause 105 of the Bill seeks to amend Section 75 of the Central Goods and Services Tax Act so as to insert an Explanation in sub-section (12) to clarify that "self-assessed tax" shall include the tax payable in respect of details of outward supplies furnished under	Self-assessed tax explained to include tax on outward supply furnished in GSTR 1 but not paid in GSTR-3B. The liability declared under GSTR-1 was not falling within its purview of the existing Section 75(12) as self-assessed tax and therefore, the same could be recovered without any SCN from the taxpayer. In case of **Kabeer Reality P. Ltd v. Union of India,** Hon'ble Madhya Pradesh High Court upheld the action of department of initiating recovery without determining tax under Section 73 / 74 as the tax was duly declared and accepted by taxpayer in his GSTR-1. The present amendment

		section 37, but not included in the return furnished under section 39.	further strengthens the arguments against a taxpayer who declaresoutput tax liability in GSTR-1 but fails to pay the same in GSTR-3B. This change might force genuine taxpayers into litigations and financial hardship due to overzealous departmental recovery actions.
7.	**Scope of Provisional Attachment enhanced**	Clause 106 of the Bill seeks to substitute sub-section (1) of Section 83 of the Central Goods and Services Tax Act so as to provide that provisional attachment shall remain valid for the entire period starting from the initiation of any proceeding under Chapter XII,Chapter XIV or Chapter XV till the expiry of a period of one year from the date of Order made thereunder.	Section 83 is being amended to provide powers to the Commissioner to attach any property including the bank account of the taxable person or any person specified in Section 122(1A) in order to protect the interest of the Revenue. This can be done after initiation of any proceeding under Chapter XII (Assessment), Chapter XIV (Inspection, Search, Seizure and Arrest) and Chapter XV (Demands and Recovery). The existing provisions referred to pendency of any proceedings under Sections 62, 63, 67, 73 or 74 and covered only taxable persons Section 122(1A) refers to the person who retains the benefit of certain transactions and at whose instance such transaction is conducted.
8.	**Refund on Zero-rated supply with payment of integrated tax restricted**	Clause 114 of the Bill seeks to amend Section 16 of the Integrated Goods and Services Tax Act, 2017 so as to make provisions for restricting the zero rated supply on payment of integrated tax only to specified class of taxpayers or specified supplies of goods or services. It further provides to link the foreign exchange remittance in case of export of goods withrefund and further restricting zero rating of supplies made to special economic zone only when such supplies are for authorised operations.	Section 16 of IGST Act has been amended to restrict the option of making export with payment of duty. The option will be limited to notified class of goods or suppliers. In all other cases, refund shall be available to taxpayers on accumulated input tax credit attributable to Zero-rated supplies. Further, this would take away the benefit of claiming refund of tax paid on capital goods utilized for payment of IGST and claiming refund of such IGST so paid. Secondly, supply to SEZ units or developers shall qualify as Zero rated supply only when the same is made for authorised operations. Accordingly, the zero rated supply has now been reserved to the list of services used for authorised operations only. Further, any registered person who has received refund but yet not received the payment against the export shall also be required to deposit the refund so received along with the applicable interest under Section 50 of the CGST Act within 30 days after the expiry of the time limit prescribed under the FEMA, for receipt of foreign exchange remittances.

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An Analysis of Sections 45(4) and 45(4A) Introduced Through Finance Bill, 2021

■ CA. S Ramasubramanian

INTRODUCTION

The Finance Bill 2021 proposes to replace the present system of taxation of distribution of capital assets on dissolution or otherwise of a firm / AOP by substituting existing Section 45(4) and introducing a new Section 45(4A). In this article, an attempt is made to unravel the intricacies of the proposed amendment.

1. Section 45(4) Issues :

1.1 The Finance Bill 2021 proposes to substitute the existing S.45(4) and introduce the new sub-section 45(4A). The relevant clauses of the Finance Bill are reproduced below:

45(4) Notwithstanding anything contained in sub-section (1), where a specified person receives during the previous year any capital asset at the time of dissolution or reconstitution of thespecified entity, which represents the balance in his capitalaccount in the books of accounts of such specified entity at the time of its dissolution or reconstitution, then any profits or gains arising from receipt of such capital asset by the specified person shall be chargeable to income-tax as income of such specifiedentity under the head "Capital gains" and shall be deemed to bethe income of such specified entity of the previous year in whichsuch capital asset was received by the specified person andnotwithstanding anything to the contrary contained in this Act,for the purposes of section 48,––

(a) fair market value of the capital asset on the date ofsuch receipt shall be deemed to be the full value of theconsideration received or accruing as a result of the transfer of such capital asset; and

(b) the cost of acquisition of the capital asset shall be determined in accordance with the provisions of this Chapter:

Provided that the balance in the capital account of the specified person in the books of account of the specified entity is to be calculated without taking into account increase in the capital account of the specified person due to revaluation of any asset or due to self-generated goodwill or any other self-generated asset.

Explanation.––For the purposes of this sub-section,––

(i) "specified entity" means a firm or other association of persons or body of individuals (not being a company or a cooperative society);

(ii) "self-generated goodwill" and "self-generated asset" mean goodwill or asset, as the case may be, which has been acquired without incurring any cost for purchase or which has been generated during the course of the business or profession;

(iii) "specified person" means a person who is partner of a firm or member of other association of persons or body of individuals (not being a company or a cooperative society), in any previous year.

45 (4A) Notwithstanding anything contained in sub-section (1), where a specified person receives during the previous year any money or other asset at the time of dissolution or reconstitution of the specified entity, which is in excess of the balance in his capital account in the books of accounts of such specified entity at the time of its dissolution or reconstitution, then any profits or gains arising from receipt of such money or other asset by the specified person shall be chargeable to income-tax as income of such specified entity under the head "Capital gains" and shall bedeemed to be the income of such specified entity of the previous year in which such money or other asset was received by the specified person and notwithstanding anything to the contrary contained in this Act, for the purposes of section 48,––

(a) value of any money or the fair market value of other asset on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset; and

(b) the balance in the capital account of the specifiedperson in the books of accounts of the specified entity at the time of its dissolution or reconstitution shall be deemed to bethe cost of acquisition:

Provided that the balance in the capital account of thespecified person in the books of account of the specified entity isto be calculated without taking into account increase in thecapital account of the specified person due to revaluation of anyasset or due to self-generated goodwill or any other self-generatedasset.

Explanation.– For the purpose of this sub-section, the expressions "specified entity", "self-generated goodwill", "self generated asset" and "specified person" shall have the meaning respectively assigned to them in sub-section (4).'.

1.2 The wordings of the section lead to a lot of confusion as they are antithetical to fundamentally well settled principles of nature of firm, its partners, partners' interest in various assets of firm etc. This section is non-obstant to S.45(1). Therefore, to be taxed u/s 45(4) the charging ingredients of S.45(1) need not be present. An analysis of S.45(4) would show that the following issues need to be discussed in depth:

a) What is the meaning of capital asset which represents the balance in its capital account? Would it include all capital assets or in the context of the language of S.45(4) would refer only to the assets which were brought in by a partner as his capital contribution to the firm and which is reallotted to him on dissolution/ reconstitution.

b) Whether S.45(4) is workable at all as it is founded on a concept which is totally alien to the partnership law.

c) What is the meaning to be attributed to the expression *"Then any profits or gains arising from receipt of such capital asset by a specified person" ?* Does this refer to the profit earned by the outgoing partner/member and whether the accrual of profit in the hands of such person is pre-condition for invoking S.45(4)? Or whether the above expression deems that the profit from receipt of the capital asset is earned by the specified entity.

d) Whether indexation is available?

e) What is the significance of the expression *"receipts …….at the time of dissolution or reconstitution of specified entity. Whether S.45(4) would apply if such receipt had occurred prior to dissolution / reconstitution?"*

MEANING OF CAPITAL ASSET

- Paragraphs 1.3 to 1.5 deal with the proposition with the capital asset referred to in S.45(4) is the capital asset which was brought in by the partner/member as his capital contribution.
- Paragraph 1.6 deals with the objections to the above proposition.
- Paragraphs 1.7 and 1.8 deal with the proposition that the capital asset referred to in S.45(4) is that capital asset which is allotted on a stand-alone basis and not along with money, capital assets and other assets which is covered by S.45(4A).
- Paragraph 1.10 deal with the proposition that S.45(4) in its present avatar is unworkable.

CAPITAL ASSET IN S.45(4) IS THAT ASSET WHICH IS BROUGHT IN AS A CAPITAL CONTRIBUTION

1.3 The use of expression *"where a specified person receives during the previous year any capital asset at the time of dissolution or reconstitution of the specified entity which represents the balance in his capital account in the books of account of such specified entity at the time of its dissolution or reconstitution"* has led to many doubts. The first issue is whether a capital asset of the firm can be represented in the balance of a capital account of a partner in the books of the firm. It is well known that during the subsistence of the partnership, no partner has an interest in the assets of the firm. He is not a co-owner of the assets of the firm. His right is only to receive profits. On dissolution or on retirement, the outgoing partner is entitled to his share of the net assets of the firm as agreed to between the partners. The above principles were laid down by the Hon'ble Supreme Court in **Addanki Narayanappa Vs Bhaskara Krishnappa AIR 966 SC 1300.** The Hon'ble Gujarat High Court in **CIT Vs Mohanbhai Pamabhai 91 ITR 393** in a well-reasonedand exhaustive judgment, laid down the principles governing the relationship between a partner and a firm and the nature of interest of the partner in the firm. It reiterated the principles stated above. It may be noted that the Supreme Court in **CIT Vs Mohanbhai Pamabhai 165 ITR 166** approved the Gujrat High Court judgment. Therefore, it is conceptually difficult to accept that the capital asset of the firm is represented in the capital account of the partner.

1.4 Assuming that some meaning has to be given to the expression to make it workable, there are two possible interpretations. The first interpretation is that the capital asset referred to in S.45(4) is that capital asset which a partner has brought into the firm as his share of capital and which on dissolution or reconstitution of the firm is allotted back to him. In other words, the capital asset referred to in S.45(4) is that capital asset which is referred to in S.45(3). This interpretation would

be in harmony with the proposed computation of capital gains given in S.45(4)(a) & (b). The section creates a fiction that when such a capital asset is given back to the partner, capital gains arise to the firm and it is computed in the manner laid down in S.45(4)(a) & (b).

1.5 The interpretation that "capital asset" in S.45(4) refers to capital asset specified in S.45(3) canalso be justified on another ground. It can be stated that S.45(4) and (4A) capture the gains arising on account of transfer of assets or money to the partner on dissolution / reconstitution. While S.45(4) deal with the assets which were brought in by a partner as his capital contribution which is allotted back to him on dissolution / reconstitution, S.45(4A) deals with the allotment of money and other assets. Therefore, while computing the capital gains, S. 45(4) stipulates that the FMV of the capital asset is taken as the full of consideration and the cost of such asset is computed in accordance with the provisions of Part E of Chapter IV. In respect of other assets and money given, the difference between the money plus FMV of the assets and the balance in the capital account is taken as capital gains.

OBJECTIONS TO THE ABOVE PROPOSITION

1.6 But this interpretation does not flow quite naturally from the wordings of the proposed S.45(4). If the intention of the parliament was to cover only the capital assets which fall u/s 4(3), it could have easily rephrased the section by making a reference to S.45(3).

CAPITAL ASSET IS THAT ASSET WHICH IS ALLOTTED ON A STAND-ALONE BASIS

1.7 The second interpretation is explained below; S.45(4) refers to a capital asset whereas S.45(4A) refers to money orother asset. Therefore, it is possible to contend that S. 45(4) would apply only when capital asset (s) alone is / are allotted to the outgoing partner. S.45(4A) would apply when the combination of items like money, capital assets and other assets are allotted.

1.8 This interpretation also does not flow naturally from the wordings of S. 45(4). This interpretation ignores the impact of the expression *"which represents the balance in his capital account in the books of account of such specified entity"*. It is well settled that nothing in a section is to be read otiose and tautology cannot be attributed to the legislature.

OBJECTIONS TO THE ABOVE PROPOSITION

1.9 If one has to accept that S. 45(4) has to be made workable even by straining the language to a great extent, then it is perhaps reasonable to interpret "capital asset" in S.45(4) as referring to a capital asset referred to in S.45(3).

S.45(4) AS IT STANDS NOW UNWORKABLE

1.10 A drastic view is that S.45(4) is founded on a concept which is just not recognised in law. As stated earlier, the capital account balance of a partner in a firm does not represent his interest in the assets of the firm. In fact, during the subsistence of partnership the partners have no interest in the assets of the firm individually. Since S.45(4) violates this fundamental concept, it is totally unworkable. While the courts can strain a language to a reasonable extent, it cannot stretch them beyond a point. It is also important to note that the memorandum explaining the finance bill states that there is uncertainty regarding the applicability of the provision of present S.45(4) where assets are revalued, or self-generated assets are recorded in the books of account and payment is made to partner or member which is in excess to his capital contribution. The Memorandum is really not helpful in understanding what mischief the law makers want to correct. In the absence of any clear intention as to the meaning of various phrases used in the proposed S.45(4), S.45(4A) it becomes unworkable and hence cannot be given effect to.

WHETHER THE ACCRUAL OF PROFIT TO THE OUTGOING PARTNER/MEMBER IS A PRE-CONDITION

1.11 Another imponderable in interpretation of S.45(4) is the meaning that is to be attributed to the expression *"Then any profits or gains arising from receipt of such capital asst by the specified person shall be chargeable to income tax as income of such specified entity under the head capital gains"*. What this expression means is that some profit should arise to the outgoing partner at the time of dissolution or reconstitution when a capital asset is allotted to him and unless it is shown that some profits arise to him as aforesaid, S.45(4) is not applicable. Though the profits may arise to partner, the law wants to tax the gains in the hands of the firm in a manner provided u/s 45(4). This can be

considered as a reasonable interpretation because S.45(4) uses the expression *"profits or gains arising from receipt of such capital asset"*. Since receipt of the capital asset is by the outgoing partner, it is reasonable to say that the profits should arise to him. One fallout of this interpretation is that unless some profits arise to the outgoing partner, S.45(4) will not apply at all. In other words, the arisal of profits in the hands of the outgoing partner is a qualifying pre-condition for taxing the firm and once this pre-condition is satisfied, the capital gains will be determined in accordance with S.45(4) (a) & (b).

1.12 This view is also supported by the proviso to S.45(4). The proviso to S.45(4) states that balance in the capital account is to be calculated without taking into account increase in the capital account due to revaluation to any asset or due to self-generated goodwill or any other self-generated asset. When the actual capital gains are determined without any reference to the balance in the capital account, the proviso stating that the balance in the capital account has to be determined by disregarding certain events like revaluation, creation of self-generated assets does not make sense. But, if the view that the profit should arise to the outgoing partner is a pre-condition for applicability of S.45(4) is accepted, then, it makes sense to have the proviso in place. Otherwise, the proviso does not make any sense at all.

OBJECTIONS TO THE ABOVE PROPOSITION

1.13 Objection to the above interpretation is that there is no fiction under S.45(4) that the income arising to a partner can be taxed in the hands of the firm. It can be said that that the profits arising to a partner on allotment of capital asset at the time of dissolution or reconstitution can be taxed in the hands of the firm is antithetical to the provision of S.5 of the Act. The scope of total income is the total income of a person. Therefore, total income of another person cannot be taxed. A counter to this argument would be that S.64, 64(1A) provide for clubbing the income arising to another person as a part of the total income of an assessee. Though S.45(4) does not use an expression similar to that of S.64, the underlying principle of S.64 can be applied to S.45(4) also.

1.14 Moreover, the actual determination of the capital gains has no relation to the profits supposed to be earned by the partner. It is well settled that the capital contribution does not represent the consideration paid for becoming a partner and therefore, any amount in excess of the capital contribution cannot be considered as profits.

INDEXATION BENEFITS

1.15 The computation of capital gains u/s 45(4) is also provided for in the section. It is summarised below. *"Notwithstanding anything to contrary contained in this Act, for the purpose of S.48"*

a) The fair market value of the capital asset on the date of such receipt shall be the full value of consideration received,

b) The cost of the acquisition of the capital asset shall be determined in accordance with the Part E of Chapter IV.

Since the cost of acquisition is to be computed in accordance with Chapter IV, S.48 to 55 would apply in full force. Therefore, indexation benefits and other benefits etc. envisaged in Part E of Chapter IV would also be applicable, if otherwise available.

WHETHER A LONG TERM OR A SHORT TERMS CAPITAL ASSET

1.16 There is no difficulty in determining whether the capital asset is a long term or short-term capital asset. The period of holding of the capital asset can easily be determined and one can decide whether it is a short-term capital asset u/s 2(42A) or a long-term capital asset u/s 2(29A).

SIGNIFICANCE OF THE EXPRESSION *"RECEIPTS .....AT THE TIME OF DISSOLUTION OR RECONSTITUTION*

1.17 S.45(4) uses the expression *"where a specified person receives during the previous year any capital asset at the time of dissolution or reconstitution of the specified entity"*. Similarly, S.45(4A) uses the expression *"where a specified person receives during the previous year any money or other asset at the time of dissolution or reconstitution of a specified entity"*. Therefore, in order to apply S.45(4) and 45(4A), it is necessary that the receipt of the capital asset or the receipt of money or other assets should be at the time of dissolution or reconstitution. If such a receipt happens prior to the dissolution or reconstitution, S.45(4) / 45(4A) would not apply. S.45(4) can be avoided by the simple act of allowing the partner who wants to retire to overdraw his capital account well before the

retirement and at the time of retirement, the other partners can agree that the retiring partner need not pay back the amount to the firm and the debit balance forgone by the firm is the consideration for the partner retiring from the firm. This is an attractive interpretation. But this proposition is subject to the courts accepting the bonafides of the transaction.

2. S.45(4A) ISSUES:

2.1 This section is also non-obstant to S.45(1). Therefore, to be taxed u/s 45(4A) the charging ingredients of S.45(1) need not be present. An analysis of S.45(4A) throws the following issues:

- What is the meaning of "other asset"?
- it include current assets?
- What is the meaning to be attributed to the expression *"as a result of the transfer of such capital asset"* used in S.45(4A)(a).
- Indexation
- Whether long term or short-term capital asset
- Cost of improvement.

MEANING OF "OTHER ASSET"

2.2 S.45(4A) would apply where money or other asset at the time of dissolution or reconstitution is given to an outgoing partner. The question is what is the meaning of the expression "other asset"? Does it refer to only assets other than capital assets or assets including capital assets? The answer to this question depends on the view taken in respect of "capital asset" specified in S.45(4). If the capital asset referred to in S.45(4) is confined to the assets referred to in S.45(3), "other assets" in S.45(4A) would include capital assets which do not fall under S.45(4). On the other hand, the view that "the capital asset" in S.45(4) would refer to any type of capital asset is accepted, then, "other assets" in S.45(4A) cannot include capital asset.

2.3 If it includes all types of assets, there is a problem in computing the profits referable to other assets as income under the head "capital gains". If other assets are current assets, the income cannot be computed under the head "capital gains". It has to be computed under the head "profits and gains of business or profession".

SIGNIFICANCE OF THE EXPRESSION "SUCH CAPITAL ASSET" IN S.45(4A)(a)

2.4 S.45(4A)(a) states that the value of money or fair market value of the other asset on the date of such receipt shall be deemed to be the full value of consideration received as a result of transfer of such capital asset. Even a cursory glance at S.45(4A) would show that it does not refer to "capital asset"anywhere. Therefore, the use of "such capital asset" in S. 45(4A)(a) creates much confusion. One way of resolving this conundrum is to say that the "other asset" should necessarily refer only to a capital asset. It will not include current assets. If this interpretation is correct, it would support the theory that "capital asset" referred to in S.45(4) would be an asset which is referred to in S.45(3). The reconciliation of S.45(4) and 45(4A) would bethat:-

a) S.45(4) refers to capital assets which are transferred by a partner to the firm as his capital contribution and which is allotted back to him at the time of dissolution or reconstitution,

b) Other capital assets would fall u/s 45(4A).

INDEXATION WHETHER AVAILABLE

2.5 Unlike S.45(4)(b) which states that cost of acquisition of capital asset shall be determined in accordance with the provision of Chapter IV, S.45(4A)(b) does not state that cost of acquisition should be determined as per Part E of Chapter IV. All it states is that the balance in the capital account of the partner shall be the cost of acquisition. Therefore, there are two possible interpretations on indexation and applicability of other provisions of Part E of Chapter IV. One interpretation is that S.48 is fully modified by clauses (a) & (b) of S.45(4A) and the computation of the capital gains has to be only in accordance with S.45(4A) and other sections of Part E of Chapter IV cannot be pressed into service. The language of S.45(4A)(b) is to be contrasted with language of S.45(4)(b). While S.45(4)(b) makes an explicit reference to applicability of Chapter IV, reference to Chapter IV is conspicuously absent in S.45(4A)(b). Therefore, indexation is not available. Other view is that it only defines the cost of acquisition and there is nothing in the section which prevents an assessee to claim the indexation benefit. Wherever the legislature wanted that the indexationbenefit would not be applicable, it has specifically stated so. Please see S.50B, S.112. Hence, in the absence of any prohibition of indexation in S.45(4A)(b), indexation benefit cannot be denied.

WHETHER LONG TERM OR SHORT TERM CAPITAL ASSET

2.6 Another vexatious issue is whether the underlying capital asset which is charged to capital gains u/s 45(4A) is a long term or a short-term capital gain. A reasonable view is that it will be long term or a short-term depending on the period during which a person would be a partner in the firm.

COST OF IMPROVEMENT

2.7 Another issue is cost of improvement. Is there a cost of improvement? Is an addition permissible at all? The cost is deemed to be the balance in the capital account at the time of dissolution or reconstitution. This would factor in all improvements and therefore, it is difficult to envisage that further cost of improvement can be added.

3. CONCLUSION

3.1 S.45(4) and 45(4A) as proposed in the Finance Bill betray a conceptual lack of understanding of the fundamental principles of law governing the relationship between firm and its partners. It is quite obvious that if at all profit arises when asset/ money is given to an outgoing partner, the profit would arise to such partner and not to the firm. Therefore, it would be more logical to introduce provisions taxing the outgoing partner in respect of the profits received by him. It is quite illogical to tax the firm when no profit accrues to the firm.

3.2 For the sake of convenience, the reference has been made to a partnership firm and partners in the Articles. The views expressed in this Article would apply equally to the AOP and BOI and its members.

3.3 The way S.45(4) and S.45(4A) have been provided leaves much to be desired. It is almost impossible to give a reasonable interpretation wherein one could reasonably say that such interpretation is justified on settled principles of interpretation. Any view taken would do much violence to the language. It is hoped that the proposed S.45(4) and 45(4A) in the Finance Bill would be scrapped and a much simpler and easier to understand provisions would be enacted which could tax the profit in the hands of the partner / member who is the actual recipient of the profits.

3.4 If the reader feels confused after reading this article, it is understandable as the author himself is confused and finds it difficult to arrive at some reasonable interpretation because of the language of S.45(4) and 45(4A).

3.5 The author acknowledges with thanks the inputs given by Mr. Padamchand Khincha, Mr. K.K Chythanya and Mr. G.S Prasahanth in unravelling the conundrum of S.45(4) and 45(4A).

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KSCAA Welcomes New Members January 2021

Sl.No.	Name	Place
1	Parvatkumar S Bijaspur	Brahampur
2	Kedar Ramakrishna Paranjape	Bengaluru
3	Dhananjaya D. Bhave	Shivamogga
4	Vishnu Ravikumar	Bengaluru
5	Shraddha Kamath	Karkala
6	K Nagaraja	Ballari
7	Pradyumna Saralaya	Bengaluru

Solution to Sudoku - 5 January 2021

9	5	6	7	8	4	1	2	3
1	8	3	2	5	6	9	4	7
2	4	7	1	9	3	8	5	6
8	1	5	9	4	7	3	6	2
7	9	4	6	3	2	5	1	8
6	3	2	5	1	8	4	7	9
5	7	9	8	6	1	2	3	4
3	6	8	4	2	5	7	9	1
4	2	1	3	7	9	6	8	5

Intellectual Property Rights and Protection in India

Designs as an Intellectual Property Right

(Part-VI of IPR series)

■ **Adv. M G Kodandaram, *IRS, Assistant Director (Retd.), NACIN***

In the *'IPRs and protection in India'* series, overview of IPRs and the modalities involved in selection, application, grant of trademark and the protection in instances of infringement have been deliberated in the earlier parts. In this part the Design as an Intellectual Property Right is being planned.

Design - an essential element in marketing

Business is all about attracting consumers and retaining them to increase sales volumes and profits. Visually attractive and appealing products drawing the attention of consumers, and such 'attention-grabbing' criteria is often touted as the "basic rule" of business. It is said, *"Jo dikhtahai, who biktahai"* (one that's appealing to see, is the most sold).The marketability of any article is dependent not only on the outward visual appeal but also on other characteristics like quality, utility, brand, goodwill, after sales service etc. All these elements help in aggregating the business wherein the consumers are encouraged to purchase the article, and also spread their good feelings to others by word of mouth. From a commercial point of view, the outward appearance of an article is an important aspect to be taken care of, for increased marketability of such goods. The design of an article and the overall packaging of the article are vital from the commercial point of view. This is referred to as the *DESIGN* of the product, which is eligible for exclusive sui-generis copyrights subject to other conditions as stipulated in the Designs Act 2000. ('Act' for brevity).

The word 'Design' as per Section 2(d) of the Act means, *'the features of shape, configuration, pattern or ornament or composition of lines or colour or combination thereof applied to any article whether two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye'*. Object of the Act is to protect the new or original design, created to be applied or used on a particular article to be manufactured by Industrial Process or means, from being copied illegally by others.

New or original designs are protected

A design could be registered seeking exclusive rights only if it is *new or original* in nature. A design shall be considered to be new when it has not been disclosed in the public domain around the globe, by publication or by use or in any other way, prior to the filing date or priority date. In relation to a design, the term original, means that it is originating from the creator of design. Designs, though old, are treated as new in their application and are called as original for the purposes of this enactment. To illustrate, the figure of *'Melukote Narasimha hillock'* is a natural structure in place from time immemorial. If a person uses the picture of the hillock for the first time and comes out with a product or article in the form of figure of the hillock, such an effort could be treated as an original design, eligible for registration.

The term *"Original"* in relation to a design, means originating from the author of such design and includes the cases which though old in themselves yet are new in their application. [Refer Section 2(g)]. The meaning of expression *"new or original"* design has been clarified by the Apex court in the case of ***Bharat Glass Tubes Ltd Vs. Gopal Glass Works Ltd.*** (reported in AIR 2008 SC 2520) to mean that which has been registered and, has not been published anywhere or that it had been invented for the first time or it has not been reproduced by anyone. In this case the respondents M/s. Gopal Glass Works Ltd had registered their designs for diamond shaped glass sheets under the Designs Act. They had acquired the

sole right to manufacture and market the glass sheets in the design that was registered in their names. The appellant however started marketing his glass sheets with the same design, that were formed on the glass sheets by engraved rollers which were developed by a German Company which had licensed all Indian rights to the respondent. *'Section 2(d) design means the application of shape, configuration etc. to any article and since in this case the respondent had specifically mentioned in the application form that he was applying the designs only to glass sheets, he would have exclusive rights to do so despite the fact that the design already existed on the engraved rollers',* the Court held. In this case the Court emphasized the objects of the Act, i.e., to protect and reward the inventor of the design for his hard work.

Published Designs ineligible for registration

As per Section 4 of the Act, *"a design which has been disclosed to the public anywhere in tangible form or by use or in any other way prior to the filing date; or is not significantly distinguishable from known designs or combination of known designs; or comprises or contains scandalous or obscene matter, shall not be registered".* In the case of ***Gammeter v. Controller of Patents and Designs,*** the Calcutta High Court (reported in (1918) ILR 45 CAL 606) held that the design for which the novelty is being claimed should be placed side-by-side with the other design and then decided. The court upheld the claim of novelty or originality for the registered design of a metal wrist-band for watches, even when such gold bracelet was used as jewellery from several years. The court held that, *'although the shape of the band was not new or original, its application to the watch was for a purpose and this design could be said to be original'.* Such overall impression produced by a design must differ from the overall impression produced by an earlier design made available to the public and this is referred often as *"of individual character".*

For a design which is original and new, *'any person'* who claims to be the proprietor of that design can apply for registration. Any person includes any firm, any partnership firm, company or a similar entity or an agent on behalf of the owner. As stated above for eligibility to register, such design should be (i) new and original; (ii) should not have been published earlier; (iii) should not be contrary to morality; and (vi) should not have been prohibited by the Government or any institution. A design that is capable of disrupting the public order and peace is not considered for registration. Once the design is registered, the proprietor of the design shall enjoy a right of exclusive use of the design and a corresponding right to protect the same from piracy. The important purpose of design Registration is to see that the artisan, creator, originator of a design, having aesthetic look, is not deprived of the bonafide reward by others applying it to their goods. By this right, the thought, time and expense incurred in finding a design that could increase sales and marketability of a product could be recognized.

Design on articles only are covered

The Act protects the aesthetic / ornamental features of a product that could be industrially produced. Under Act, the "article" means any article of manufacture and any substance, artificial, or partly artificial and partly natural; and includes any part of an article capable of being made and sold separately. Such goods produced could be consumer goods such as handicrafts, watches, jewellery, fashion and luxury items, furniture, toothbrush, textiles or an industrial commodity. The grant of design rights is intended to promote innovative activity in the industries.

The gists of the essential requirements for the registration under the act are:

(i) The design should be new or original, not previously published or used in any country before the date of application for registration. The novelty may reside in the application of a known shape or pattern to new subject matter.

(ii) The design should relate to features of shape, configuration, pattern or ornamentation applied or applicable to an article by an industrial process.

(iii) The features of the design in the finished article should appeal to and are judged solely by the eye (visual appeal).

The design must be applicable to an 'article of manufacture'. This means that designs such as garden design, urban planning and architectural design etc have been excluded from the scope of design protection.

A group of articles can be considered for design protection under the act. The group of articles meeting the following requirements may be regarded as a set of articles under the Act - (i)ordinarily on sale or

intended to be used together; (ii) all having common design even though articles are different (same class); (iii) similar general character. Generally, an article having the same design and sold in different sizes is not considered as a set of articles.

The registration of a design confers upon the registered proprietor 'Copyright' in the design for the period of registration providing exclusive right to apply a design to the article belonging to the class in which it is registered.

Some of the advantages of registration of a design under act are, (i) the registered design can be protected from being infringed by another person; (ii) helpful for fast-moving industries like the fashion industry, where copying a product is rampant, could be stalled. Further the design rights are registerable on a lower fee and its grant process is simple and fast and this helps the smaller entities to protect designs of a wide variety of products. The pace with which the design rights provide a remedy for infringement can help the right holder in protecting their products in the key markets.

Once a design is registered, it gives the legal right to bring an action against those persons who infringe the design right to stop such exploitation and to claim any damage to which the registered proprietor is legally entitled. It is to be noted that the Patent /design Office does not become involved either with any issue relating to enforcement of right accrued by registration or with any issue relating to exploitation or commercialization of the registered design.

Exclusions from Design protection

As per the act, the following IP rights are not eligible for consideration as a design.

(i) Any registered trademark under Trademarks Act, 1999;

(ii) Any property mark, under the Indian Penal Code, 1860, or

(iii) Designs that are primarily literary or artistic character are not protected under the Designs Act. Examples of primarily protected IPs under copyright act are: (a) books, calendars, certificates, forms-and other documents, dressmaking; (b) patterns, greeting cards, leaflets, maps and plan cards, postcards, stamps, medals. labels, tokens, cards, cartoons; (c) any principle or mode of construction of an article; (d) mere mechanical contrivance, buildings and structures, parts of articles not manufactured and sold separately, variations commonly used in the trade, mere workshop alterations of components of an assembly, mere change in size of article, flags, emblems or signs of any country, layout designs of integrated circuits.

(iv) Any mode or principle of construction or operation or anything which is in substance a mere mechanical device, would not be a registrable design. For instance, a key having its novelty only in the shape of its corrugation or bent at the portion intended to engage with levers inside the lock associated with, cannot be registered as a design under the Act.

Classification of an article

Designs are required to be categorizes in separate classes in order to provide for systematic registration. The applications for registration of Designs applied to articles are classified according to the Third Schedule of Designs Rules, 2001. The classification is based on the International Classification System for Industrial Designs known as Locarno Classification. The classification of goods is based upon the function of the classification of goods is applied. There are 32 classes and most of the classes are further divided into sub-classes. Normally, the name of the article should be such that, it is common / familiar in the trade or Industries. The name of the article as mentioned in the application form should correspond with the representation of the article as filed. **Only one class number is to be mentioned in one particular application which is mandatory under the Rules.** This classification is made on the basis of Articles on which the design is applied. Some examples are hereinunder:

a) Class 1 - Food Stuffs;
b) Class 3 - Travel Goods, Cases, Parasols and Personal Belongings, Not Elsewhere Specified;
c) Class 5 - Textile Piecegoods, Artificial and Natural Sheet Material;
d) Class 31 - Machines and appliances for preparing food or drink not elsewhere specified
e) Class 99 - Miscellaneous, including all products not included in the preceding classes

Subsequent application by the same proprietor for registration of same or similar design applied to any

article of the same class is possible, but period of registration will be valid only up to period of previous registration of same design.

Registration process

The registration and protection of industrial designs in India is administered by the Designs Act, 2000. The Controller General of Patents, Designs and Trade Marks is the authority for registration and their HQ is at Mumbai. The Designs Wing of the Indian Patent Office processes the applications and undertakes other design related procedures.

The application for registration of design can be filed by the applicant himself or through a patent agent or legal practitioner. There are two types of Applications prescribed under the act viz.,*(a) The Ordinary application – which does not claim priority; and (b) the Reciprocity application.*

First-to-file rule is applicable for registrability of design. If two or more applications relating to an identical or a similar design are filed on different dates only first application will be considered for registration of design. A reciprocity application claims priority of an application filed previously in a convention country. Such an application shall be filed in India within six-month from the date of filing in convention country. The date of registration except in case of priority is the actual date of filing of the application. In case of registration of design with priority, the date of registration is the date of making an application in the reciprocal country.

Search for prior publication of a Design

Before seeking rights through an application, it is essential to conduct a detailed search whether the design has been previously registered. For this purpose, the search engines in the WIPO and IP office could be used. Even the assistance of the IP office could be sought through a prescribed form along with payment of requisite fee. The Design Wing of the Patent Office may be approached for finding out whether a design has been previously registered or not, on prescribed form. An Application for registration of design may be prepared either by the applicant or with the professional help of attorneys. A list of patent agents is available in the Register of Patent agents maintained by the Patent Office and also available in **www.ipindia.nic.in**

Contents of the application

For the purposes of registration of a design, an application shall be filed in Form-1along with the prescribed fees, stating the full name, address, nationality, name of the article, class number and address for service in India. Foreign applicants are also required to give an address for service in India, which could be the address of their Agent in India. In case of foreign applicants, it is mandatory to give an address for service in India. Unless such an address is given, the Office shall not proceed with the application.

The application shall be signed either by the applicant or by his authorized agent/legal representative. In India, only a registered patent agent or a legal practitioner can be appointed as an authorised agent. In case the applicant has already registered a design in any other class of articles, the fact of such registration along with the registration number shall be mentioned. If the application is filed through a patent agent/legal practitioner, a power of authority shall be submitted along with the application. General Power of Attorney is also acceptable.

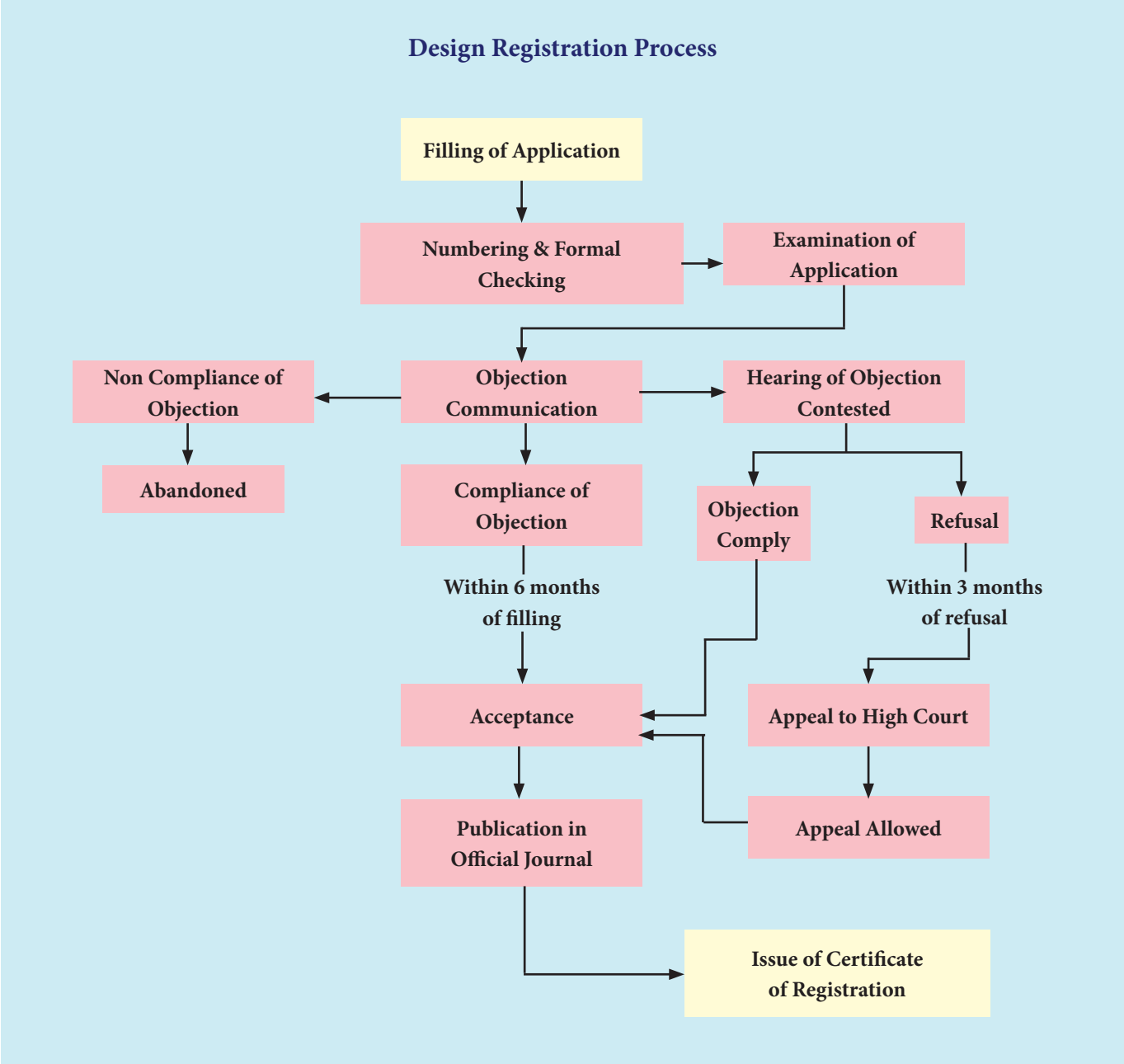
Other important factors in filing application

The registration fees in respect of natural person and MSMEs is Rs. 1,000 and Rs. 4,000 for large entities. Designs are required to be categorized in separate classes in order to provide for systematic registration. The class and sub-class should be mentioned in the application. An exact representation of the article on which the design has been applied has to be prepared on white A4 size paper of durable quality. The details of the design and applicant are to be mentioned clearly.A statement of novelty should be included on the representation of a design as per the Act in order to specify the claim. This will enable speedier examination and more specific protection. The claim will protect the overall visual appearance of the design as described in the representation of drawing. If one has applied for protection of the design in convention countries or countries which are members of inter-governmental organizations, a priority registration date can be sought. This is the date of filing of the application in any of such countries provided the application is made in India within six months. An application should be filed only after ensuring that all enclosures and fee prescribed are paid. Applications can be filed in either

the Design Office in Kolkata or the branch offices of the Patent office in Delhi, Mumbai or Chennai or online.

Design registration process

The procedure and process followed in the design registry office for grant of design right is shown in the following flow chart.



The duration of protection of industrial design is for 10 years which can be extended for a further period of 5 years. This can be used by MSMEs to protect the outward appearance of their products so that competitors are stopped from copying such designs.

In the coming part, the infringement and protection of the registered design will be deliberated.

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IPR

Is Good Health Only About Eating?

■ **Dr. Sharmila Bhat,** B.A.M.S., T.C.E.M., MS (Counseling & Psychotherapy), MSc DFSM (Dietetics & Nutrition)

"I have been eating the same kind of food and doing the same kind of work, in fact more work than before, yet my weight is increasing. Why??" This is a common query that we often get to hear.

Before addressing the above question, one needs to know that the thinking part of the brain has no control on the involuntary functioning of the body. Nature, by default gears life for protection and not automatic destruction. So, when a person decides, I want to be.....(fill any of the following - thin, chubby, tall, short, fair, tanned); it does not have an impact on the functioning aspect. Weight changes start to occur at different phases of life, due to different reasons. One reason does not fit for all, at all times.We need to be able to see truthfully the cause for weight change.

At present, sedentary life style starts from early childhood. With so much stress on only academic excellence, children literally have no time to be active to explore what they like or want. The impact of this is very strongly seen in them not getting adequate height, but having more weight than recommended.

Routines that don't help in health sustenance starts very early such as bad eating patterns, wrong sleep schedules and excess exposure to screen time (in terms of TV,computers and mobile phones).What is learnt early becomes a habit hard to break.

These children while entering adulthood have a marked tendency for incidence of metabolic disorders.

If children have picked these patterns, are adults far behind? In fact, children can be corrected with counselling, logic and rational approach. They see the reasoning behind the statements and do try to make the changes. Dealing with educated adults, who argue with complete knowledge from Whatsapp College and Google University, many a time is cumbersome and an arduous task.

In the present scenario, especially in the ongoing Covid pandemic, with work from home setup, lines are blurred between personal and professional life. Lack of routine has lead to unhealthy eating habits, which include binging on food, snacking at odd hours and being inactive while working through screens. Erratic schedules have become a norm; often track of time is lost while working. This has resulted in eating and sleeping at odd hours.

It's a known fact that apart from what we eat and when we eat, the state of mind while eating also affects health.

(Having irregular meal times disturbs the natural body clock, leaving the body confused, regarding when to expect its next meal. Eating at wrong times doesn't let insulin do its job effectively, leading to glucose getting stored as fat. Moreover, inconsistent meal times can also lead to eating large portions of food at once. When erratic meal times become a habit, it causes acid reflux, flatulence and headache. In the long run, these little issues result in bigger health problems like hypertension, high cholesterol, type 2 diabetes, thyroid variations. Hence, in working professionals, a balance must be struck between healthy habits and work)

Therefore our primary focus should actually be on maintaining good health (which is most often confused with only physical fitness a lot of time). When we see the definition of health as said by Acharya Sushruta--

"Sama dosha sama agnischa sama dhatu mala kriyaaha

Prasanna atma indriya manaha swastha iti abhidheeyate" –

i.e., health is "a state of equilibrium of tridosha (fundamental physiological governing principles of the body), Agni (metabolic and digestive processes) and Dhatu (principles that uphold the formation of body tissues); with a pleasantly disposed and contented mind, senses and spirit."

Word Heath Organization's definition is also very close to this -

"Health is a state of complete physical, mental and social well- being and not merely the absence of disease or infirmity"

So good health implies full strength and vigour as well as freedom from signs of disease and not just about eating and managing weight.

The seven dimensions of wellness are –physical, emotional, intellectual, social, spiritual, environmental and occupational. All the dimensions have to be paid equal attention to, as all are inter linked and inter dependent to each other. Addressing one in isolation does not give sustained benefit in the long run .

For the present, primarily the main concern is the physical aspect. Below are ways that each key area of physical health can be addressed through lifestyle choices:

1. **Physical activity:** Most healthy children and adults should be active on a daily basis. This should be a mix of both leisurely physical activity and structured exercise. Examples of leisurely physical activity include swimming, cycling, and walking. Examples of more structured forms of exercise include strength training, running, and sports.
2. **Nutrition and diet:** A well-balanced diet should contain carbohydrates, proteins, fats, vitamins and minerals. Restricting specific nutrients should only be done under the supervision of a doctor. Fluid, ideally in the form of water, should be adequately and regularly taken. Meals and snacks should be consumed in moderate portions and on time.

Presently all information available have their primary focus only on the quantitative measurements of food i.e.,1 portion of rice, 2 small chapatis,1 bowl of vegetables, salad, buttermilk; without taking into consideration the age, work,background, likes-dislikes, acceptability of the person who is eating the food.

The best diet that works is the one that can be followed easily. Indian food when cooked properly makes for a very balanced meal plan. The whole grains, dals, paneer, lentils, soya, green vegetables, curd, egg, fish, chicken provide all the essential nutrients, vitamins and minerals

More than the sharp focus on the actual food quantities, the other areas like food choices, food practices and attitudes towards food also needs to be corrected. This helps in weight maintenance, good immunity and health. The best way to benefit is by incorporating them into ones' daily schedule.

3. **Alcohol and drugs:** Substances that alter mood or other bodily processes should be limited or avoided. Those with addictive tendencies or other health risks should consider complete abstinence from these substances.
4. **Rest and sleep:** While regular activity is essential for physical health, allowing the body to rest is just as important. Spending time relaxing or taking short naps can help rejuvenate the body. Night sleep should take place in a quiet, dark environment and should last approximately 7-9 hours every day.

The Author is Professor and Head of the Dept. of PTSR, Ramakrishna Ayurvedic Medical College Yelahanka Bangalore and can be reached on :
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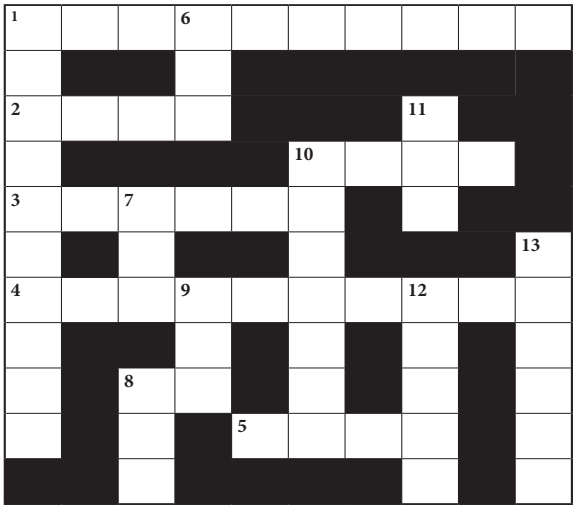
CROSS WORD 6



DOWN

1.	A legal proceeding involving a person or business that is unable to repay their outstanding debts (10)
6.	Listing of the names of the accounts that a company has identified and made available for recording transactions in its general ledger (3) (abbreviation)
7.	A process where the goals of the organization are defined and conveyed by the management to the members of the organization with the intention to achieve each objective (3) (abbreviation)
8.	A consumption tax placed on a product whenever value is added at each stage of the supply chain, from production to the point of sale (3) (abbreviation)
9.	Codes issued by CBEC to uniformly classify each services under GST (3) (abbreviation)
10.	Profits that have been appropriated for a particular purpose (7)
11.	Share of a bank's total deposit that is mandated by the Reserve Bank of India (RBI) to be maintained with the latter in the form of liquid cash (3) (abbreviation)
12.	Basic economic concept involving the buying and selling of goods and services (5)
13.	To estimate officially the value of (property, income, etc.) as a basis for taxation (6)

ACROSS

1.	An open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way (10)
2.	An independent regulator to oversee the auditing profession and accounting standards in India under Companies Act 2013 (4) (abbreviation)
3.	A …….. audit is an electronic audit that uses technology to evaluate compliance. The 2020 COVID-19 pandemic has spurred the adoption of this type of audit (6)
4.	An offer document or information brochure issued by a public company used for inviting offers from the general public for subscribing the shares (10)
5.	Any written legal document that transfers, affirms, or confirms the interest, rights, property, etc (4)
10.	An Act of the Parliament of India which seeks to protect home-buyers as well as help boost investments in the real estate industry (4) (abbreviation)

Answers will be published in next month's News Bulletin.

sudoku-6

	2	1					3	7
6				2				
				4				1
			4	5			1	
8	4							9
1				6			8	4
			9			3		
7	1	9	5					
								2

Answers to "Cross Word 5" (January 2021)

Across

1. Endowment, 2. Assertions, 3. MAT, 4. Trend, 5. Basel, 6. CBS, 7. IPO

Down

1. Empanelment, 8. MSME, 9. TIN, 10. Wear, 11. Tranche, 12. Forensic, 13. DSC, 14. Short

Credits: CA. Archana Sridhar

Brain Teasers

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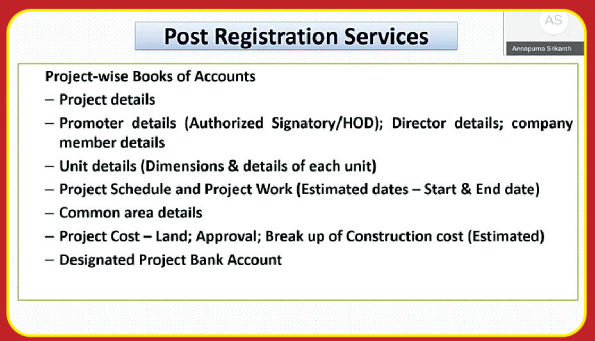
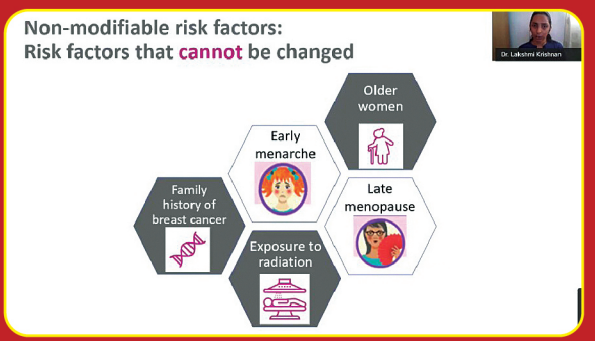
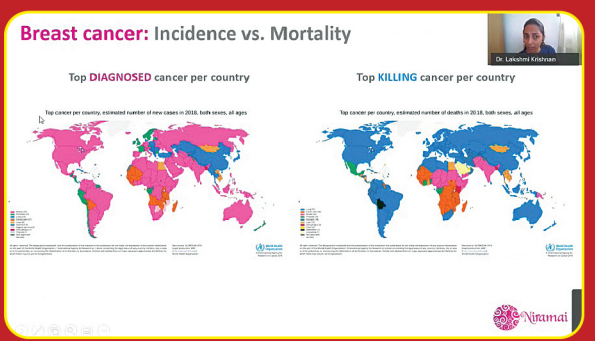
Photo Gallery

Webinar on Igniting minds - Awareness of Cancer by Dr. Lakshmi Krishnan and Learning in Depth - Opportunities in RERA practice by CA. Annapurna Srikanth held on 29th January, 2021.







Physical Seminar on on Union Budget direct tax & indirect tax & GST Recent Judgements jointly organised by Karnataka State Chartered Accountants Association, Shimoga District Chartered Accountants Association in association with Shimoga CPE Chapter of SIRC of ICAI held on 12th February, 2021.

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